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## ADDENDA.

Preamble (p 9) The law of evidence is a law of procedure and alterations in the law of evidence are, therefore, retrospective in operation, *Paras Ram v Meera Kunwar* Ind Rul. (1930) All 733=125 Ind Cas 762=28 A L J 793

S 3 (p 46) Evidence signifies only the instrument by which relevant facts are brought before Court. *Gobaraya v Emperor*, A I R 1930 Nag 242 (F B)

S 3 (p 52) The word "proved" means that it is probable that a fact is established that persons should as reasonable men act upon it The law does not require that facts should be proved with anything like mathematical certainty The word "disproved" is merely the converse of the previous proposition The expression "not to be proved" indicates a state of mind between the two states of mind, when it is not possible to say precisely how the matter stands *Emperor v Shafi*, 31 Bom L R 515

S 3 (p 58) "Reasonable doubt" is the doubt which is reasonably entertained and not the doubt of a weak or vacillating mind *Emperor v Shafi*, 31 Bom L R 515

S 6 (p 81) Statement by a raped girl to her mother after transaction is over is not relevant under s 6—*Sreehari v Emperor*, 50 C L J 524=A I R 1930 Cal 132, see also *Ghulam v Emperor*, A I R 1930 Lah 336=31 P L R. 109, where it was held that such statement, where it was a part of a *res gestae*, would be of very little value

S 7 (p 110) Where an accused takes the defence founded on an *alibi* reasoning from probabilities can not take the place of evidence *Gurdas v Emperor*, A I R 1930 Pat 509=1930 Cr C 93

S 8 (p 114) Subsequent conduct when relevant is proof of guilt explained *Chandrika v Emperor* A I R 1930 Oudh 234

S 8 (p 130) Complaint in answer to question is not relevant *Emperor v Soofi* A I R 1930 Lah 84

S 9 (p 150) Where several persons are charged with conspiracies evidence to show previous association for criminal purposes with approver is admissible to corroborate approver under s 9 or s 11 as regards his statement regarding conspiracy *Emperor v Wahududin*, A L R 1930 Bom 157=32 Bom L R 324

S 10 (p 154) If two persons conspire together to commit an offence, each is regarded as being the agent of another and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained First you must find that there was a conspiracy, and, secondly, that the person to whom the doctrine is to apply should have joined the conspiracy before they can be made liable for anything said or done by others *Emperor v Shafi Ahmad* 31 Bom L R 515

S 11 (p 163) A deed which is not admissible in evidence on account of its being barred under s 49 Registration Act, can be admitted under this

# THE INDIAN EVIDENCE ACT

section if it is consistent with fact in issue *Sheo Bardhan v Shah Deo*, A I R 1930 All 130

S 11 (p 167) Declaration of religion in formal document and is relevant admission when religion of deceased person is a fact in issue *Irong v L*

S 13 (p 207) Judgment not *inter partes* although throwing light on title of landlord is not relevant *Panda v Shua* 31 Bom L R 375

S 13 (p 211) Judgment in which right under dispute was recognized by Court is admissible as relevant fact *Muhammad v Behan Sahai*, A I R 1930 All 9

S 13 (p 213) Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him *Aravinda v Official Assignee* A I R 1930 Mad 701

S 13 (p 214) Where a judgment is not in rem nor relating to matter of public nature nor between the parties to a subsequent suit the fact that the Court by that judgment decides a point in a particular case is not relevant for the purpose of the decision of the same point in the subsequent suit *Shankar v Keloo* A I R 1930 Nag 129 (F B) overruling *Ramadhan v Pannashah* 88 Ind Cas 699=22 N L R 49

S 13 (p 214) Judgments not *inter partes* in which an adoption was upheld constitute relevant piece of evidence under s 13 *Yamunabai v Dhanna* 114 Ind Cas 616

S 13 (p 214) Where the question was whether a certain transaction was benami and a prior judgment not *inter partes* was relied on to prove the motive for the benami transaction held that the judgment was admissible under ss 11 and 13 of the Evidence Act *Babai v Ram*, 8 Pat 783=A I R 1929 Pat 739 but see *Ram Lakhan v Jai Upadhaya*, A I R 1920 Pat 719

S 13 (p 217) Decrees not binding on parties as res judicata is not conclusive evidence of enforcement of custom *Niamat v Abdul A* I R 1930 Sind

S 13 (p 217) Recitals in sale deeds in favour of one party to suit showing nature of same land are admissible not only under s 32 but also under s 13 (b) *Ali Ram v Moti Lal*, A I R 1930 All 299=28 A L J 564

S 13 (p 217) Where the question related to the existence of a permanent tenancy and the will by which the law was conveyed by the tenant to his son contained a recital that there was a permanent tenancy held that the same was admissible in evidence under s 13 of the Act. *Pramatha Nath v Champa Das* 56 C 275=118 Ind Cas 353=A I R 1929 Cal 473

S 13 (225) Statement made in prior litigation is admissible in subsequent suit *Bry Rao v Basant*, 118 Ind Cas 154=A I R 1929 A 561

S 14 (p 231) Declaration of religion in formal document is relevant admission when religion of deceased person is a fact in issue *Lelong v Leong* A I R 1930 Rang 12=7 Rang 722

S 14 (p 230) Evidence of committing theft is not relevant to show stamp of mind in committing dacoity *Emperor v Wahiduddin*, A I R 1930 Bom 157=32 Bom L R 324

§ 14 (p 256) Previous speech though made about six months before is admissible as evidence of intention of speaker if both speeches form part of speeches on one topic *Dan Prakash v Emperor* A I R 1930 Lah 867=1930 Cr C 911

§ 17 (p 287) If a statement is to be relied upon as an admission, the whole statement must be taken *Juala Das v Pu Santa Das* A I R, 1930 P C 245

§ 17 (p 291) Admission raises presumption as to the truth of fact admitted *Bhag Sing v Joy Singh*, 10 Lah 624=116 Ind Cas 903=A I R 1929 Lah 318

§ 18 (p 314) Admission by one of the defendants that the land in suit is ancestral is not binding on the other, when they are not represented by him and have independent rights of their own *Kishan v Lochman*, A I R 1930 Lah 138

§ 19 (p 330) Admission and conduct of trustees of public institution cannot be allowed to prejudice institution's conduct materially *Balak Ram v Nanupal*, A I R 1930 Lah 579

§ 19 (p 330) In a suit on title, proceedings in a previous title suit instituted by defendant against third persons are relevant under s 19 of the Evidence Act *Jatiram v Lokenath*, Ind Rul (1930) Pat 558=125 Ind Cas 783

§ 21 (p 337) In a suit on title the pleadings of a defendant in the prior suit are admissible as admission under s 21 of the Evidence Act *Jatiram v Lokenath* Ind Rul (1930) Pat 558=125 Ind Cas 783

§ 21 (p 337) Statement in an unregistered compromise is admissible as admission *Satish Chandra v Bireswar* A I R 1930 Cal 559

§ 21(2) (p 342) Declaration of religion in formal document is relevant admission when religion of deceased person is a fact in issue *Leong v Leon*, A I R 1930 Rang 42=7 Rang 720

§ 21(3) (p 343) This clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestae* as a statement accompanying or explaining a particular conduct but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to s 21(3)—*Alca v Emma*, A I R 1930 Oudh 441

§ 23 (p 354) Section 23 is no bar to use of admission in compromise, which is not rejected *Sadhu Ram v Botha Ram* A I R 1930 Lah 293

§ 23 (p 354) Section 23 does not cover cases of letters merely because of the insertion of 'without prejudice' *Lucknow Improvement Trust v Ph Jarby*, A I R 1930, Oudh 193

§ 24 (p 354) Confession is admission made by accused *Khub Kha v Emperor* A I R 1929 All 29

§ 24 (p 356) Admission by party in case in which charge is baseless and prosecution is carried to harass party are not voluntary and therefore not binding *Secretary of State v G T Sarin*, A I R 1930 Lah 364=120 Ind Cas 593

# THE INDIAN EVIDENCE ACT

S 24 (p 357) A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime *Akhuban v Emperor*, A I R 1930 All 29

S 24 (p 378) Where an accused not shown to have understood English is asked in broken English as to whether he was responsible for the act and he nods his head and salams in reply the conduct does not amount to confession *Emperor v Sooraj* A I R 1930 Lah 84

S 24 (p 361) Where the confession is any thing but a full confession the Court is at liberty to use the confession as it stands and derive a deduction of the guilt of the man who made it even while rejecting portions of it which are false *Usta Din v Emperor* A I R 1930 Oudh 113=6 O W N 1017

S 24 (p 373) If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession is obtained the accused is justified in asking the Court to give them the benefit of doubt *Rahman v Emperor*, A I R 1930 Lah 88=30 Cr L J 1080=119 Ind Cas 420

S 24 (p 378) The expression used in s 24 of the Evidence Act is not 'proved' but 'if it appears' which is not as strong an expression as "proved" Though the accused has not adduced evidence to substantiate the allegation that the confession was obtained by threat or inducement it is still open to him to show that the circumstances under which it was made would justify that inference *Alno Mondal v Emperor* 33 C W N 1112= A I R 1929 Cal 720=57 C 610

S 24 (p 385) A villager exercising no influence or authority is not person in authority *Emperor v Kutub* A I R 1930 Cal 633=57 C 458, see also *Kutthappa v Emperor*, 1929 M W N 791

S 24 (p 385) Though a too restricted meaning should not be given to the expression person in authority" in section 24 the test to be applied is whether the person had authority to interfere in the matter and any concern or interest in it would be sufficient to give him that authority *Emperor v Kulu Bur* Ind Rul (1930) Cal 739=57 C 189=126 Ind Cas 545=A I R (1930) Cal 382

S 24 (p 386) A confession made by an accused person is not invalid merely because it was made under the belief that he would gain some benefit by making it *Public Prosecutor v Chandaya*, Ind Rul (1930) Mad 890=126 Ind Cas 109= A I R 1929 Mad 92

S 24 (p 389) The question whether a confession made by the accused was made voluntarily or not is a question to be decided by the Judge and not by the jury *Akbar v Emperor* Ind Rul 1930 Cal 602=33 C W N 1112=57 C 610=125 Ind Cas 730

S 24 (p 392) Retracted confession made voluntarily is sufficient to warrant conviction *Rahman v Emperor* A I R 1930 Lah 88=30 Cr L J 1080=119 Ind Cas 420 see also *Nauab v Emperor* 6 O W N 345=118 Ind Cas 757=A I R 1929 Oudh 381 *Sauvaldas v Emperor* A I R 1929 Sind 203 *Kutthappa v Emperor* 1929 M W N 791 *Kesara Pillai, In re* 30 L W 612=1929 M W N 901=A I R 1920 Mad 837=57 M L J 621 *Rahman v Emperor* 119 Ind Cas 420=30 Cr L J 1080 But it is a well

established rule of practice that a retracted confession must be corroborated by independent evidence in material details before a conviction can be made to rest on it whether against the person who has made it or against the co accused *Miran v Crown* 3 P L R 377=116 Ind Cas 621=30 Cr L J 640=A I R 1929 Lah 597, see also *Sheonaraun v Emperor*, 8 Pat 262=10 Pat L T 228=117 Ind Cas 43=A I R 1929 Pat 212=30 Cr L J 716, *Kunja v Emperor*, 8 Pat 289=10 Pat L T 549=30 Cr L J 675=A I R 1929 Pat 275 *Ajjan Singh v Emperor*, 30 P L R 646=119 Ind Cas 325=30 Cr L J 1046

S 24 (p 396) Confession excluded by trial Magistrate wrongly or rightly cannot be relied on in revision *Billu v Emperor*, A I R 1930 Sind 168=126 Ind Cas 58

S 25 (p 401) A confession made to a Police Officer is inadmissible in evidence under s 25 of the Evidence Act, even if the Police Officer is invested with the powers of a Magistrate *Jas Bahadur v Emperor*, Ind Rul (1930) Rang 257=125 Ind Cas 337=8 R 52

S 25 (p 401) The question whether or not a statement is to be regarded as admissible as being a confession or not usually arises in the case of a statement made to a man while in custody of police *Ambar Ali v Emperor*, A I R 1929 Cal 539

S 26 (p 410) Section 26 makes no difference between oral and written confession *Jograj v Emperor* A I R 1930 Lah 534

S 26 (p 410) Section 26 does not make admission dependant upon knowledge of accused as to the identity of Magistrate *Josraj v Emperor*, A I R 1930 Lah 534

S 27 (p 412) Section 27 has nothing to do with the question whether the fact discovered is or is not relevant *Sulhan v Emperor*, 10 Lah 283=11 Lah L J 159=115 Ind Cas 6=A I R 1929 Lah 344 (F B)

S 27 (p 412) Recoveries alone do not justify person's conviction *Sham Singh v Emperor* A I R 1930 Lah 91

S 27 (p 416) Joint discoveries are not admissible at all against any of the accused unless it can be shown who first made the discovery *Faquara v Crown* 30 P L R 397=116 Ind Cas 619=30 Cr L J 639=A I R 1929 Lah 665, see also *Emperor v Shripudraya*, A I R 1930 Bom 244=32 Bom L R 574

S 27 (p 421) Out of statement containing confession only such portion as leads to discoveries is admissible *Superintendent v Bhajoo* A I R 1930 Cal 291=34 C W N 106, *Manommed v Emperor* Ind Rul (1930) Sind 241=126 Ind Cas 62=A I R 1930 Sind 11, *Mannun v Emperor* A I R 1930 Lah 530=121 Ind Cas 728, *Emperor v Shripudraya* A I R 1930 Bom 244=32 Bom L R 574, *Mohammed v Emperor* A I R 1930 Sind 225 *Superintendent of Legal Affairs v Bhajoo Majhi*, 1930 Ind Rul Cal 605=34 C W N 106=125 Ind Cas 733, *Emperor v Mela*, 10 Lah L J 531=112 Ind Cas 55=29 Cr L J 967 *Sulhan v Emperor*, 10 Lah 283=11 Lah L J 1159=A I R 1929 Lah 344 (F B)

S 30 (p 441) This section should be construed strictly *Abbor Naidu v Emperor*, 1929 M W N 693

S 30 (p 439) Self implication is guarantee for truth of accusation against co accused *Khubone v Emperor*, A I R 1930 All 29

S 30 (p 452) In the absence of any corroboration connecting an accused with the commission of offence the confession of a co accused cannot be taken into consideration against him *Aryan Singh v Emperor*, A I R 1930 Lah 257=30 P L R 646 The question of what corroborative evidence is sufficient must depend on the circumstances of each particular case *Ugappa v Emperor* 30 L W 403=1929 M W N 272=119 Ind Cas 474=A I R 1929 Mad 498

S 30 (p 454) A retracted confession of a co accused cannot alone be sufficient evidence to justify a conviction but if that confession is unrebuted it is admissible as very strong piece of evidence *Sheo Ratan v Emperor*, 11 Ind Cas 771=A I R 1929 Oudh 167, see also *Aryan Singh v Emperor* 30 P L R 646=119 Ind Cas 325, *Rahmat v Emperor* 11 Lah L J 5=11 Ind Cas 65 *Sordora v Emperor*, 125 Ind Cas 638, *Wajid v Emperor*, A I R 1930 Oudh 412, but see *Goborya v Emperor* 125 Ind Cas 673 (F B)

S 30 (p 455) Confessional statements of accused cannot be used for corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other tainted evidence *Daulat v Emperor* 193 Nag 98=120 Ind Cas 331

S 30 (p 457) In cases where the sole evidence against the accused is the confession of a retracted confession such confession if it is relied on must be relied on as a whole and not only in part *Durjan v Emperor*, A I R 1930 All 92

S 31 (p 458) Under section 31 admissions are not conclusive evidence of the matters admitted *Jagannath v Kali*, 8 Pat 776=10 Pat L T 191=A I R 1929 Pat 745

S 32(1) (p 488) A dying declaration made at the time when a person is in a precarious condition does not cease to be such and become inadmissible under s 32 of the Evidence Act merely because the declarant happens to linger for a few days more *Thakur Singh v Emperor* 10 Lah L J 463=119 Ind Cas 177=A I R 1929 Lah 64

S 32 (1) (p 488) First information report is admissible under s 32(1) as the statement of a person since deceased relating to the instances of the transaction *Kaper Singh v Emperor*, A I R 1930 Lah 450=31 P L R 81

S 32 (1) (p 488) Where a person dies in hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries, such as for example as pneumonia the dying declaration by such person is not admissible in evidence in a trial of his assaulters under s 324 *Wali Mohammad v Emperor*, A I R 1930 Oudh 249

S 32 (1) (p 488) Statement by deceased before third class Magistrate competent to record statement under s 164 Criminal Procedure Code is relevant *Gladys v Emperor* A I R 1930 Lah 60

S 32 (1) (p 498) A statement cannot be admitted under s 32 (1) of the Evidence Act as dying declaration unless it is a statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death

came into question *Wali Mohammad v. Emperor*, 126 Ind Cas 511=A I R 1930 Oudh 749

S 32 (1) (p 488) Dying declaration can be proved by examining person recording it or person who heard its being made It must be taken as a whole and a portion of it cannot be allowed *Tafiz v. Emperor* A I, R 1930 Cal 218=50 C L J 584

S 32 (2) (p 501) The entry in the certificate of guardianship is sufficient evidence to prove the age of particular person *Mehpi Ali v. Walayat*, A I R 1930 Oudh 97

S 32 (2) (p 504) The principle upon which statements coming under s 32 (3) are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true *Dal Bahadur v. Byai Bahadur* A I R 1930 P C 79=34 C W N 369

S 32 (3) (p 517) Recitals in deeds in favour of one party to suit showing nature of some laws are admissible not only under s 32 (3) but also under s 13 (b) *Takaram v. Moti Lal* A I R 1930 All 299

S 32 (3) (p 518) Statement by a Hindu widow since deceased, as to the power given to her to adopt is not admissible in evidence of such power under s 32 (3) as a statement against her own interest, when the facts are that she adopted one of her own relations after a life long enjoyment of her husband's property *Dal Bahadur v. Byai Bahadur* 34 C W N 369=A I R 1930 P C 79=32 Bom L R 487=58 M L J 446=51 C L J 230

S 32 (3) (p 519) A statement of a neighbour disclaiming his own title to a land and recognising another's title is a statement against the proprietary interest of the person making it and is admissible under s 32, clause (3)—*Tika Ram v. Motilal*, Ind Rul 1930 All 781=1930 A L J 564, but see *Ailgiri Nayakar v. Perumal*, 30 L W 422

S 32 (5) (p 545) Entries in books of parties at places of pilgrimage are admissible to prove relationship *Balakram v. Nannumal*, A I R 1930 Lab 579

S 32 (7) (p 552) A settlement deed under which a promissory note is transferred to the plaintiff if admissible as secondary evidence, maybe employed to prove the promissory note under s 32 (7) read with section 13 (a), since a settlement deed constitutes a transaction in which a right was asserted *Subba Rayaba v. Vengama*, A I R 1930 Mad 742=123 Ind Cas 107

S 33 (p 560) A previous disposition can be admitted in evidence only under the provisions of sections 33 of the Evidence Act but before it can be placed on the record of a criminal trial the Court must decide judicially that a proper effort had been made on behalf of the prosecution to secure the presence of the witness that in spite of that effort he had not been treated and could not be found out or that he was incapable of giving evidence or was kept out of the way by the adverse party or his presence could not be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable *Ghulam Harder v. Crown* 30 P L R. 192=116 Ind Cas 329=30 Cr L J 623=A I R 1929 Lab 542 It is impossible to



lay down any hard and fast rule for the application of this section. Each case must depend upon its own facts and the matter is essentially one for the exercise of the discretion of the part of the presiding Judge. *Jati Mahi v Emperor*, 33 C W N 1215=125 Ind Cas 597=A I R 1929 Cal 165

S 33 (p 570) The true reading of s 33 is that the party had both the right and the opportunity of cross-examining. Mere opportunity of cross-examining is not sufficient. There must also be the right to do so. *Dal Bahadur v Byari Bahadur* A I R 1930 P C 79=31 C W N 369. In this section, which requires that the adverse party in the first proceeding "had the right and opportunity to cross-examine" the word "and" cannot be read as "or". The true meaning of the section is that the adverse party had both the right and the opportunity of cross-examining. *Ibid*. So the deposition of a witness is admissible under this section when the witness died and the opposite party had an opportunity of cross-examining him, though he did not avail himself of it. *Tafiz Paramani v Emperor*, 50 C L J 581=125 Ind Cas 743=A I R 1930 Cal 228. But if the cross-examination of a witness is recorded by a Magistrate in committal proceedings of his own record that deposition is not complete and should not be admitted in evidence at the trial in the course of business. *Emperor v Mahab* A I R 1930 Sind 51. So also when a sub-Inspector was examined under s 203 of the Criminal Procedure Code but was not cross-examined by the defence his deposition is not admissible under s 30 in the Sessions trial, even when the Sub-Inspector dies before Sessions trial. *Tafiz v Emperor* 50 C L J 581=A I R 1930 Cal 228.

S 34 (p 581) Relevant entries in account books unless corroborated are not sufficient to fasten liability upon a person. *Khuni Mal v Duarka Das* A I R 1930 All 710=1930 A L J 987.

S 35 (p 592) An entry in the scholar's register made by the father since deceased as regards his son's age is admissible under s 35 of the Evidence Act as one made in a public register made by a public servant in the discharge of his official duty. *Munnal Lal v Kameshwar* 114 Ind Cas 801=A I R 1929 Oudh 113.

S 35 (p 592) Although an assessment list prepared by a municipality is not the final or sole test of the liability of the assessee to pay the particular taxes there is a presumption that the assessment list was duly published at the time the assessment was made. *Bhuwalpur v Moulazai*, A I R 1930 Pat 370.

S 35 (p 592) Entries in revenue records prepared by public servant in the discharge of their official duty are relevant evidence of the facts recorded therein under the provisions of the Indian Evidence Act s 35. *Gangbar v Fakirgouda* 51 C L J 592.

S 35 (p 592) Entry in death register may be rejected when used to prove or disprove death on particular day if register is prepared in casual way. *Kalipoda v Sashi Bhuzan* A I R 1930 Cal 636.

S 35 (p 601) It is doubtful whether entries made in the vaccination register regarding father's name of illegitimate child made three years after child's birth is admissible under this section. *Kamappa v Kullammal*, A I R 1930 Mad 194=1929 M W N 696.

S 39 (p 614) Because a document is admissible for a certain purpose all recitals statements and references therein cannot be used as proof of the facts to which they relate *Til Ram v Moti Lal*, A I R 1930 All 229

S 43 (p 668) Recitals of judgments not *inter partes* of relevant fact are not admissible in evidence *Asa Ram v Mansha*, A I R 1930 Lah 237

S 45 (p 668) In law and as applied to a witness the term "expert" has a special significance and no witness is permitted to express his opinion unless he is an expert within the terms of s 45 or in special cases is permitted to express such opinion by some special law *Ram Das v Secretary of State*, A I R 1930 All 587

S 45 (p 678) Evidence of person who is not expert in art of handwriting can be ruled out as inadmissible under s 45—*Chet Ram v Jogi Ram* A I R 1930 Lah 336=31 P L R 109

S 50 (p 705) That the proofs as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relations and an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage is a wrong doctrine regarding proof of marriage The evidence on this subject should not be allowed as it is without competence *Mohabbat v Mahomed*, 56 I A 201=31 Bom L R 856=33 C W N 645 P C

S 54 (p 724) Evidence to show character of persons associating with accused and nature of association is admissible *Emperor v Wahiduddin*, A I R 1930 Bom 157=32 Bom L R 324

S 57 (p 754) The question whether a certain property belongs to a particular person or is a wakf property cannot be deemed to be a matter of public history within the meaning of s 57 Evidence Act, and historical works cannot be referred to for the purpose of deciding the question *Sant Singh v Rallia Ram*, 126 Ind Cas 744=126 Ind Cas 171=A I R 1930 Lah 738

S 61 (p 784) Use of a document to settle dispute does not make it a true copy *Abdul Bari v Hrishukesh*, 49 C L J 546=A I R 1929 Cal 459

S2 6, Expl I (p 786) One specimen of news paper is counter part original of another of the same date *Ram Chandra v Emperor*, A I R 1930 Lah 371=170 Ind Cas 615

SS 65, 66 (p 806) Secondary evidence of sale deeds of houses adjacent to the house in suit, can be given in order to prove title only when the person in possession of the documents fails to produce them in spite of notice given to him *Abdul v Kishan* 11 Lah L 7 401, see also *Molan Lal, v Ganida*, 13 R D 718, *Subarayule v Vengamma*, A I R 1930 Mad 742=123 Ind Cas 197

S 66 (p 816) Where oral evidence was given to prove contents of a letter, which was neither produced nor called for, and no objection was raised to the giving of evidence the secondary evidence was inadmissible under s 66 and the subsequent dispensing with the notice would not make the evidence admissible that was inadmissible at the time it was given *Profulla v K P*, 59 C L J 593

S 68 (p 831) This section has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title, if there has been no proper attestation as required by law *Balbahadur v Lakshmi* A I R 1930 All 669=1930 A L J 623=125 Ind Cas 507

S 68 (p 838) Where the executant of a document, who is an illiterate man denies execution and having put his mark to it and all the attesting witnesses are either dead, or have turned hostile or are not available, there is no rule of law which prevents a Court from holding the execution proved when the signature of the attesting witnesses are proved to its satisfaction having regard to all the circumstances of the case *Ponnu Sami v Kalyansundara* A I R 1930 Mad 770

S 74 (p 865) Statement during departmental enquiries by Magistrates are not public documents *Government of Bengal v Santi Ram*, A I R 1930 Cal 370

S 75 (p 866) Abstract statement prepared by a patwari even though based on papers in his possession and filed in suit is only private document *Shcodas v Sheo Dayal*, A I R 1930 All 712

S 81 (p 879) There is a presumption under section 81 of the genuineness of the specimen of the news paper actually produced *Ram Chandra v Emperor* A L R 1930 Lab 371=120 Ind Cas 615

S 90 (p 897) There is no presumption under section 90 with regard to unsigned accounts not purporting to be in the handwriting of any particular person *Trimbakdas v Muthabai*, A I R 1930 Nag 225

S 90 (p 897) The presumption arising under section 90 applies even to the fact that the testator was in a sound disposing state of mind, for the phrase "duly executed" means executed by a person legally competent to execute the document *Kotayya v Harran Chitti*, A I R 1930 Mad 744

S 90 (p 898) The question whether the custody from which a document is produced is proper or not within the meaning of section 90 cannot be determined by any general principles but is one to be determined on the facts of the particular case *Bhagwant v Ram Sahai*, 126 Ind Cas 19=Ind Rul (1930) All 771

S 90 (p 901) Before any presumption as to the genuineness of a lost document can be made under s 90 of the Evidence Act it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under section 65 of the Evidence Act *Gayo Prasad v Jaswant Rai*, Ind Rul (1930) All 668=A I R 1930 All 815=125 Ind Cas 452

S 91 (p 909) Some evidence of fact is always admissible to assist in a judicial determination of the meaning of the language of parties to an agreement though the parties may not testify as to their intention *Morris v David Jones* 125 Ind Cas 867=Ind Rul (1930) P C 291

S 91 (p 909) Where there is a document in writing which does not contain the entire agreement between the parties but embodies only some of the conditions, oral evidence to prove certain other terms which had been agreed upon and which are not inconsistent with the instrument is clearly

admissible in evidence *Co-operative Co v Bhagwan Das* A I R 1930 All 615

S 91 (p 909) Provisions of section 91 are not applicable to permission granted under C P Municipal Act s 111 *Abdulla v Imbr Das*, A I R 1930 Nag 130=120 Ind Crs 221

S 91 (p 910) Where the agreement has been reduced to the form of letters oral evidence of the agreement could not be admitted in evidence *Raj Ram v Hukam Chand*, 125 Ind Cas 618=Ind Rul 1930 Lah 634

S 91 (913) It is not necessary to get a family settlement reduced into writing and get the writing registered Oral evidence on the point of the alleged settlement is therefore admissible *Rangu v Lakshman* A I R 1930 Bom 438

S 92 (p 930) Documents evidencing family arrangement affecting immovable property require to be registered and if such documents are not registered they are wholly inadmissible in evidence *Bhagwan v Shub Singh* A I R 1930 All 341

S 92 (p 930) For the purpose of s 92 of the Evidence Act it is immaterial whether the oral agreement sought to be proved is prior to or subsequent to the disposition *Gopala v Sankara* Ind Rul (1930) Mad 799=1930 M W N 240=125 Ind Cas 545

S 92 (p 964) Under s 92, mistake of the plaintiff as regards a document can be proved *Sukhdeo v Ram Narain* A I R 1930 All 387

S 92 Proviso (2) (p 965) Under proviso 2, the existence of a separate oral agreement can be proved only when it is not inconsistent with the terms of the written document or when the matter involved in the oral agreement is a matter on which the document is silent *Kala Deen v Jagat Pathak* A I R 1930 All 400

S 92, Proviso (2) (p 968) It is open to a party to prove want of consideration or failure of consideration, but it is not open to him to prove a variation in the amount of consideration *Mathey Krishnappa v Mohamed*, A I R 1930 Mad 779=58 M L J 240

S 92, Proviso (4) (p 976) By proviso 4, oral evidence, varying or modifying terms of a written contract are entirely inadmissible *Collector of Fatah v Kishori Lal*, A I R 1930 All 721 (F B)=1930 A L J 1193

S 92 Proviso (6) (p 988) Oral agreement showing the nature of document is not admissible but Court can take into consideration circumstances if document is of doubtful tenor *Lakshmaya v Muralari* A I R 1930 Mad 547=31 M L W 516=1930 M W N 129 Where the document is silent as to interest of two joint transferees, evidence of subsequent conduct is not barred as between the transferees *inter se* *Pamappa v Mamataru* A I R 1930 Mad 590

S 93 (p 988) In a suit for pronote where one defendant denies his liability on the ground that he signed the document as an attesting witness, oral evidence to prove that the defendant was executant and hence liable under the terms of the contract was held to be admissible *Muhammad v Saichin* A I R 1930 All 700

S 94 (p 1001) Where the dispute is not as to the existing facts but as to what is intended by the parties to be done by them in future, s 94 does not

apply and mutual mistake of fact can be proved *Dalip v Dalip*, A I R 1930 Lah 446=122 Ind Cas 193

S 101 (p 1031) Where all material facts are before Court, question of burden or proof is not pertinent *Trimbal v Muthabai*, A I R 1930 Nar 225, see also *Ma-sappa v Palaniappa* A I R 1930 Mad 796=125 Ind Cas 68

SS 101 102 (p 1031) The plaintiff has to state when his cause of action arose and it lies upon him to substantiate his statement To cast the burden on the defendants would run counter to the provisions of §§ 101 and 102, Evidence Act *Subbarayudu v Lennama*, A I R 1930 Mad 712=123 Ind Cas 197

S 104 (p 1033) Grave and serious onus rests on persons seeking to displace natural succession by act of adoption *Balal Kani v Nanu Mal* A I R 1930 Lah 579

S 108 (p 1075) The presumption raised by this section is confined to the presumption of oath and not to the exact time when death may have occurred *Jewan Singh v Kuar Reoti* A I R 1930 All 127=1930 A L J 469

S 112 (p 1093) Child born nine months after death of his father was held to be legitimate *Bharon Pershad v Gopi Kunwar*, A I R 1930 P C 139

S 114 (p 1108) Presumption referred to in illustration (a) to section 114 is not confined to charges of theft but extends to all charges however penal not excluding even murder This presumption relates to offence of dacoity also *Ram Surup v Emperor*, A I R 1930 Pat 513=9 Pat 606

S 114 (p 1127) Where a person executing a deed required by law to be registered is of full age when appearing before the Registrar, and admits the execution of the deed, the presumption is that the transaction to which the deed relates is valid *Mohammed v Mohammed*, A I R 1930 All 605

S 115 (p 1155) Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded *Co-operative Loan Bank v Shanmugan* A I R 1930 Rang 265

S 115 (p 1180) Acts in representative character do not create estoppel on personal claims *Ram Horalal v Hanuaxi*, A I R 1930 P C 249

S 115 (p 1187) Next presumptive reversioner consenting to and acting upon family arrangement agreed to on acceleration of estate by limited owner is estopped from challenging it *Polhar Singh v Dulari Kunwar* A I R 1930 All 633=1930 A L J 656=125 Ind Cas 1

S 116 (p 1201) The words 'continuance of tenancy' in s 116 apply to the tenancy in question in the same suit in which the estoppel arises and not to any previous tenancy *Nagindas v Bahadral*, A I R 1930 Bom 395=32 Bom L R 692

S 116 (p 1202) A tenant attorning to the mortgagee and paying rent to him will be estopped from questioning the mortgagee's title in a suit for ejectment by the mortgagee *Nagindas v Bahadral* A I R 1930 Bom 395=32 Bom L R 692

S 118 (p 1219) Evidence by child should be accepted with caution *Mannu v Emperor* A I R 1930 Oudh 406

**S 145** (p 1330) Failure to object to the admission of a previous statement made by a witness does not amount to the use of it as substantive evidence or its use against the provision of s 145 of the Evidence Act *Gobind v Baldeo* 126 Ind Cas 369=A I R 1929 Pat 305

**S 157** (p 1369) Deposition of attesting witness in prior proceeding if, he being alive is examined in subsequent case can only be used to contradict or corroborate him *Ponnusami v Kalyan* A I R 1930 Mad 770

**S 157** (p 1370) Oral evidence of what a witness had said on the occasion of an identification parade in the presence of a competent Police Officer of the Bombay City Police is admissible in evidence under s 157 of the Evidence Act to corroborate a subsequent statement made by the witness *Wahuddin v Emperor* Ind Rul (1930) Bom 429

**S 159** (p 1378) Section 159 does not render the notes of a speech inadmissible in evidence *Om Prolash v Emperor*, A I R 1930 Lah 867=1930 Cr C 911

**SS 159 to 161** (p 1378) §§ 159 to 161 permit a limited use being made of post mortem notes of medical officer, namely that for refreshing his memory or by a party for the purpose of contradicting the witness *Mohamed v Emperor*, A I R 1930 Sind 225=1930 Cr 865

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## INTRODUCTION

When we speak of the law of any subject, we are taken to mean those rules by which its consideration is to be governed. The laws of honour are the general rules of honourable conduct, the laws of thought are the fundamental principles of thought, the laws of war are the rules and usages recognised and accepted among civilized nations for regulating the conduct of the belligerents, the law of nature is the uniform occurrence of natural phenomena in the same way or order under the same conditions so far as human knowledge goes. The law of evidence, and by "evidence" is always to be understood "legal evidence," consists of those rules, statutory or otherwise, which regulate the acceptance or rejection of that information to a legal tribunal which will justify a conclusion or judgment upon the matter in issue before it. Those rules have been adopted from the experience of ages not only to regulate what evidence shall be admitted and what excluded but the way in which it shall be presented or objected to—the mode and order which its component parts shall assume—what shall be the extent of its recognition and cogency—what quantity and quality of proof if any, shall be called for with respect to any particular matter submitted. Such are broadly the rules of evidence which taken together, are called the 'law' of evidence. A rule of evidence is defined by *Barler P J*, in *Lapham v. Marshall*, 51 Hun (N Y) 561=3 N Y Supp 601, 603, to be the mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure.

In *Sir James Stephen's* monumental Digest of the Law of Evidence, he named the great artery of law which defines rights, duties and liabilities the substantive, and the next in importance by which that substantive law is applied to particular cases, the law of procedure.

Wherever the human race has existed and under whatever conditions,—whether as some savage tribe in the heart of Africa or as the most enlightened community of modern times,—the distinct personality of its members has always been prominent. Man is, above everything an individual. However much he may combine for protective, social or commercial purposes, it is the distinct personality of the individual which is seen in all the relations which are established. In this fact that man is an individual complete in himself and not a component part of some larger personality lies the idea which distinguishes between "mine and yours"—the idea of ownership. This idea implanted in man as a part of his nature is at the basis of all law—upon it the whole system rests. Rules which have from the inception of the human race governed human action are developments of this idea. These rules made up a large part of the law of the primitive peoples. They were rules which expressed general

Meaning of the word law"

Meaning of evidence" and law of evidence"

Division of law into substantive and adjective

Beginnings of the Substantive Law



rights with respect to person and property—broad principles which need no law making power to establish them but which were universally recognised as necessary to the existence of any intercourse between individuals

I have a right to defend my person from injury and to enjoy, without interference my property. This is because they are mine, because from the relation in which they stand to me, the mind conceives in respect to them the idea of ownership. Stated in the form of rules, we might say, (1) every person may defend his person from injury, (2) every person may enjoy his property without interference. These are rules of human action every where recognised and relied upon. They are laws and were in the beginning the law. Perhaps it was not long before they were qualified, explained, amplified and developed by means of numerous other rules but in the beginning, they constituted the law.

It certainly could not have been long after intercourse between human beings began before the question arose as to what makes property A's instead of B's and undoubtedly the general recognition of certain rules as to the ownership of property soon came about. For instance, it was probably not long disputed that what A subdued from a wild state, or reduced to his possession, or made with his hands, belonged to A, in preference to B. It may soon have become established that if A by gift or exchange put B in possession of that which had formerly been his (A's) it then became B's in preference to C's. It must soon have been recognized that A's right to defend his person from injury was qualified by the rule that he must not himself interfere with the person or property of B, and that, injured while so doing, he could claim no redress. The two general rules relating to the enjoyment of person and property unless they were thus amplified, would avail man little. While it is true that all men under normal conditions, instinctively recognise these rules in their general application to the relations between them, yet the conditions under which men act are so often not normal and the chances of a clashing of rights are so great, that if the law were expressed in these two general rules, with no subsidiary rules to explain, define and limit their application men would be constantly in uncertainty as to the effect of their actions.

Such subsidiary rules are a part of the law. They are rules of human action and have become a part of the law because the varying relations between individuals in business and social life have demanded them. They have come slowly and been grafted into the law one by one, sometimes by the common recognition of men, later it may be, finding a definite expression in the decision of Courts, sometimes put forth in the first instance by the Courts, sometimes established by legislative bodies. Together they make up the body of law which defines the rights and obligations of men that which is known as the substantive law.

It must not be supposed that this mass of rules alone constitutes the law as it exists to day. A being the stronger, might injure

Development of the adjective law B's person with impunity and B be powerless to defend himself or A might trespass upon B's land, and, defying B may remain a trespasser during his own pleasure, were it not

that means exist by which B can enforce his rights in respect to his person and property. So, too, a piece of property—a horse, for example—claimed by both A and B might go to the stronger, though not the one rightfully entitled to it, were it not for such means. In fact, the rules defining the rights and obligations of men, however complete and perfect they might be, would be of little use to mankind, unless there existed the means of compelling men to conform their actions to them, or of inflicting punishment upon them for failure to do so. So it happens that, with the growth of the substantive law, another kind of law has been established, which relates, not to the rights and obligations of men directly, but to the means of enforcing them. This is the law which defines the nature and powers of judicial tribunals, and then prescribes the methods of procedure therein. This is known as the adjective law.

The rules both of substantive and adjective law have attained such vast proportions that for convenience in explaining and discussing them, they are generally grouped into classes according to the nature of the subject matter to which they relate. Each class is then spoken of by itself as the law of the particular subject to which it relates, as the "law of torts," the "law of contracts," "the law of evidence," and the like. What each subject includes is dependent largely upon the conception of the particular writer handling it, for there is no well defined dividing line between many of the subjects.

The adjective law includes all the laws which have built up the judicial system, whether they have had their origin in the constitution, the legislature, or the Courts. It embraces, too, the laws which have fixed the practice in the Courts—the methods of carrying on the work by Judge and jury, the laws prescribing the manner in which litigants might seek relief and carry on their cases are also included, and, finally, certain rules have grown up, as a part of this law, which relate, not to the machinery of the system, but, having regard to the imperfections of the machinery, are concerned with sorting out and selecting the materials which are supplied to it. These last mentioned rules make up the law of evidence.

'The law of evidence' says Sir James Fitzjames Stephens 'is that part of the law of procedure which with a view to ascertain individual rights and liabilities in particular cases, decides, (1) what facts may and what may not be proved in such cases, (2) what sort of evidence must be given of a fact which may be proved, (3) By whom and in what manner the evidence must be produced by which any fact is to be proved.'

Thus before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given states of facts, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding.

Thus in general terms the law of evidence consists of provisions upon the following subjects —

- (1) The relevancy of facts
- (2) The proof of facts
- (3) The production of proof of relevant facts

The foregoing observations show that this account of the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the inquiry and this is all that the Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly as follows —

*I The Relevancy of Facts.* Facts may be related to rights and liabilities in one of two ways —

(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B there arises of necessity the inference that A is by the law of England the heir at law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances and with a certain intention or knowledge there arises of necessity the inference that A murdered B and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue unless their existence is undisputed.

(2) Facts which are not themselves in issue in the sense above explained may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them, such facts are described in the Evidence Act as relevant facts.

All the facts with which it can in any event be necessary for Court of Justice to concern themselves, are included in these two classes.

The first great question therefore which the law of evidence should decide is what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence in chapter II of the Evidence Act.

What facts are in issue in particular cases is a question to be determined by the substantive law or in some instances by that branch of the law of procedure which regulates the forms of pleading Civil or Criminal.

*II Proof of Relevant Facts.* Whether any alleged fact is a fact in issue or a relevant fact the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have

constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.

'Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice, but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the

1 Judicial notice, 2  
Oral evidence 3 Do  
documentary evidence

Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things other than documents, is usually proved by oral evidence so that there is no occasion to distinguish between oral and material evidence.

*III The production of Proof* This includes the subject of the burden of proof the rules upon which answer the question by whom is proof to be given. The subject of witnesses the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses the rules upon which answer the question how are the witnesses to be examined and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence may be included under this head.\*

The word relevancy is 'more fully defined in sections 6-11 of the Evidence Act. These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (s 8) is part of its cause (s 7) Subsequent conduct influenced by it (s 8) is part of its effect (s 7) Facts relevant under section 11 would in most cases be relevant under other sections. The object of drawing up the Act in this manner was that the general

\* Stephens' Introduction to the Evidence Act pp 11-1.

ground on which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy may be easily ascertained. These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known and merely declares negatively that certain facts shall not be proved."

The definition given in sections 6-11 is that of logical relevancy. Logical relevancy plays a certain part in the law of evidence. Definition of logical relevancy in that no evidence is admissible unless it is logically relevant. It does not follow that all evidence which is

logically relevant is admissible and in fact much that is logically relevant is excluded. Certain rules are laid down, founded on various considerations by which many matters which are logically relevant are declared inadmissible.

The modern system of Evidence as *Prof Wigmore* 'rests upon two axioms. These underlie its whole structure. Implicitly but nevertheless

Two axioms underlying the law of evidence actually and positively recognised in the practice of Courts and in the utterances of the Judges, they were first distinctly formulated by the great master and ex-

pounder of the history of our law of Evidence. The first is this: None but facts having rational probative value are admissible. This principle is indeed axiomatic, for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standard of reasoning, to effect rational persuasion. The second axiom on which our law of Evidence rests is this: All facts having rational probative value are admissible, unless some specific rule forbids."

'The great bulk of the Law of Evidence says Sir James Fitzjames Stephens 'consists of negative rules declaring what, as the expression runs is not evidence. The doctrine that all facts in

issue and relevant to the issue, and no others, may be proved is the unexpressed principle, which forms the centre of and gives unity to all these express negative rules. The law has been worked out by degrees by many generations of Judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but exceptions excepted all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others may be proved.

"Our classes of facts which in common life would usually be regarded as falling in with this definition of relevancy are excluded from it by the Law of Evidence except in certain cases.

"1. Facts familiar to but not specifically connected with each other (*Res inter alios acta*)

2 The fact that a person not called a witness has asserted the existence of any fact (*Hearsay*)

“3 The fact that any person is of opinion that a fact exists (*Opinion*)

4 The fact that a person's character is such as to render the conduct imputed to him probable or improbable (*Character*)

To each of those four exclusive rules there are however important exceptions which are defined by the Law of Evidence

‘The rejection on one or another practical ground of what is really probative is the characteristic thing in the English common law of Evidence stamping it out as the child of the jury system. In the shape it has taken it is not at all a necessary development of the rational method of proof, so that where people did not have the jury or having once had it did not keep it (as on the continent of Europe although they, no less than we worked out a rational system), they developed under the head of Evidence no separate and systematized branch of law. The greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English Law of Evidence. This judicial oversight and control of the process of introducing evidence to the jury was what gave our system birth, and he who would understand it must keep this fact constantly in mind’\*

The growth and the characteristic of the English Law of Evidence is thus described by an author of great eminence—‘At once, when a man raises his eyes from the common law system of evidence, and looks at foreign methods, he is struck with the fact that English system is radically peculiar. Here, a great mass of evidential matter, logically important and probative is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English speaking countries have what we call a Law of Evidence but no other country has it, we alone have generated and evolved this large elaborate and difficult doctrine. We have done it, not by direct legislation, but, almost wholly, by the slow accumulated rulings of Judges made in the trying of causes during the last two or three centuries—rulings which at first were not preserved in print but in the practice and tradition of the trial Courts, and only during the last half or two thirds of this period have they been revised, reasoned upon, and generalized by the Courts *in banc*. When one has come to perceive these striking facts he is not long in finding the reason for them. Indeed the very structure of the system thus produced points to the reason when we observe its constant anxious, and over anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled, and from dealing with questions which it has no right to deal with. It might seem strange and not worth while to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usages, as well as the deep political significance

Characteristic of English common law of evidence

Peculiarity of English Law of evidence depends on jury system

of the jury and its relation to what is most valued in the national history and traditions of the English race. It is the institution of the jury which accounts for the common law system of evidence—an institution which English-speaking people have had and used in one or another department of their public affairs ever since the Conquest. Other peoples have had it only in quite recent times and so indeed this may belong to those who began with it centuries ago, and that allowed it to become obsolete and forgotten. England alone kept it and in its original fashion has developed it.

This institution the jury which is thus the occasion of our law of Evidence and which is also at the bottom of our system of pleading and procedure and of very much in all branches of the substantive common law has a peculiar interest for us.

A system of evidence like ours, thus worked out at the forge of Juries, experienced in the trial of causes not created or greatly changed until lately by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with the niceties and definitions or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the common-sense suggestions of good sense, legal experience and a sound practical understanding, and they are seeking to determine, not what is or is not in its nature, probative—but rather, passing by that enquiry, what amount of probative matters shall nevertheless, for this or that practical reason be admitted and not even heard by the jury. From the diversity and multiplicity of the actual rulings by the Judges,—rulings often hastily made, ill-considered and even—often the endeavour to follow these as precedents and to generalize upon them from the forgetting by some Courts in making the attempt of the accidental and empirical nature of much in these determinations, and the combination of this fact by others there has resulted plenty of confusion. The position under which a ruling must be made is often unfavourable to correct action and the law of evidence largely shaped at *non prius* took on a shape, which was very confused and unintelligible. One thing is

to the sixteenth, thence to the seventeenth thence to 1 D 1790, thence to 1830 thence to 1860 and thence to the present time (1) From the section quoted we gather that up to the year 1200 we have no reliable data although to the formalities of the earliest tribunals there can be traced the sources of our present rules for the summoning of witnesses the effect of an oath, and the necessary production of original documents

(2) The next three centuries marked the establishment of the trial by jury. In this period no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths, documentary originals is developed. The rule for the conclusion of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision for they are not commonly caused to be informed by witnesses in the modern sense.

(3) Between 1500 and 1700 the foundation of the present English system was laid. In that period we find the regulation of the competency of witnesses, the rules of privilege and privileged communications, the rules for attorneys the compulsory attendance of witnesses, the privilege against self incrimination, the "parol evidence" rule and the enactment of the Statute of Frauds. The "parol evidence" enlarged its scope and came to include all writings and not merely sealed documents. The mark of the new period is seen at the Restoration. Justice on all hands, then begins to mend. Crudities which Matthew Hale permitted, under the Commonwealth, Scroggs refused under James II. The privilege against self incrimination the rule for two witnesses in treason and the character rule—three landmarks of our law of Evidence—find their first full recognition in the last days of the Stuarts.

(4) The fourth period of ninety years saw the final establishment of cross examination by counsel the rule for impeachment and corroboration of witnesses the "best evidence" doctrine and the publication of the first treatise on the Law of Evidence by Chief Baron Gilbert in 1726. About the same time the abridgments of Bacon and Comeyns gave many pages to the title of Evidence, but no other treatise appeared for a quarter of a century, when the notes of Mr J Bithurst (later Lord Chancellor) were printed, under the significant title of the 'Theory of Evidence'. Blackstone's commentaries were published in 1768. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination) are to be reckoned also the origins of the rules for confessions for leading questions, and for the order of testimony. The various principles affecting documents—such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals—now also received their final shape.

(5) The next forty years (1790-1830, saw a tremendous increase of the rulings upon evidence, there being more than in the preceding two centuries. In this development the dominant influence is plain, it was the increase of the printed reports of *Nisi Prius* rulings. This was at first the cause, and afterwards the self multiplying effect of the detailed development of the rules. As soon as *Nisi Prius* reports, multiplied and became available to all, the circuits must be



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reconciled the rulings once made and recorded must be followed, and the precedents must be open to the entire profession to be invoked. There was to speak a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises summing up the recent acquisitions of precedent and practice. In nearly the same year Peake, for England (1801) and MacNally for Ireland printed small volumes whose contents, as compared with those of Gilbert and Bullen seem to represent almost a different system. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch making. In 1814 and then in 1821 came Philipps and Starkie—method combining Evans' philosophies with Peake's strict reflection of the detail of practice. There was now indeed a system of Evidence consciously and fully utilized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced in 1810 by Swift's Connecticut book while Philipps and Starkie were replaced by Greenleaf's treatise of 1842.

(6) The thirty years ending with 1860 will be ever associated with the names of Bentham, Brougham and Denman. The Theory of Judicial Evidence in spite of or perhaps by reason of its philippic tone created a mighty influence for good—in influence fortified by such doughty legal champions as Brougham and Denman. Their efforts culminated in England in the Common Law Procedure Acts of 1852 and 1854 while in the United States Livingston and Field were the sponsors of similar results.

(7) In the period following 1860 there has been no serious emendation of the law of evidence in England later than the Judicature Act of 1875 and the Rules of Court of 1883 and the law of evidence attained rest. It is still over patched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demand of justice and above all to be so certain and settled in its acceptance that no further detoured development is called for.

The Indian Evidence Act is ever associated with the name of Sir James Fitzjames Stephens Q C, the great jurist and Judge who sponsored the amended Evidence Bill on which the present Act is based. At the final stage of the Bill he was vehemently criticised by competent critics but time shows how very judicious he was in enacting its provisions.

Before the passing of the Indian Evidence Act there was no complete code of evidence enforceable in every part of British India. The town of Calcutta had been from its foundation (1690) an English Colony governed by English law. The early charters empowered the Governor in Council of each settlement to exercise civil and criminal jurisdiction therein according to the laws of England, and charters of 1726 and 1753 provided, at least on paper for more regular tribunals at each of the principal settlements in shape of Mayor's Court for Civil and Courts of Oyer and Terminer and

No complete Code before the passing of the Evidence Act

Quarter Sessions for criminal proceedings. These Courts were supposed to decide cases according to English law and adopting English procedure.

Since the establishment of the Supreme Courts of Calcutta, Madras and Bombay, the English rules of evidence have systematically been followed in the Presidency towns and several of the reforms made in England by Parliament were from time to time applied to these by the Governor General in Council. Thus incompetency on the ground of crime and interest was abolished by Act IX of 1840 and Act VII of 1841. And Act XV of 1852 enabled parties to give evidence except in criminal proceedings and proceedings for adultery or breach of promise.

But in the Muffussal there was an absolute absence of any systematic law of evidence. The English laws of evidence were not in force in the Muffussal. The Muhammadan laws of evidence as laid down in the Hedaya, as modified by Regulations passed from 1793 to 1834 as well as to a certain extent by English practice and English text books were generally followed in the Muffussal Courts.

The Regulations of Bengal, Bombay and Madras laid down very few rules as regards evidence. Under section 15 of the Bengal Regulations III of 1793 a bond was required to be proved at least by two witnesses. But such documentary evidence was received without any proof unless objected to such as copies of judicial proceedings appearing to be authenticated by the signature of the proper officer, and copies of English correspondence from the Collectors or other Government officers similarly authenticated. Even copies of copies were so received. Rules as to witness, corresponding those contained in the present Codes of Criminal and Civil Procedure,

were made by the following Regulations in Bengal, Beng Reg IV of 1793 ss 6 14, Beng Reg IX of 1796 ss 2, 3 and 4, Beng Reg IV of 1807, s 7, Beng Reg VIII of 1803 s 25, Beng Reg I of 1803, ss 2, 3 and 4, Beng Reg III of 1812 s 2, Beng Reg XXIII of 1814 ss 33 and 73, Beng Reg XXIV of 1814 s 11. In Madras also rules relating to this subject were contained in several regulations namely Mad Reg III of 1802 s, 7, Mad Reg IV of 1802, s 18, Mad Reg V of 1802 s 16, Mad Reg VII of 1802, s 18, Mad Reg VII of 1809 s 22, Mad Reg XII of 1809, s 8, Mad Reg IV of 1816 ss 15 16, Mad Reg VI of 1816 ss 28 34, Mad Reg VII of 1816 ss 4 5, Mad Reg X of 1816 ss 15 16, Mad Reg XIV of 1816, s. 9. Mad Reg IV of 1821 s 10, and Mad Reg VIII of 1832 s 3. Moreover Mad Reg VI of 1816, s 35 and Mad Reg VII of 1816 s 15, have excluded documents not duly stamped. Evidence declared by the Muhammadan law officer to be inadmissible is dealt with by Mad Regs I of 1825 s 8 and VI of 1829, s 2. In Bombay some rules as to witnesses in civil proceedings were made by Bom Reg IV of 1827 and rules as to witnesses in criminal proceedings were prescribed by Regs XII and XIII of the same year. All persons who had arrived at years of discretion and were of sane mind were made competent witnesses by Bombay Reg IV of 1827 s 33 and XIII of 1827, s 35. And the section

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last mentioned contain provisions (wanting in the present law) as to irrational animals and inanimate objects produced in elucidation of the case.

The first Act of the Governor General dealing with the law of Evidence was Act X of 1835. That Act was made applicable to all the Courts in British India. By that Act all the Acts passed by the Governor General in Council could be proved by the mere production of the Gazette purporting to contain it.

This Act was followed in quick succession by other fragmentary enactments, laying down rules of evidence. Incompetency as a witness was abolished by Act XIX of 1837 which was also declared to be in force in all the Courts of British India. Hindus and Muhammadans were permitted to make solemn affirmations instead of oath or declaration in the Mofussil Courts by Act V of 1840. That Act had no binding effect on any of the three Supreme Courts of Calcutta, Bombay and Madras. Act IX of 1840 declared that if a witness in any of the Supreme Courts were objected to on the ground that if a witness in any

incompetent and the verdict or judgment should not be so admissible. The object of this enactment which was taken from 3 & 4 Will IV Chap 42 was to render less frequent the rejection of witnesses on the ground of interest. Incompetency of a witness on the ground of interest or crime was abolished within the jurisdiction of the Supreme Courts by Act VII of 1841. But that Act did not make the party on whose behalf an action was brought or defended a competent witness. By Act XV of 1852 parties to a cause were made competent witnesses except in criminal proceedings and proceedings for adultery or breach of promise of marriage. By this Act the parties were compelled to allow inspection of documents and Acts of state and judicial proceedings could be proved by the production of certified copies alone. It made the register of British ships and certificates of registry admissible without proof of signature. It dispensed with the production of the record of a conviction or acquittal. That Act was in force also in the Supreme Courts. Act XIX of 1853 extended some of these reforms to the Civil Courts of the East India Company in the Bengal Presidency. By this Act, parties to suits as well as husbands and wives of the parties were made competent witnesses. Although there was no express prohibition henceforth a husband or a wife is enabled to give evidence and produce documents in competency of a witness on the ground of relationship or interest was also abolished and a party could be compelled to give evidence and produce documents. But a witness was exempted from producing documents relating to a party's title deeds, State documents and irrelevant documents. Communication between a witness and his professional adviser was also privileged. The Court could compel a witness to produce any other documents. Section 26 of that Act rendered absconding witnesses liable for damage.

In 1855 Sir Lawrence Peel introduced a Bill for the further improvement of the law of evidence which was carried by Sir James Colville and found place in the Statute Book as Act II of 1855. This Act though totally devoid of arrangement

History of the passing of the Indian Evidence Act

• Whitley Stokes pp 812 813

was skilfully worded and contained many valuable provisions which applied to all Courts in British India (*Vide Appendix C infra*) Act X of 1855, which was in force in the Civil Courts of the East India Company in the Presidencies of Fort St George and Bombay enacted by s 10 a provision like section 26 of Act XIX of 1853 In 1859 the first Civil Procedure Code was passed by Act VIII of 1859 and in 1861 the first Criminal Procedure Code found place in the Statute book Act XV of 1869 provides facilities for obtaining the evidence and appearance in Court of prisoners and for service of process upon them So it is clear that down to 1872 there was no fixed rules of evidence, except those contained in Act XIX of 1853 and Act II of 1855 which could be applied in the Muffasal Courts The Commissioners appointed in England to prepare a body of substantive laws for India (ignoring the fact that their commission did not comprise adjective law) accordingly framed a draft code, which in October 1868 was introduced by Sir Henry Sumner Maine and referred to a select committee as a Bill to define and amend the law of evidence This Bill was published and circulated to local authorities in the usual manner But it was pronounced to be unsuited to India by some competent persons It was far from complete it was ill arranged it was not elementary enough for the officers for whose use it was designed, and it assumed an acquaintance with the law of England which could scarcely be expected from them A new Bill was therefore prepared by Sir James Fitzjames Stephens, the worthy successor of Sir Henry which was printed circulated and very freely criticised Sir James accordingly recast it, and it was ultimately passed as Act I of 1872\* It is on the main based on the English law of Evidence

This enactment purports to consolidate define and amend the whole law of Evidence with certain exceptions mentioned in sections 1 and 2 But rules contained in the Indian Evidence Act are also thus criticised by *Sir Henry Sumner Maine* 'It must always be recollected that the affirmative or positive method of arrangement followed in the Indian Evidence Act does not represent the historical growth of the English law of Evidence So far as it consisted express

Sir Henry Sumner  
Maine's criticism on the  
Indian Evidence Act

rules it was in its origin a pure system of exclusion, and the great bulk of its present rules were developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury The chief of these were founded on general propositions of which the approximation to truth was but remote Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed that witnesses interested in the subject matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men A complete account of it cannot in fact be given unless the mode of its development be kept in view

Another important reason, too, for remembering that our law of Evidence is historically a system of exclusion, is that we cannot in any other way account for its occasional miscarriages The conditions under which it was

\* Stokes Anglo Indian Code Vol II pp 812 817

# THE INDIAN EVIDENCE ACT

originally developed must still be referred to in explanation of the difficulty of applying it in certain cases or of the ill success which attends the attempt to apply it. The mechanism of judicial administration which once extended over a great part of Europe and in which the functions of the Judge were distributed between persons or bodies representing distinct sources of authority—the King and the country, or the lord and his tenants—in England gradually assumed the shape under which we are all familiar with it in criminal trials and at Nisi Prius. A body of men, whose award on questions of fact is in the last resort conclusive are instructed and guided to a decision by a dignitary sitting in their presence who is assumed to have an eminent acquaintance with the principles of human conduct whether embodied or not in technical rules and who is the sole judge of points of law, and of the admissibility of evidence. The system of technical rules, which this procedure carries with it fails then in the first place, whenever the arbiter of facts—the person who has to draw inferences from or about them—has especial qualifications for deciding on them supplied to them by experience, study, or the peculiarities of his own character which are of more value to him than could be any general direction from book or person. For his reason a police man guiding himself by the strict rules of evidence would be chargeable with incapacity, and a General would be guilty of a military crime.

Again the blending of the duties of the judge of law and of the judge of fact deprives the system of much though not necessarily of all of its utility. An Equity Judge, an Admiralty Judge, a Common Law Judge trying an election petition an historian may employ the English rules of Evidence particularly when stated affirmatively to steady and sober his judgment. But he cannot give general directions to his own mind without running much risk of entangling or enfeebling it and under the existing conditions of thought he can not really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it. English men are extremely prone to do injustice to foreign systems of judicial administration from forgetting the inherent difficulty of applying the English law of Evidence when the same authority decides both on law and on fact as is mostly the case in other countries.

When India came under the British rule there were many branches of law in which the political officers of the British Government could find few positive rules of any sort, or if any could be discovered, they were the special observances of limited classes or castes. Thus there was no law of Evidence in the proper sense of the words, hardly any law of contract scarcely any of Civil Wrong. Whole provinces of law became exclusively, or nearly exclusively, English. The law of Evidence became wholly English so did the law of Tort. It is quite possible to hold a respectful opinion of many parts of English law and yet to affirm strongly that its introduction by Courts of Justice into India has amounted to a grievous wrong. No branch of law had become more thoroughly English at the time when it was first comprehensively dealt with by the Indian Legislature than the law of Evidence, and the practical evils which hence arose were even greater than those which ordinarily result from the adoption of an exotic system of legal rules collected

with difficulty from isolated decisions reported in a foreign language. The theory of judicial evidence is constantly misstated or misconceived even in this country. The English law on the subject is too often described as being that which it is its chief distinction not to be—that is, an *Organon* as a sort of contrivance for the discovery of truth which English lawyers have patented. In India, several special causes have contributed to disguise its true character. There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other western societies the separation of the province of the Judge from the province of the jury, and, in fact, the English rules of Evidence are never very scrupulously attended to by tribunals which like the Court of Chancery, adjudicate both on law and on fact through the same organs and same procedure. Now, an Indian functionary when he acts as a civil Judge and for the most part when he acts as a criminal Judge decides both on law and on fact. He it is who applies the rules of Evidence to himself, and not to a body distinct from himself, and he has often to perform the delicate achievement of preventing his decision from being affected by sources of information which in reality have been opened to him.

‘The effects of their peculiar experience on many distinguished Indian functionaries may be seen to be of two kinds. In some minds there is a complete scepticism as to the value of the rules of Evidence, and though the man who for the time being is a Judge may attempt to apply them, he is intimately persuaded that he has gone into bondage to a foolish technical system under compulsion from the Court of Appeal above him. With others, the consequences are of a different sort, but practically much more serious. They accept from the lawyers the doctrine that the law of Evidence is of the extremest importance, and unconsciously allow this belief to influence them, not only in their judicial, but in their executive and administrative duties. It is often said in India that the servile reliance upon the English law of Evidence, which now-a-days characterizes many of the servants of Government, is producing a paralysis of administration, and though the assertion may be exaggerated, it is far from impossible that it may have a basis of truth.’

‘The jury trial system of rules of Evidence’ says *Prof Wigmore* “is not the only safe system of investigation in matters of liberty and property, for other nations have had a long experience of successful justice without it. Nor is it correct to assume that the general wisdom of experience which is represented in the system at large is represented in all the detailed rules rigidly enforced, quite the contrary. What is commonly forgotten is that most of the rules—nineteen

*Prof Wigmore's criticism*

twenty-two let us say—are merely rules of caution, *i.e.*, they are based upon a possibility of error, so that the failure to observe the rule is perfectly consistent with a high probability of truth. The rule, for example, requiring the original of a document to be produced is merely a rule against possibilities for thousands of banks and business houses daily deal with ‘millions of wealth’ on the faith of copies not originals, to assert that truth was certainly missed because a copy was used is an absurdity. So too, with the hearsay rule, it aims to guard against possibilities, and is sound.

enough, as a rule, but all history of the past, and all public news of present, is learned by hearsay, for less than a million of our population knew by personal observation, that our soldiers fought in a war with Germany and the entire financial and economic operations of the country are built on a complex structure of hearsay which is as solid as a steel and concrete building.

A second thing to remember is that the jury trial rules are intended for a constantly changing tribunals of fact composed of inexperienced men dealing with hundred types of cases. When the tribunal is composed of experienced professional men, habitually inquiring day after day into some limited class of facts, an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury rules could well be applied by such a tribunal in weighing the evidence, without the actual exclusion of it. Sir Henry Sumner Maine's comment on this feature represents a general truth. And in a community where the major part of such offices are filled by men already trained in the law, it is certain that the general wisdom of the cautions embodied in the jury rules of evidence will be employed by them.

Prof. Greenleaf, at the end of his famous book on Evidence says "The student will not fail to observe the symmetry and beauty of this branch of the law and will rise from the study of its principles convinced with Lord Esher that they are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." Commenting on this statement says Prof. James Bradley Thayer "I think that it would

Nature of the English rules of evidence be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork not at all to be admired, nor easily to be found intelligible, except as a product of the jury system as the outcome of the quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over Courts where ordinary, untrained citizens are acting as judges of fact. Largely irrational in any other aspect, in this point of view it is full of good sense,—a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedent that is often short-sighted and ill instructed and that needs to be taken in hand by the jurist and illuminated, simplified and invigorated by a reference to general principles.

I have said that our law of evidence is ripe for the hand of the jurist. It does not mean for the hand of the codifier, it is not—but for a treatment which

beginning with a full historical examination of the subject and continuing with a criticism of the cases shall end with a re-statement of the existing law and with suggestions for the course of its future development. Such a task is a noble one, and it should commend itself to the best efforts of a legislature in framing the law of evidence. It is not only a light cooperation from the legislature to give to the law the simplicity and capacity for growth which would make it a law worthy its treatment of justice than it is."

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SUPPLEMENT CONTAINING DIGEST OF CASES  
UP TO July, 1932

S 4 (p 60)—Presumptions are of two kinds presumptions of law and presumptions of fact Presumptions of law are true presumptions, presumptions sometimes rebuttable, sometimes irrebuttable, which Courts are bound to take up before hand *a priori* before they ever consider the evidence in the case or the part of the case to which the presumption apply Those presumptions are correctly called presumptions, positions which a Court must take up before hand It is a little unfortunate that in legal phraseology the word 'presumptions' is used in what are spoken of as "presumptions of fact" *Bommadevara v Sona*, A I R 1932 Mad 343=35 M L W 493=1932 M W N 264

S 4 (p 64)—Where under a given rule extreme evidential value is to be assigned to a given piece of evidence, the probative force of such piece of evidence cannot be extended to collateral matters Where one fact is declared by law to be conclusive proof of another the Court cannot allow evidence to be given in rebuttal *Parbhu v Jang Bahadur*, A I R 1932 All 35=1931 A L J 360

S 8 (p 116)—Though under s 8 of the Evidence Act a motive is provable as a relevant fact, yet it cannot be proved by hearsay evidence Where a statement made by the deceased person not falling under s 32 (1) is said to constitute a motive it cannot be proved unless it explains or accompanies any act of the deceased and falls under Expl I to s 8 *Venkata Subba Reddi, In re*, 54 M 931=61 M L J 608=A I R 1931 Mad 689

S 8 (p 116)—To Judge what the real state of a person's mind on a previous occasion was, the surrounding circumstances and subsequent events can be referred to *Ganesh v Emperor*, A I R 1931 Pat 52=32 Cr L J 478

S 8 (p 129)—If a person is proving that he has retired from a firm he is quite entitled to show that immediately after the date of retirement he wrote to the Bank and informed them that he had severed his connection with the firm and could not continue to guarantee its account If he does that any statement by him made at the time as the reason for his refusing to continue to guarantee is admissible to explain the conduct *Promotha v Bhagandas*, 35 C W N 705

S 8 (p 136)—Though the statement made by the accused to the police may be inadmissible under s 162 Cr Pro Code, evidence of their conduct is certainly admissible under s 8 *Syamo v Emperor*, A I R 1932 Mad 391 Fact of production of share of property by an accused is admissible as conduct under s 8 *Ganu v Emperor*, A I R 1932 Bom 286=56 B 172

S 10 (p 159)—Before anything said, done or written by any one alleged member of a conspiracy can be used as evidence against another or against all, the Court must have reasonable ground for believing that the conspiracy between them existed *Mukundlal v Emperor*, 1930 M W N 1264

S 10 (p 160)—Under s 10 narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention The word 'intention' implies that the act intended is in the future and the section makes relevant statement made by a conspirator with reference to the future *Emperor v Vishampayan* 55 B 839=33 Bom L R 1159

S 11 (p 174)—Where the accused have been charged under the Arms Act for possessing arms and for conspiracy to commit a dacoity the fact that one of the accused was seen showing a revolver to a companion with whom it is alleged he was conspiring to commit a dacoity would be relevant as evidence of preparation under s 11 *Saroj Kumar v Emperor*, A I R 1932 Cal 474

S 11 (p 174)—Where the precise date of death of the last holder is in question a statement in a copy of the application for probate of his will that the deceased died on a particular date is admissible in evidence under s 11, if not under s 32 (5), where it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know of the date of his death and the



application was filed about one year after the testator's death - *Lachhman Lal v Kamalshya* A I R 1931 Pat 221=12 Pat L 1 891

S 13 (p 182)—Section 13 (a) refers to admissibility of transaction by which right is asserted *Narendra v Sanyasi*, A I R 1932 Cal 393, see also *Devdas v Ramnanyandas*, A I R 1932 Bom 291=31 Bom L R 236

S 13 (p 196)—A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible under the provisions of ss 13 and 14 as establishing a particular transaction in which the partition of the estate was asserted and recognized. The reason upon which the judgment is founded is no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself be relevant to prove partition in a subsequent suit *Gobinda Narayan v Shamlal*, 35 C W N 521 (P C)

S 13 (p 218)—Recitals in a *lobala* by the vendor that the lands sold to the vendee were *muskar brahmottar* and that his father was in possession of them in *muskar* right are not admissible in evidence against the zemindar (who was a party to the *lobala*) in a suit brought against the heirs of the vendee for possession of the land *Jagadishchandra Narayan v Bilash*, A I R 1932 Cal 427=59 C 451

S 13 (p 224)—Where in a prosecution for counterfeiting trade mark certain previous proceedings, in a Civil Court relating to the exclusive right of the complainant were referred to and the judgments in the prior case were filed, held, that the judgment were relevant under s 13 as a particular instance when the right claimed was claimed and was disputed *Palli Ram v Emperor*, A I R 1931 Oudh 277=134 Ind Cis 477

S 13 (p 224)—A recital in the order of a President of a Union Board is not admissible under s 35 or s 13 in evidence unless such President has been examined with regard to the fact mentioned in his order *Doraisami v Kannappa*, A I R 1931 Mad 187=131 Ind Cis 654

S 13 (p 224)—Apart from ss 40 to 42 it is doubtful if s 13 covers previous judgments but it certainly will not cover judgments subsequent to the matter under investigation in both the clauses of the section it is the past tense that is used *Jhugur Raut v Emperor*, A I R 1931 Pat 386=12 Pat L 1 647

S 13 (p 224)—Partition deed between two persons would not be admissible to show permanency or otherwise of tenancy *Narendra v Sanyasi*, A I R 1932 Cal 393

S 14 (p 253)—In a prosecution under section 400 I P Code, the previous conviction of the accused is admissible not as evidence of character but as evidence to prove habit and association *Bachchu v Emperor* A I R 1930 Oudh 455

S 14 (p 253)—In a prosecution under s 415 of the I P Code, evidence would be relevant on the question whether the accused was in embarrassed circumstances at the date when he entered into his contract *Mohsinbhai v Emperor*, A I R 1932 Bom 273=34 Bom L R 313

S 17 (p 291)—A decree holder making an erroneous admission in an application accompanied by an affidavit is entitled to retract that admission *Sita Ram v Pir Baksh*, 130 Ind Cas 406=32 P L R 413=A I R 1931 Loh 6

S 18 (p 297)—A party's admission should be accepted as true until contrary is proved *Abdul Rafiq v Bhajan* A I R 1932 All 199=1932 A L J 77, *Amimuddin v Tajaddin*, A I R 1932 Cal 538=58 C 541

S 18 (p 297)—Where there is no privity of contract between the parties an admission made by one party will not bind another *Ganesh v Dhali*, 132 Ind Cas 7=12 L L J 187

S 18 (p 299)—An admission alleged to have been made by one person on behalf of another is not binding on the latter unless it is proved that the former was really authorised to make the admission on behalf of the latter *Purnima v Nand Lal*, 12 Pat L T 582. A person called by a party as his witness cannot however be regarded as his agent within the meaning of section 18 *Parbhudas v Lallubhai*, A I R 1932 Bom 117=34 Bom L R 35

S 18 (p 321)—Where *Mahants* are nothing more than custodians or managers, a statement made by previous *Mahant* cannot be regarded as binding

on the subsequent incumbent of the office *Ram Parshad v Shuomou*, 12 Lah 497=A I R 1931 Lah 161

S 21 (p 337)—Admissions are relevant under the Evidence Act, unless they are rendered inadmissible by some circumstances which the Act declares to be of an invalidating nature *Irunachala v Emperor*, A I R 1932 Mad 500=62 M L J 680=35 M L W 607

S 21 (p 337)—The document affecting a transfer which is attacked as being fraudulent preference is admissible in such a proceeding under s 21 *Kashi v Official Receiver*, 1931 A L J 26=A I R 1931 All 142

S 24 (p 353)—A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by ss 24, 25 or 26 *Brij Nandan v Emperor*, 133 Ind Cas 154=A I R 1931 All 9

S 24 (p 365)—Confession to be taken as a whole *Emperor v Balmul und*, 52 A 1011=A I R 1931 All 1 (F B). Even when a part of the confession is found to be false the entire confession should not be rejected simply for that reason. If sufficient grounds exist that part that charges the prisoner may be believed while that which is in his favour may be rejected *Durga v Emperor* 32 Cr L J 830

S 24 (p 367)—A true confession made by a person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of truth *Matadin v Emperor* 132 Ind Cas 228=A I R 1931 Oudh 166

S 24 (p 367)—The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a magistrate. It requires no corroboration *Munnu v Emperor*, A I R 1931 Oudh 415=131 Ind Cas 1018

S 24 (p 371)—Where the confession was recorded on a Sunday and at the house of the Magistrate and the Magistrate while certifying and stating on oath as a witness that he satisfied himself that the accused was making a statement voluntarily did not record the question and answers put and it was further objected that the evidence was recorded in English though made in Urdu. Held that the irregularities in recording the confession did not render it inadmissible *Abdul Ghan v Emperor*, 133 Ind Cas 55=A I R 1931 Lah 763

S 24 (p 380)—Court can under s 24 form its own opinion as to whether inducement, threat or promise was sufficient to lead accused to believe that he would benefit from making confession *Emperor v Attursing*, A I R 1932 Sind 64

S 24 (p 385)—Where a statement made by a person who at the time was not an accused but subsequently became one was tendered in evidence against him, it must be treated in the same way as if he had been an accused at the time he made it *Ghani v Emperor* A I R 1931 Lah 763=133 Ind Cas 55

S 24 (p 385)—A manager of the local branch of a limited company is a person in authority *Emperor v Athur Sing*, A I R 1932 Sind 64. Zamindars connected with investigation are persons in authority *Nawal Kamal v Emperor*, A I R 1932 Sind 55. A police officer is a person in authority *Indar v Emperor*, A I R 1931 Lah 408

S 24 (p 385)—A confession made to a jail warden which was not read over to him, is absolutely valueless *Ciochin v Pakrisani*, 1930 M W N 1249

S 24 (p 396)—Retracted confession value of—*Vide Durga v Emperor*, 132 Ind Cas 70, *Nanpey v Emperor* A I R 1931 Oudh 412=134 Ind Cas 876, *Nanah v Emperor* A I R 1932 Lah 73. A retracted confession is not necessarily worthless *Symo v Emperor*, A I R 1932 Mad 391

S 25 (p 403)—An excise officer is not a police officer with the meaning of s 25 *Pura Surdar v Emperor*, A I R 1930 Cal 710=129 Ind Cas 101, *Matlal v Emperor*, A I R 1932 Cal 122=36 C W N 163, *contra*, *Ibrahim v Emperor*, A I R 1931 Cal 250, *Behari Lal v Emperor*, A I R 1927 All 343=8 Lah 326, *vide* article in A I R 1932 pages 47—55 (Journal)

S 25 (p 106)—Statement of Police officer that accused confessed having sent false incriminating telegram cannot be proved *Kodangar v Emperor*, A I R 1932 Mad 24=61 M L J 860

S 25 (p 106)—The confession under s 25 need not be a confession of the crime which the police officer is at the moment investigating. If A says to a police officer, I notice B murdering X while I was murdering Z his confession that he murdered Z cannot be proved *Kadangar v Emperor* 61 M L J 860

S 25 (p 106)—A confession recorded by an Excise officer without the safe guard that are prescribed by s 162 Cr Pro Code, is not of much evidentiary value *Ibrahim v Emperor*, 53 C 1260=35 C W N 601=A I R 1931 Cal 350

S 25 (p 106)—No part of a confession made to a police officer is admissible in evidence *Gurusami v Emperor*, 1931 M W N 725

S 26 (p 409)—A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession is certainly admissible in evidence. But the accused, its value is not discounted by the fact that the accused was at that time in the custody of the police *Crown v Pakrisami*, 1930 M W N 1249. A confession made to a Sub magistrate is not vitiated by the presence of a police man *Rajah Gadu v Emperor*, 1931 M W N 723

S 26 (p 411)—Confession of accused to Magistrate not deputed by police is admissible *Ala Mohammad v Emperor*, A I R 1932 Lab 261

S 27 (p 415)—Section 27 is a special provision, whereas s 162, Cr Pro Code is general and does not in any way affect the operation of s 27, Evidence Act when the conditions mentioned therein fulfilled *Syama v Emperor*, A I R 1932 Mad 391=1932 M W N 305 (F B)

S 27 (p 416)—Section 27 is in form and substance a proviso to preceding section *Ganu v Emperor* A I R 1932 Bom 286=34 Bom L R 303=56 B 172 *Durlav v Emperor* A I R 1932 Cal 297=36 C W N 373

S 27 (p 416)—Section 27 has no application when nothing in connection with the crime is discovered as a result of information given by the accused *Durala v Emperor*, A I R 1931 Oudh 119=14 O L J 210

S 27 (p 419)—Where many persons are charged and all the accused got together with the Police officer and take out the property at one and the same time but there is no evidence to show that any one of them said where it was buried, the fact of discovering has no value against any one of them under s 27 *Dito v Emperor* A I R 1931 Sind 151=1931 Cr C 525

S 27 (p 420)—I or the purposes of s 27 "custody" does not necessarily mean detention or confinement, but submission to custody by word or action under s 16(1) Cr Pro Code, may be taken to amount to custody *Jalla v Emperor* 131 Ind Cas 93=A I R 1931 Lab 278=32 P L R 347

S 27 (p 423)—Where the accused has made a statement of a self incriminating nature in consequence of which a discovery was made only so much of the statement as relates to that fact is admissible but not the rest of the incriminating statement. The statement made to the Police Officer cannot be garbled so as to be rendered absolutely innocuous to the prisoner and removed entirely from the nature of a confessional statement *Sonaram v Emperor*, A I R 1931 Pat 115=12 Pat L F 491

S 29 (p 437)—Section 164 Cr Pro Code does not override the provisions of s 29 Evidence Act. It is the latter Act that must be looked at when there is a question of the admissibility of a particular piece of evidence. Hence a confession otherwise admissible does not become inadmissible because the accused person was not warned that he was not bound to make such confession and that evidence of it might be given against him *Vellamoonji v Emperor* A I R 1932 Mad 431=62 M L J 559

S 30 (p 411)—This section creates an exception to the fundamental principles of criminal law and as such must be strictly construed in favour of an accused person *Mirudamuthu In re*, 34 M 788=A I R 1931 Mad 520

S 30 (p 419)—The words "may take into consideration" mean may take into evidence. The weight that is to be attached to it as evidence against the accused, however depends on the circumstances of the particular case. Nor

is there any provision in the Act to the effect that the confession of one co accused implicating the accused cannot be corroborated by the confession of another co accused which also implicates the accused *Aung Hla v Emperor*, 9 Rang 404=A I R 1931 Rang 235

S 30 (p 449)—A self exculpatory statement cannot be created as a confession of an offence so that any fact of it might be used against the other accused who was tried for the same offence *Dulo v Emperor*, A I R 1931 Sind 154 Where the accused in his confession did not implicate himself as fully and substantially as his co accused such confession cannot be used as evidence against co accused *Shamblu v Emperor*, A I R 1932 All 228=1932 A L J 162, see also *Emperor v Chatterpal Singh* A I R 1930 Oudh 502, *Abdul Jalil v Emperor*, A I R 1930 All 746=1930 A L J 1105, *Emperor v Narain*, A I R 1931 Oudh 83

S 30 (p 449)—The word "proved" in this section means proved before the case for the prosecutor comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial So a confession by one accused made from the dock implicating himself and the other accused cannot be taken into consideration by the Court as such confession can not be made the basis of the conviction of the other accused *Maruda multhu Padayachu, In re*, 54 M 788=A I R 1931 Mad 820

S 30 (p 449)—It is permissible for the Court to consider a confessional statement made by the accused person as a confession proved within the meaning of s 30 whether made before the trial or during the trial, provided that it is recorded according to law *Ganpat v Emperor*, 27 N L R 163=A I R 1931 Nag 169

S 30 (p 449)—It is always desirable to pass a sentence completely before calling upon an accused pleading guilty in a joint trial to give evidence against his co accused, so that the witness may give his evidence with a mind free of all corrupt influences which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce But this course is not essential *Mahammad v Emperor*, 58 C 1214=35 C W N 490

S 30 (p 455)—A retracted confession is evidence and there is no provision in this section by which a confession is to be received one way or another The use to be made by a Court of a confession whether retracted or not is a matter of procedure rather than law, the business of the Court being to make up its mind in accordance with the dictates of common sense whether it is safe to believe the confession or not *Amna v Emperor*, 130 Ind Cas 641=32 Cr L J 579=A I R 1931 Lah 196 As regards value of retracted confession, vide, *Emperor v Narain*, A I R 1931 Oudh 83=14 O L J 630 *India Datt v Emperor*, A I R 1931 Lah 408=132 Ind Cas 185=32 Cr L J 818, *Surjan Singh v Emperor*, A I R 1932 Lah 293=33 Cr L J 251, *Nanal v Emperor* A I R 1932 Lah 73

S 31 (p 458)—Admission is conclusive in itself but is only a piece of evidence which should be weighed against other evidence *Sada v Jallu*, A I R 1932 Lah 126=134 Ind Cas 128

S 31 (p 458)—A party making admission must show that it is incorrect *Darindar v Lachmi*, A I R 1930 Lah 985, see also *Suquuddin v Johur*, 134 Ind Cas 888

S 31 (p 458)—Express admission of a party to the suit, or admissions implied from his conduct are evidence, and strong evidence against him, but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or excluded by them unless another person has been induced by them to alter his condition *Abdul v Rashuuddin*, 131 Ind Cas 903=A I R 1931 Oudh 246

S 32 (p 469)—Section 32 provides an exception to the general rule that evidence must be given in Court by witnesses *Rahman v Emperor*, 32 Cr L J 1118=134 Ind Cas 117=A I R 1932 Lah 14

S 32 (1) (p 481)—A statement made by a deceased person relating to the facts leading to his death and recorded by the doctor who attended on the deceased at the time of his death in the presence of his compounder is admissible

book keeping rather than to the truth or correctness of the entries in the account books *Gulab v Baagwan*, A I R 1932 Oudh 225=9 O W N 532

S 34 (p 582)—Whatever particular words the plaintiff may have used in proving the balance of account based on a *bahi khata*, where the sum total of his statement leaves it in doubt whether he was speaking from personal knowledge, and the defendant fails to cross examine him to show that he had no personal knowledge either about all or any of the words sufficient to give the plaintiff the benefit of the doubt he should be deemed to have personal knowledge *Har De v Srikishun*, A I R 1932 All 60=1931 A L J 946

S 34 (p 586)—Though an entry in books of account when relevant under s 34 requires corroboration no corroboration is needed if the same becomes admissible under s 32 (2) *Manikchand v Paralaji*, 9 Mys L J 337

S 35 (p 592)—Where there is a statutory duty laid upon public officers to investigate and report facts a report of the facts elicited by their investigation is an official record within the meaning of section 35 *Ramlrishna v Inunarayana* A I R 1932 Mad 193 An entry in a report made at a police station and recorded by a public servant is a relevant fact under s 35 *Abheraj v Gaja*, S O W N 1228 But a recital in the order of a President of a Union Board is not admissible under s 35 or 13 in evidence unless such President has been examined with regard to the fact mentioned in his order *Doraisami v Kannappa*, A I R 1931 Mad 487=1931 M W N 366 So also a recital in a judgment of a matter only incidentally mentioned cannot be evidence of what is there said in another case *Bhupa v Jachand*, 32 P L R 763 Summary settlements have not the same values as a regular settlement A presumption arising from entries in a regular settlement cannot therefore be rebutted by entries in an earlier summary settlement *Sadu v Mani Ram*, A I R 1931 Lah 139=31 P L R 1024

S 35 (p 600)—The entry in the Mouzawari Register in which the Barrack pore Cantonment was entered as a '*mahal khas sircar*' meaning in the possession of the Government is admissible to prove the title to the land when that is in dispute in proceedings under the Land Acquisition Act *Secretary v Salish Chandra*, 58 C 858=35 C W N 173 P C *Fards Bachli* are records of the acts of Public officers under s 151, Land Revenue Act and a *patuarsi* shall be deemed for the purposes of the Evidence Act to be public officer having the custody of a public document which any person has a right to inspect *Malik v Khushi*, A I R 1931 Lah 605 The evidence of custom contained in the village regarding the right of tenant to the timber of trees in his holding is admissible under s 35 and the question of its probative value is one of fact *Bidya Prasad v Sunlhur* A I R 1931 Pat 263=12 Pat L J 302

S 35 (p 600)—It would be unsafe to reject the settlement entry on the *a priori* arguments advanced against its correctness *Ram Nath v Ram Sewal*, 12 P L R 17 Rev

S 40 (p 618)—Judgments not *inter partes* are not evidence at all so far as regards the matters which they decide unless they fall under s 40 or 42 They may be relevant under s 13 *Purnima v Nand Lal* 12 Pat L J 582

S 40 (p 618)—Unless a judgment is relevant under ss 40 to 42, it is not evidence at all so far as regards the matter which it decides *Purnima v Nandlal*, A I R 1932 Pat 105

S 41 (p 627)—Statement in judgment not *inter partes* is not admissible *Bhupa v Jachand*, A I R 1932 Lah 50

S 41 (p 627)—Judgment in probate proceeding operate as a judgment *in rem* so far as genuineness or otherwise of will is concerned *Phenka v Manika* A I R 1930 Pat 618

S 41 (p 627)—This section applies to the foreign judgment of a competent Court no less than to domestic judgments *Official Receiver v Lakshminarayana* 54 M 724=A I R 1931 Mad 474

S 41 (p 627)—In order that declaration of title to specific thing should, have the conclusive character as against the whole world, it is not enough to show that under the judgment of the Insolvency Court one has become entitled to a specific thing but his title to such a thing must have been declared not as against any specified person but absolutely *Venkataramanayya In re*, 51 M 601=

A I R 1931 Mad 441—A right to recover a debt or a chose in action can not be deemed to be a "specific thing" *Venkataramanayya In re*, 51 M 601

S 41 (p 624)—"Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is. The meaning of 'legal character' must be narrowly construed for it must be remembered that an action availing against all the world. *Venkataramanayya, In re*, 51 M 601=A I R 1931 Mad 441

S 41 (p 627)—Though it be necessary as a step to making a declaration which will operate *in rem* to find a fact, that finding will not bind third parties in subsequent proceedings. *Ibid*

S 41 (p 627)—Judgment is admissible only to show its date and legal consequences. *Trailokya v Emperor*, A I R 1932 Cal 293

S 41 (p 631)—The judgment of Insolvency Court declaring a person as creditor of the insolvent does not confer any 'legal character' on him within the meaning of s 41 and hence declaration does not operate as a judgment *in rem*. *Venkataramanayya In re* 51 M 601=A I R 1931 Mad 441

S 42 (p 631)—Judgments determining similar question are relevant though not conclusive. *Sundarabai v Hanmant*, A I R 1932 Bom 393=31 Bom L R 802

S 43 (p 639)—A judgment *not inter partes* holding that a partition of a certain estate was proved is only admissible under the provisions of ss 13 and 43 as establishing a particular transaction in which the partition of the estate was asserted and recognised. *Gobinda v Shamlat* 58 C 1187=58 I A 125

S 44 (p 645)—The plea that a decree passed by a Native State Court was made without jurisdiction is open to the objector under s 44 and can be raised at any stage of the proceedings unless there is a bar or *res judicata* or any rule of equitable estoppel against him. *Sheo Talal v Bimal*, A I R 1931 All 689

S 45 (p 668)—The opinions or conclusions of skilled persons are certainly receivable by way of proof in point of fact but the witness must have made a special study of the subject or acquired a special experience therein. *United State Shipping v St Albans*, A I R 1931 P C 189=131 Ind Crs 771

S 45 (p 682)—To base a conviction upon evidence of an expert in hand writing is as a general rule very unsafe. *Indar Dutt v Emperor*, A I R 1931 Lah 108=32 Cr L J 818

S 45 (p 681)—It cannot be laid down as a rule that it is unsafe to base a conviction on the uncorroborated testimony of a finger-print expert. The true rule seems to be one of caution, that is to say, that the Court must not take the expert opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake and the responsibility is all the greater when there is no other evidence to corroborate the expert. *Harendra v Emperor*, 35 C W N 693=A I R 1931 Cal 141

S 45 (p 685)—Where the so called expert witnesses give no data in support of their opinions, their evidence should be rejected. *Pubhu v Secretary of State*, A I R 1931 Lah 361

S 48 (p 700)—When any question of right or custom is to be decided opinions of persons who would be likely to know of its existence are admissible in evidence under s 48. *Hubraj v Chandrabai*, A I R 1931 Oudh 89

S 51 (p 724)—The evidence of a police officer that the accused person was under police surveillance in order to make the prosecution story sound and probable is hopelessly inadmissible. *Purekh v Emperor*, A I R 1931 Pat 315. But if evidence is otherwise relevant it is not rendered inadmissible merely because it shows bad character or the commission of offences other than the offence with which the accused is charged. *Snoy v Emperor*, A I R 1932 Cal 474

S 57 (p 758)—A Court can take judicial notice of matters of universal notoriety, its general knowledge of daily life. But a judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. He cannot therefore impart into a case his knowledge of the previous conduct of the accused. *Shimthunay v Emperor* 215 L R 11=12 Ind Cas 176

S 58, Proviso (p 768)—The general rule contained in order 12, r 6 of the Procedure Code, that the Court has a discretion to pass a decree on the basis of an admission is supported by s 53, proviso, of the Evidence Act *Bhagwan L v Sheoraj*, A I R 1931 Oudh 321=14 O L J 462

S 63 (p 787)—The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in very clear case of miscarriage *Visvanath v Rahbar*, A I R 1931 Bom 100 55 B 103

S 63 (p 787)—A register containing copies and directly from the originals is legally admissible in evidence in proof of them *Chandran v Sheo Nath*, A I R 1931 Oudh 146

S 63 (p 789)—A copy transcribed from a copy of an original document but not compared with the original is not secondary evidence of the original *Rajendra v Behari*, A I R 1932 Pat 157

S 65 (p 798)—It is doubtful whether a copy of a list attached to a plan obtained from some record in the Revenue Court is admissible in the evidence *Bhagwati v Majad*, A I R 1931 Oudh 136

S 65 (p 798)—Where secondary evidence which is inadmissible has been erroneously admitted without objection in the Court of first instance such objection cannot be taken later in appeal *Fauza v Allah Ditta*, A I R 1931 Lah 722=133 Ind Cas 874

S 65 (p 800)—Where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under s 65 (c) and s 66 proviso (2)—*Narvudas v Ravirankar*, A I R 1931 Bom 33

S 65 (p 809)—Where the original of a document has been proved to have been destroyed by fire certified copy of the same is admissible under this section *Rajendra v Behari*, A I R 1932 Pat 157 But where a party fails to prove that the original of the document was lost secondary evidence of its contents is not admissible *Abheraj v Gaya*, 8 O W N 1228

S 68 (p 839)—A document which purports to be a mortgage but is not a mortgage owing to noncompliance with the provisions of s 59 of the T P Act regarding attestation is not a document which is required by law within the meaning of s 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested *Venkatesh Venkata*, 51 M 163=60 M L J 56=A I R 1931 Mad 140

S 68 (p 839)—Other evidence under s 71 cannot be admitted where the provisions of s 68 have not been complied with *Banwari v Gopinath*, A I R 1931 All 411, *Pedu v Venkata*, A I R 1932 Mad 148=31 L W 663

S 68 (p 840)—It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case Proviso to s 68 of the Evidence Act was held inapplicable to a case disposed of before it took effect *Banwari v Gopi*, 131 Ind Cas 557=1931 A L J 342=A L R 1931 All 411

S 68 (p 842)—Proper reading of the proviso to s 68 is that if any of the defendants to a suit brought upon the basis of a document required by law to be attested, denies that the alleged executants executed the deed the plaintiff must produce one of the attesting witnesses to prove the document and the fact that the deed is registered and none of the executants of the deed have denied its execution will not absolve the plaintiff from producing an attesting witness *Ludha v Deoki*, A I R 1932 All 320=1932 A L J 207

S 71 (p 850)—Other evidence under s 71 cannot be admitted where provisions of section 68 have not been complied with *Banwari Lal v Gopinath*, A I R 1931 All 411=1931 A L J 342

S 74 (p 864)—A judgment of a Court is a public document within the meaning of s 71 *Ladli v Emperor*, I R 1931 All 487=132 Ind Cas 327=A I R 1931 All 364

S 74 (p 864)—Petition of appeal produced from Government secretariat is not a public document *Mahomed v Sayyid*, 8 O W N 349=A I R 1931 Oudh 177

S 74 (p 861)—Report to police that certain woman married to certain person is not public document and hence inadmissible in evidence *Nauab v Sher Zaman* A I R 1930 Lah 1067

S 74 (p 861)—Where a power of attorney was executed before and authenticated by the Sub-Registrar under s 33(1) of the Registration Act and he did not keep a copy of the original held that s 74(2) of the Evidence Act was not applicable to such a case *Bishen v Abdul*, 1931 A L J 666=A I R 1931 All 649

S 76 (p 867)—The word 'right to inspect' in s 76 exclude all such documents as a Government officer has a right to refuse to show on the ground of State policy or privilege *Debidatt v Sri Ram*, A I R 1932 Bom 291=34 Bom L R 236 The right of a member of the public to demand a copy of a judgment is limited by s 76 to "a person who has a right to inspect the document" The right of a person to inspect a judgment therefore must be looked from outside the Evidence Act Every member of a public can inspect a judgment in a criminal case *Ladli v Emperor*, A I R 1931 All 364=1931 A L J 405

S 76 (p 867)—*Fard Bachhs* are records of the acts of public officers and are public documents *Malik v Khushi* 32 P L R 508=A I R 1931 Lah 605

S 78 (p 877)—An extract from a News paper about a government notification is inadmissible in Evidence A copy of the Government *Gazette* should be produced *Mohi Lal v Emperor*, 1930 A L J 1535=A I R 1931 All 12

S 81 (p 879)—Where a copy of a *Gazette* Notification is produced for the first time before the High Court in revision from an order of conviction under s 3, the High Court can presume its genuineness under s 81, Evidence Act, and can hold the production of it in the High Court sufficient even if it had not been tendered in evidence before *Nanak v Emperor* A I R 1931 Lah 273=32 Cr L J 1227

S 90 (p 900)—The presumption of execution of the document extends to the marksman *Shailendra v Gurya*, 58 C 686=A I R 1931 Cal 596

S 90 (p 900)—Section 90 does not contain any restrictions that a presumption should not be drawn there under if the person claiming under the document in question is out of possession or has not actually signed or thumb marked the document himself It is for the Court to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper it can raise the presumption *Imam v Natha*, A I R 1932 Lah 43=32 P L R 626

S 90 (p 900)—Court has discretion to raise or not to raise presumption under s 90 It is not compulsory upon any Court before whom a document purporting or proved to be 30 years old produced to presume that the said document is genuine The presumption that arises under s 90 of the Act only extends to the genuineness of the old documents coming from proper custody, it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority *Ram Naresk v Churlul*, A I R 1932 Oudh 227=9 O W N 379

S 91 (p 911)—Where the terms of an agreement has been reduced to the form of a document no evidence about the terms of the agreement is permissible except the document itself or secondary evidence of its contents *Sri Durga v Badri*, 15 R D 399 *Nazir v Ram Mohan* 53 A 114=1931 A L J 64=A I R 1931 All 183 (F B)

S 91 (p 911)—It is a well established principle of law that every loan carries with it a contract to repay and if a hand note which forms the evidence of the transaction, cannot be accepted in evidence for some reason or other, there is nothing in law to prevent the plaintiff from giving other evidence as regards the loan and if he can satisfy the Court as regards the truth of his version there is no reason why a decree should not be made in favour of the plaintiff *Abdul v Mahananda* 133 Ind Cas 685=A I R 1931 Pat 293 *Kumcar v Suraj*, A I R 1932 Oudh 235, *Airaj v Ram*, 130 Ind Cas 347, *contra Nazir Khan v Ram Mohan* A I R 1931 All 183=53 A 114 (F B), *Saligram v Radhay* A I R 1931 All 560,



S 91 (p 911)—I let of partition may be proved by oral evidence although deed embodying terms of partition cannot be proved for want of registration *Subbarao v Mahalal Shamma*, A I R 1930 Mad 883

S 91 (p 911)—Where an agreement to relinquish ex proprietary right which should be in writing and registered was not so executed held that oral evidence was not admissible regarding the agreement *Ram Nath v Specu Manager*, 12 L R 1 Rev

S 91 (p 911)—Documents merely evidence of transaction complete independently of them and not embodying terms of mortgage transaction do not require registration and are admissible in evidence *Ralli Brothers v Punjab National Bank* A I R 1930 Lah 920 But where it does require registration other evidence is not admissible to prove the nature of the transaction *Ralli v Namikon*, A I R 1932 All 259=1932 A L J 101

S 91 (p 911)—Unregistered sale deed cannot be made basis for suit for specific performance as if it were merely document creating right to obtain another document *Dutan v Gurbachan*, A I R 1932 Lah 276=33 P I R 227

S 92 (p 928)—Section 92 applies only in cases where a document contains or appears to contain on the face of it all the terms of the contract The burden of proving that the writing does not contain the whole of the agreement would be on the party setting up that plea *Chumanram v Ditanchand*, A I R 193 Bom 151=34 Bom L R 26

S 92 (p 930)—Acknowledgment is not a document contemplated in section 92 *Chhedilal v Monoharlal*, A I R 1930 Nag 298=26 N I R 320

S 92 (p 930)—Extraneous oral evidence is inadmissible especially where the terms of the bond are clear The parties must be presumed to know the difference between interest on interest and compound interest and if they deliberately choose to use one expression they cannot be permitted to prove that they meant the other *Bhadu v Ganpati*, A I R 1931 Nag 25

S 92 (p 930)—Oral evidence by plaintiffs for the purpose of showing that one of the parties to the extract had acted as agents, is admissible *Ladhomal Chandumal*, 25 S L R 91=A I R 1931 Sind 4

S 92 (p 930)—In case of lease in the name of one member of a joint family, evidence is admissible to show that it was for entire joint family *Raghunath v Budhooram* 133 Ind Cas 897=A I R 1932 All 112

S 92 (p 933)—Person not parties to the instrument can give evidence, challenging the nature of transfer *Ram Sundar v Collector of Gorakhpur*, A I R 1930 All 797=1930 A L J 724, *Gopi v Rup Ram*, A I R 1930 All 786=1930 A L J 926 Sale deeds and mortgage deeds are essentially transactions between the vendor and the vendee or the mortgagor and the mortgagee The vendor and the mortgagee must be regarded as parties to the transaction But in case of an instrument which is essentially a deed of family settlement between the claimants to an estate is quite different The mere fact that they agree to make provisions for certain relations or dependents does not make such persons parties to the instrument and oral evidence given by a person concerning maintenance allowance to be given to one of such relations cannot be excluded by reason of section 92, the relation not being a party to the deed of agreement *Ilhanarayan v Rup Kuar*, A I R 1932 Oudh 168=9 O W N 29 The word "as between the parties to such instrument" suggests that the section applies only to the 'dispositive' documents between the contracting parties *Madiya v Varada* 9 Mys L J 203

S 92 (p 933)—Person described in bond as principal debtor cannot be proved to be surety *Nandlal v Surajmal*, A I R 1932 Nag 62

S 92 (p 935)—An oral agreement between the parties to a decree varying the terms of the decree can be proved and the proof of it is not barred by s. 92 as the section only refers to dispositive instruments *Ilal Chand v Prem Chand* 20 S L R 279=A I R 1931 Sind 42

S 92 (p 935)—In case of a deed of gift by husband to wife the husband can prove that the same is of a fictitious nature *Mahomed v Sayid* A I R 193 Oudh 177=8 O W N 349

S 92 (p 936)—Decree operating to create lease is compulsorily registrable and consequently a lease comprised in the petition of compromise and incorporated in the consent decree is not admissible in evidence under s 92 if not registered *Sachindra v Ramyash*, A I R 1932 Pat 97=12 P L T 871

S 92 (p 940)—Where the terms of the mortgage contract are reduced as required by law to writing an oral agreement varying those terms cannot be admitted in evidence *Mulhu Kumar Swami v Govinda*, A I R 1932 Mad 218=35 M L W 145

S 92 (p 940)—Where, according to the terms of the registered mortgage deed the whole of the mortgage money is payable on demand with interest evidence of a contemporaneous oral agreement between the parties that the amount would not be payable on demand, but shall be accepted in instalments, is inadmissible under the express provisions of s 92—*Mohammad v Kishori*, A I R 1932 All 375=1932 A L J 414

S 92 (p 946)—The discharge of a mortgage represented by a mortgage-deed by payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement *Suppan Chella v Yegnarayan*, A I R 1932 Mad 141

S 92 (p 946)—When a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *kistbandi* which merely provides that mortgagor is to pay the amount then found due in certain instalments spread over a certain number of years with a proviso that in default of any *kist* the entire amount under the mortgage bond would become due, the *Kistbandi* shows the arrangement between the parties and does not alter or vary the terms of the mortgage bond and it is admissible in evidence without registration *Sasi v Ram*, A I R 1932 Cal 136=35 C W N 861

S 92 (p 958)—Parties can show that they never came to an agreement or that written contract having no date was intended to operate from future uncertain date *Radhalissen v Durgaprasad*, A I R 1932 Cal 328=59 C 106

S 92 (p 963)—Where it is recited in the document sued on that consideration was paid in cash it is open to the defendant to plead want of consideration *Gokal v Harcharan* 32 P L R 577=134 Ind Cas 102 The consideration mentioned in a document is not one of the terms of the document but it is the recital of a fact which can be contradicted or raised under proviso (1) to section 92 *Nabin v Shona*, 35 C W N 279

S 92 (p 963)—Where a plaintiff makes no claim for rectification regarding the rate of interest contained in the mortgage instrument, the proviso to s 92 does not empower a plaintiff suing on an unambiguous unreformed and registered deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation *Sayamma v Venkata*, A I R 1931 Mad 785=61 M L J 637=51 M 973

S 92 (p 973)—A condition precedent within the meaning of proviso (3) to section 92 is a condition without the fulfilment of which there is in effect no written agreement at all and no contractual obligation of any description *Sheo Lal v Bai*, A I R 1931 Bom 297=33 Bom L R 490

S 92 (p 973)—Proviso (3) s 92 does not contemplate the division or splitting up of a contract, the result of which would be to vary the contract taken as a whole *Radha Kissen v Durgaprasad* A I R 1932 Cal 328=59 C 106 The true meaning of the words "any obligation" in proviso (3) is any obligation whatever, under the contract and not some particular obligation which the contract may contain *Ibid* Oral evidence to show that one of the executants of a bond was to be regarded only as a surety is inadmissible in view of s 92 *Ibid*

S 92 (p 973)—If the statement as to the consideration be taken as a recital of a fact section 92 is not attracted. If it be taken as a recital of a term the agreement might come under proviso (1) to section 92. Such an agreement cannot come under proviso (3) to section 92 as the expression "any obligation" there means any obligation whatever under the contract and not some particular obligation which the contract may contain *Isfan Ali v Jogendra*, 36 C W N 151

S 92 (p 976)—Where the mortgagor pleaded a subsequent oral agreement whereby the mortgagee agreed to waive the default rate of interest both for the past and for the future and alleged that—payments had been made in pursuance of the alleged agreement and that the entire claim for interest has thus been discharged. *Held* that s 92 of the Evidence Act was no bar to the plea. *Vaidyanatha v Kandappa*, 54 M 839=61 M L J 556=A I R 1931 Mad 63.

S 92 (p 977)—Where a partnership is formed in 1921 between P and A to carry on certain business and under the terms of the contract which at reduced to writing and registered, the partnership is to continue for five years an oral evidence to prove that the partnership had in spite of the terms in the contract, been dissolved in June 1922 and P was paid his share of the assets is admissible. *Azul Hasan v Imambux*, A I R 1932 Nag 42.

S 92 (p 980)—Where the lease under a registered lease deed contained that they were cultivating an additional area by virtue of an oral agreement. *Held* that evidence of a simultaneous oral agreement was barred by s 92 and that evidence about subsequent oral agreement was not admissible under provision 4 to that section. *Manixa v Jhabbu*, 12 L R 336 (Rev).

S 92 (p 987)—Oral evidence is admissible to prove that the name of the creditor was through mistake put down as K instead of R in a deed containing acknowledgment of liability. *Aisax v Ram*, A I R 1931 Oudh 51=130 Ind Cas 347.

S 92 (p 987)—Importation of extraneous matter is forbidden unless required to show relation of language to existing facts. *Irfan Ali v Official Receiver* A I R 1930 All 837=1930 A L J 978.

S 93 (p 1000)—Section 93 of the Evidence Act does not prevent evidence being given that the municipal number given in rent-receipt which is different from the present number of the holding was in fact the old number of the same holding. *Galstaunn v Profulla*, 36 C W N 583.

S 101 (p 1030)—The burden of proving a plea of permanent occupancy right in a suit for ejectment is on the tenant. *Gopala v Juvappa*, A I R 1931 Mad 577=133 Ind Cas 369.

S 101 (p 1030)—Where defendant denied that he had made thumb mark upon any hand note but admitted that he had put his thumb mark on blank paper which might have been utilized for hand note, the burden is on the defence to explain how document bearing defendant's thumb impression came into existence. *Sahdeo v Pulesar*, A I R 1930 Pat 593.

S 101 (p 1030)—Where a deed of gift by husband to wife is attested as being colourable, person attacking the same must prove the allegation. *Nabab Mulla v Nawab Falar*, A I R 1932 P C 13.

S 101 (p 1030)—Where there is little to choose between evidence of either side, that side must lose on which burden of proof has been laid. *Ghara v Manga* A I R 1930 Lah 322=33 P L R 263=136 Ind Cas 710.

S 101 (p 1030)—Where adoption of D was acquiesced by members in adopting family for over 50 years and then one P a member of such family challenges it, the burden lies on P to disprove D's adoption because in case of a Hindu long recognized as an adopted son, raises a very strong presumption in favour of the validity of his adoption. *Ramachrishna v Tiru Narayana*, A I R 1932 Mad 193=62 M L J 116=35 L W 73.

S 101 (p 1030)—Where a signature in the account book is admitted but want of consideration is pleaded, the burden of proving that there was no consideration rests on N. *Nihal v Dal Singh* A I R 1932 Lah 135.

S 102 (p 1030)—When the execution of a hand note is admitted the onus of proving that no consideration passed is thrown entirely on the defendant. *Chalpa v Kuldip*, 134 Ind Cas 632=A I R 1931 Pat 266. But when the execution of the hand note is denied by the defendant, the onus rests on the plaintiff of proving due execution. *Ramlakhan v Gog Singh*, A I R 1931 Pat 219=12 Pat L T 233.

S 102 (p 1030)—Where a person passes a receipt in favour of another for money borrowed for him, the burden of proving that the money borrowed did not belong to that person lies heavily on the debtor. *Patiram v Sadashiva* 132 Ind Cas 459=A I R 1931 Nag 97.

S 102 (p 1030)—It is for the person claiming the benefit from disposition of property by the purdanashin lady to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. If she is illiterate it must have been read to over her if the terms are intricate they must have been adequately explained, and her degree of intelligence will be a material factor, but independent legal advice is not in itself essential. *Rama namma v Virana*, 54 C L J 183=61 M L J 94 P C=85 C W N 633

S 103 (p 1031)—Where the vendor admits receipts of full consideration in the sale deed, the burden lies heavily on him to explain the admission and prove non receipt of consideration. *Johnstone v Gopal*, 12 Lah 516=A I R 1931 Lah 419

S 103 (p 1031)—Where in a case of infringement of copyright the complainant produces his certificate of registration and the book published at that time, and he further testified that the book is not the same as that produced by his father the onus lies on the defence to show that matter contained in the complainant's book was also contained in the previous book. *Emperor v Sheo Charan*, 131 Ind Cas 865=1931 A L J 304=A I R 1931 All 353

S 106 (p 1064)—Where a person is charged with having been a member of an association declared unlawful by the Government the burden of proof is not on the accused to prove the discontinued his membership. It is for the prosecutor to prove he continued to be a member even subsequent to the notification by Government.—*Emperor v Sripad*, 55 B 484=33 Bom L R 90=A I R 1931 Bom 129

S 108 (p 1069)—Where the entry in the *Mueat* showed that a person was unheard of and there was other evidence to show that the person had not been heard of for 40 years, the presumption as to death could be drawn. *Thrallpath v Ranjit Singh*, A I R 1931 Oudh 40=130 Ind Cas 124=7 O W N 1120

S 108 (p 1074)—Under s 108 there is only a presumption of death. It does not raise any presumption as to the date of death. *Punjab v Natha* A I R 1931 Lah 582 (F B)=133 Ind Cas 889, *Meherkhan v Salhi* A I R 1932 Lah 45=134 Ind Cas 97, *Jangi v Gudri*, A I R 1932 All 365=1932 A L J 175

S 111 (p 1087)—Where the donee is in active confidence burden of proof of good faith of the gift is on the donee even if donor is not a purdanashin lady. *Vithal v Narayan* 34 L W 424=61 M L J 878

S 112 (p 1093)—Under s 112 first there is a presumption of legitimacy, this can be rebutted by non access, but once access is proved presumption becomes irrebutable. Access means actual sexual intercourse not mere opportunity. *Jogannath v Chinna Swami* 1931 M W N 755=61 M L J 878 see also *Mayandi v Sami Asasi*, 1931 M W N 1278=61 M L J 874=A I R 1932 Mad 44

S 114 (p 1107)—Section 114 does not enable Court to presume certain state of things without any proof. *B N Raj v Moolji*, A I R 1930 Cal 815

S 114 (p 1107)—(i) The presumption under s 114 is discretionary with the Court having due regard to the circumstances, (ii) the presumption means that the law exempts the crown from proving the guilt of the accused unless he gives some explanation as to how he came by the goods. If he gives any explanation which in the opinion of the Jury may possibly be true although they do not necessarily believe it, then the crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case accused did not prove his innocence affirmatively. *Bhulnath v Emperor* 35 C W N 291 Possession of stolen property about nine months after its loss does not give rise to any presumption under this section. *Suchi Ahir v Emperor*, 130 Ind Cas 800=32 Cr L J 614=A I R 1931 Pat 85

S 114 (p 1112)—It is seldom safe to base a conviction upon the statement of an accomplice unless there is independent evidence to corroborate it in material particulars. *Gaya Prasad v Emperor* 8 O W N 517=32 Cr L J 1181=134 Ind Cas 401, see also *Durga v Emperor*, 132 Ind Cas 70=32 Cr L J 830, *Indar Dutt v Emperor* 132 Ind Cas 185=32 Cr L J 818=A I R 1931 Lah 408, *Jai Singh v Emperor*, 8 O W N 1240, *Venkat Subba Reddi, In re*, 53 M 931=A I R 1931 Mad 639, *Sher Jang v Emperor*, 32 Cr L J 631=A I R

1931 Lah 178, *Manal Chand v Emperor*, 32 P L R 792; *Aug Illa v Emperor*, 9 Rang 401=1931 Cr C 875=A I R 1931 Rang 235, *Bhuneswar v Emperor*, 132 Ind Cas 234=A I R 1931 Oudh 172, *Amarnath v Emperor*, A I R 1931 Lah 406, *Ambica Charan v The Emperor*, 35 C W N 1240, *Surendra v Emperor*, A I R 1932 Cal 377=54 C L J 470, *Ranbir v Emperor*, A I R 1932 Lah 204=33 P L R 241, *Nandl Chand v Emperor*, A I R 1932 Lah 73=133 Ind Cas 545=32 Cr L J 1036, *Poras Ram v Emperor*, A I R 1930 All 740

S 114 (p 1111)—It is not right to presume from the fact that a man is member of an association when it is lawful, that he continues to be a member after it is declared unlawful. This is not a matter of presumption, there must be evidence of continuing membership. *Emperor v Dharmanand*, 33 Bom L R 333=A I R 1931 Bom 203, *Emperor v Shripad*, 55 B 484=A I R 1931 Bom 129

S 114 (p 1118)—It must be assumed that a process issued by the Court and accepted by it as having been duly served in the manner provided by law with all the formalities laid down for the service thereof and the burden of proving that the formalities were not complied with is on the defendant. *Chay v Kripa Ram*, 31 P L R 1001=132 Ind Cas 181

S 114 (p 1118)—Under s 114 the Court may presume that an entry in a public record made by a public servant was properly made. *Abheraj v Gaya*, 8 O W N 1228

S 114 (p 1118)—The decision of the Privy Council in *Jitendra Nath Ghose v Man Mahon Ghose*, 57 I A 214, seems to lay down that in the absence of evidence to the contrary it has to be presumed that the procedure laid down in ss 12 and 13, B T Act was duly followed and that proper statutory notice was given of the encumbrances and execution sales. *Sasi Sekhar v Bir Bilram*, 30 C W N 1239

S 114 (p 1118)—It may be presumed that an attachment ordered by the Court was duly effected, in the absence of evidence to the contrary. *Kiernander v Beni* 58 C 598=A I R 1931 Cal 763

S 114 (p 1118)—Though ordinarily it may be presumed that a Government notification purporting to have been published in a Gazette of a certain date was in fact so published, yet where the interval between the issue of a notification and action taken on it is short, a Court might require stricter proof that all the formalities for publishing the notification had actually been carried out. *Emperor v Ballurshna* 55 B 356=A I R 1931 Bom 132

S 114 (p 1118)—Entries in collectorate books as to arrears due must be presumed to be correct and must be looked into to ascertain whether estate was in arrears. *Radha Gobinda v Girija Prosanna*, 35 C W N 912

S 114 (p 1118)—Illustration (g) refers to evidence which can be and is not produced. *Girish v Emperor*, A I R 1932 Cal 18

S 114 (p 1120)—No presumption can be made against the defendant from their non production of their title deeds in response to a fishing application by the plaintiffs for discovery which did not disclose any material to support their claim. *Someshwar v Maheshwar*, A I R 1931 Pat 426=10 Pat 630

S 114 (1121)—The Court may draw such inferences from the accused's refusal to answer questions as it thinks just according to s 342 Cr Pro Code and s 114 illus (h). *Shri Jang v Emperor*, A I R 1931 Lah 178=32 Cr L J 684

S 114 (1122)—In a claim for recovery of the money on the basis of the lost agreement, the defendant produced the agreement, and alleged that the obligation had been discharged. The Court placed the onus on the plaintiff to show that the agreement was lost and not discharged. Held that the onus was wrongly placed as the presumption under s 114 illus (i) would be a piece of evidence in defendant's favour but it did not shift the onus of proof which was on the defendant to show that he had discharged his obligation. *Jagannath v Amara*, A I R 1931 Lah 299=134 Ind Cas 495

S 114 (p 1121)—Where there is nothing to suggest that the attesting witness signed after the mortgagor the Court can rely on the presumption under s 111 and hold that he signed after mortgagor. *Radhia v Nagendra*, 131 Ind Cas 767=53 C L J 586=A I R 1931 Cal 806

S 114 (p 1127)—Where it is shown either by proof or admission that the thumb impression on the suit hand note is that of the defendant but the defendant alleges that he put in his impression only on a blank piece of paper, no presumption of any kind can be raised in favour of the plaintiff under this section *Ram Lal Han v Gog Singh*, 12 Pat L T 233=A I R 1931 Pat 219

S 114 (p 1136)—A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status *Mahomed v Raja Sayud*, A I R 1931 Oudh 177=8 O W N 319

S 114 (p 1139)—The presumption that a particular witness has discharged his duty properly is a presumption which they "may make" and not one which they "must make" *Emperor v Thareem Ali*, 53 C 1095=A I R 1931 Cal 796

S 114 (p 1139)—In cases of arrears of revenue an entry in books of collectorate are produced to be correct *Radha v Gurja*, A I R 1932 Cal 153

S 114 (p 1139)—Due notice under s 69 Embankments Act, should be presumed under s 114 Evidence Act, in the absence of evidence to the contrary *Sasi v Bir Bikram*, A I R 1932 Cal 267

S 114 (p 1139)—An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so *President Union Board v Balkrishna Reddi* A I R 1932 Mad 509, see also *John Carapet v Syed Mohammad* 36 C W N 242

S 114 (p 1139)—Under s 114 of the Evidence Act the Court may presume unless contrary is shown that all judicial acts have been done regularly and according to law *Prian Chunder v Blackwood* 36 C W N 345

S 115 (p 1144)—The doctrine of estoppel by deed in its technical sense cannot be said to exist in India *Johnstone v Gopal* 12 Lah 546=A I R 1931 Lah 419

S 115 (p 1149)—As regards equitable estoppel, *vide Niharbala v Sashadhar*, 58 C 358, *Ariff v Jadumath*, 58 C 1235=35 C W N 550, *Sheo Tahal v Binael*, 1931 A L J 653=A I R 1931 All 689, *Canadian Specific Railway v The King*, A I R 1932 P C 108

S 115 (p 1150)—Where there is no representation by a person the value of estoppel cannot be invoked against him *Sirajuddin v Johur* 134 Ind Cas 888=53 C L J 222 In order to establish estoppel upon representation, declaration must have been made and believed and truth must have been inaccessible *Mohammad v Mohammad*, A I R 1930 All 847, *Johnstone v Gopal*, A I R 1931 Lah 418, *Abdul v Mahboob*, 6 Luck 382

S 115 (p 1151)—There can be no estoppel except when one person has by his declaration act or omission intentionally caused or permitted another person to believe a certain thing to be true and act upon such belief *Mahomed Hayat, v Gulam* 32 P L R 390=A I R 1931 Lah 598

S 115 (p 1153)—Pleas of estoppel.—Burden of proof, *vide Sheo Tahal v Binael Shul ul*, 1931 A L J 653=A I R 1931 All 689

S 115 (p 1167)—As regards cases of estoppel by conduct, *vide, Sheel h Dhunmnoo v Sheolal* A I R 1931 Nag 158=27 N L R 183, *Ram Udit v Ram Samuj* 134 Ind Cas 465=A I R 1931 Oudh 263, *Balasurya v Mrutyamavada* 131 Ind Cas 669=A I R 1931 Mad 354, *Siraj Prosad v Oudh Behari*, A I R 1931 All 216, *Nanberumal v Veera perumal*, A I R 1930 Mad 956, *Gopi v Baij Nath*, A I R 1930 All 840 *Muhammad v Ali Saghir*, A I R 1932 Pat 33, *Rama Krishna v Tirumarayana*, A I R 1932 Mad 198, *Umrav v Ramisen*, A I R 1932 Lah 281

S 115 (p 1167)—An infant is not estopped from setting up infancy even when fraudulent misrepresentation is proved *Gadigeppa v Balangunda* 55 B 741=33 Bom L R 1313

S 115 (p 1172)—There can be no estoppel against legislature *Mura v Jhandu Ram* 12 Lah 367=A I R 1930 Lah 1034, *H V Lou & Co Ltd v Sudhanna*, 58 C 1453=35 C W N 537=A I R 1931 Cal 791 *Abdul v Mahboob Ali*, A I R 1931 Oudh 133 *Dottie Korian v Lachmi*, 58 I A 58=10

S 155 (p 1361)—Section 155, Cl (3) does not render nugatory the clear and explicit provisions of s 115 and in fact takes for granted the existence and binding effect of those provisions *Mahila v Emperor*, A I R 1931 Lah 38=32 P L R 259

S 155 (p 1361)—Where two accused are alleged to have strangled a person to death and some of the prosecution witnesses say that the eye witnesses at the spot immediately after the offence was committed did not implicate one of the accused as having helped to strangle the deceased, their evidence can be used under s 155(3) to impeach the credit of the eye witnesses *Nana v Emperor*, A I R 1931 Lah 189=32 Cr L J 1205

S 155 (p 1361)—In prosecution for rape general immoral character of prosecutrix may be shown *Wahid Ali v Emperor*, A I R 1932 Cal 523

S 157 (p 1369)—Where a girl who had mixed aconite in cooked food and served the same on her near relatives two of whom died, was granted a pardon and she made statements before the doctor and the Magistrate as to the circumstances under which the aconite was administered *Held* that her statements were admissible in evidence *Emperor v Amode Ali*, 58 C 1228=35 C W N 573=A I R 1931 Cal 757

S 157 (p 1369)—Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witness who have made statements at the trial. As to corroborating a witness it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statement made at the trial has been in one way or another, challenged *Abdul Jalil v Emperor*, A I R 1930 All 746

S 159 (p 1378)—If it is merely a question for a man refreshing his memory and the document is not tendered in evidence and the witness merely gives evidence in the ordinary way after reading what has been written, section 159 applies. But where the witness says that he does not recollect the facts recorded by him in the statement but is sure that that they were correctly recorded then section 160 applies and the document may be tendered in evidence *Arishnappa v Emperor*, 60 M L J 404=A I R 1931 Mad 430, see also A I R 1931 Mad 352=131 Ind Cas 621, *Jagannath v Emperor*, 32 Cr L J 1172

S 165 (p 1394)—The power of a Judge under s 165 cannot be exercised for the purpose of introducing evidence in contravention of the law, namely s 162 Cr Pro Code *Rahyoddi v Emperor*, 35 C W N 317=58 C 1009=A I R 1931 Cal 189

S 167 (1403)—Improper admission of evidence of character of the accused goes to the very root of the administration of criminal justice and where it appears that such evidence has influenced the Magistrate's consideration of the other evidence in the case, the conviction should be set aside *Phekan Singh v Emperor*, 12 Pat L F 471=A I R 193 Pat 193 345=133 Ind Cas 449

# THE INDIAN EVIDENCE ACT. ACT I OF 1872

*Received the assent of the Governor-General on the  
15th March, 1872*

WHEREAS it is expedient to consolidate, define and amend  
the Law of Evidence, It is hereby enacted  
Preamble as follows —

**Title of an Act.** "Originally bills in Parliament were mere petitions to the King. They were entered on the rolls of Parliament with the King's answer, and at the end of the Session the Judges drew up these records into Statutes, to which they gave a title (*Co Litt* 272 a). The title was first added about the eleventh year of Henry VII. In the Lords the original title of a bill is amended at any stage at which amendments are admissible when the alterations in the body of the bill have rendered any change in the title necessary, and in the Commons since 1854 either in committee or report or on the third reading stage of a bill" *Maxwell Sixth Edition* p 73. So it was held by Lord Mansfield in *Rex v. Williams*, 1 W Bl 95 that the title of a Statute was no part of the law see also *Salkeld v. Johnston*, 84 R R 255, *Poultner's Case* 11 Rep 336, *Mills v. Wilkins*, 6 Mod 62 *A G v. Weymouth*, Amb 22, *Chance v. Adams* 1 Lord Raym 77 *Shrewsbury v. Scott* 6 C B N S 1 *Jefferys v. Boosey* 4 H L C 982, *Morant v. Taylor* 1 Ex D 191 "The title cannot be resorted to" says Lord Cottenham "in construing the enactment" *Hunter v. Norklod's* 1 Mac & G 640 1 Hall & T 644, 14 Jur 256, 19 L J Ch C 177. In *R v. Hileock* 14 L J M C 104 Lord Denham expressed that view as well. But in *Pickden v. Morley Corporation*, 67 L J Ch 611=(1899) 1 Ch 1=79 L T 231=49 W R 295 *Lindley* H observed "I read the title advisedly, because now, and for some years past title of an Act of Parliament has been part of the Act. In old days it used not to be so and in the old books we are told not so to regard it but now the title is an important part of the Act. See also the observations of Romer L J in *Ambler v. Driffield Corporation* (1902) 2 Ch C A at p 594 and *Sutton* J in *Jones v. Sherrington* (1903) 77 L J K B 774. If there is in the provisions of an Act anything admitting of a doubt the title of the Act is a matter proper to be considered in the interpretation of the Act" *Shau v. Rudin*, 9 Ir C L R 214 *S P Reg v. Mellow Union* 12 Ir C L R 35 see also *Fenton v. Thorley* (1903) A C 447, *A G v. Morgate Pier Co* 69 L J Ch 331 *London County Council v. Bermondsey Bioscope Co* 80 L J K B 144 *Taylor v. Newman* 92 L J M C 189 *Rauley v. Rauley* 45 L J Q B 67, *East and West India Dock* 39 Ch D 531 *Middlesex Justices v. R* 9 App C 772. But the enacting part of an Act is not to be controlled by the title and recitals, unless the recitals may be referred to for the purpose of a certifying the intention of Legislature. *Bentley v. Rotherham Local Board*, 1 Ch D 588=46 L J Ch 281. In India a reference may be made to the preamble and title of an Act in construing its words. *Hurro Chander v. Shooroodhooce* 9 W R (F B) 402 (404 406) see also *Uda Begam v. Imamuddin* 2 A 90 *Alangumonjori v. Sonamani* 8 C 637, *Crauford v. Spooner*, 4 M I A 187.



amble

**Preamble** The preamble is undoubtedly a part of the Act, and may be used to explain but not to control, the enacting part, which goes often beyond the preamble, if the words to be found in the former are strong enough for the purpose. *Juna Begum v Mahomed*, 2 M H C R 322 "I very much regret and Lord Altonstone C J 'that the practice of inserting preambles in Acts of Parliament has disappeared for the preamble often helped to the solution of doubtful points.' *London County Council v Bermondsey Bioscope Co*, 60 L K B 111. So the preamble of an Act of Parliament cannot be referred to in order to ascertain the intention of the Act, unless there is an ambiguity in the enacting part. *Tipton v Oldham County Corporation*, 4 Ch D 39 = 16 L Ch 105 = 35 L T 696 = 25 W R 178. In cases of doubt preamble can be legitimately invoked to determine the scope of the enactment. *Emmanuel Constable v Russ* 436. *Brett v Brett* 3 Addams 219. *Netherby v Calcutt* 61 L R 606. *Carr v Royal Exchange Ass Co* 33 L J Q B 63, *Re Masters*, 33 L Q B 146. When the language and the object and scope of the Act are not open to doubt, the preamble cannot restrict or extend the enacting part. 4 In 330. *Per Lord Hanford* in *Jettison v Bailes* (1777) Cowp 513. *Per Lord Selkirk* (1766) 1 W Bl 69. *Copland v Davies* (1872) L R 5 H L 338. *Lev v Rathnam* (1876) 16 L J Ch 234. *R v Fithos* (1723) 8 Mod 144. The enacting part in a preamble is but the motive for legislation, the remedy may be consistently and wisely be extended beyond the cure of that evil. *Per Lord Denham* in *Jettison v Bailes* (1843) 4 Q B 349. The preamble is undoubtedly a part of the Act. *Sallid v Johnson* (1818) 2 Ex 283. The meaning and effect of the preamble or a Code must be understood to overlie the whole Act, giving colour to and controlling its provisions and by showing the intention of the Legislature applying *pro tanto* the rule for the interpretation of these provisions. *Uda Begum v Inamuddin* 2 A 74 (99).

Where the object or meaning of an enactment is not clear 'the preamble of a Statute is a good means to find out the meaning of the Statute and it were a key to open the understanding thereof' (*Cole Inst* 79 i). Where the intention of the Legislature is declared by the preamble effect is to be given to the preamble to this extent namely that it shows what the Legislature intended, and if the words of enactment have a meaning which does not go beyond that preamble or which may come up to that preamble in either case the meaning is to be preferred to one showing intention of the Legislature which would not answer to the purposes of the preamble or which go beyond the preamble. *Per Lord Blackburn* in *Oversers of West Ham v Her* (1883) 9 A C 388. See also *The People v Utica Insur Co* 15 Johns N Y 149. See also *Coosan Mining Co v South Carolina*, (1891) 144 U S 550 at p 559. It has been sometimes said that the preamble may extend, but cannot restrain the enactment put of a Statute. *R v Athos* 8 Mod 114, *Copeman v Galtout* 1 P Wm 20. *Per Lord Abinger* in *Waller v Richardson* (1866) 11 L J 229. *Hopman v Heuler* 32 L J C P 132. *Drummond v Drummond* 1 K 2 Ch 11, *Keans v Cord Weavers Co* 6 C B N S. But it would be difficult to support this proposition. *Marshall*, 6th Ed 91. *Per Lord Tenterden* C B and *Lord Hardwicke* in *Ryall v Holl* 1 A 171, 182. *Per Lord Blackburn* in *West Ham Overseers v Her* (1883) 9 A C 386 at p 388. So it is well settled that the preamble cannot extend, restrict or extend the enactment put when the language and the object and the scope of the Act are not open to doubt. A preamble in a Statute can govern clear expression in the enacting part thereof. *Keshab v Bhabani* C L J 187. *Queen Empress v Indrajit* 11 A 266. *Kadu v Bhabani* 11 A 115. *Sutton v Sutton* 22 Ch D 511, *Mondal v Improvement* 11 A 115. In *Toull v Kempton Park Race Course Co* (1899) 1 C 14 P 185 = 68 L J Q B 392. *Lord Hilsbury* observed 'Two propositions quite clear one that a preamble may afford a clue light as to what a Statute intended to reach and another that if an enactment is clear and unambiguous no preamble can qualify or cut down the enactment.'

So where the enacting part is explicit and unambiguous the preamble cannot be resorted to to control, qualify or restrict it but where the enacting part is ambiguous, the preamble can be referred to to explain and elucidate it.

*Mal v. Harnam Singh*, A 1 R 1923 Lah 35=28 P L R 595=101 Ind Cas 661 In *Doe v. Braudling* 7 B & C 613, Lord Tenterden thus laid down the rule "If on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect should be given to it not withholding the less extensive import of the preamble" In *Fellows v. Clay*, (1843) 4 Q B 313, Lord Durham observed "The preamble is often no more than a recital of the inconvenience and does not exclude any others for which a remedy is given by the Statute The evil recited is but the motive for the legislation but remedy may both consistently and wisely be extended beyond the cure of that evil" In the well known *Sussex Peerage Case*, 11 C L & Fin 85, *Jindal C J* observed "If the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense The words themselves alone do, in such case, best declare the intention of the lawgiver But if any doubt arises from the terms employed by the Legislature it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the Statute and to have recourse to the preamble which according to Chief Justice Dyer is a key to open the minds of the makers of the Act, and the mischief which they intended to redress" In the *Secretary of State v. Maharaja of Bobbili* 43 M 529 P C Lord Shaw said "It is the section that governs and not the preamble" See also *Manlal Singh v. Trustees of Improvement of Calcutta*, 4 C 343=22 C W N 1 (F B) Though the preamble of an Act does not control any plain enactment which follows it it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved *Sital v. Dlamney* 20 C W N 1185, *Santabai v. Dm Dnyal* 12 A 409=A W N (1890) F B 145, *Kristonath v. J F Brown*, 11 C 176 *Gopi v. Jaykrishna* 12 C L J 8, *Kesavalu Auler v. The Corporation of Madras* 23 L W 233-92 Ind Cas 103 A I R 1926 Mad 381=50 M L J 301 *Aspen v. Sayaj Pramand*, 103 Ind Cas 662-A I R 1927 Cal 763, *Ray Mal v. Hannam Singh* 101 Ind Cas 661=25 P L R 595 Where a section, or an Act is capable of two renderings or is said to mean less or more than it says it is a maxim of interpretation that one must look at the scope and object of the enactment *Mulatal v. Ahmed* L R 5 A 201=16 A 489=22 A I J 321=A I R 1921 A 325

*Preamble to Evidence Act* The rules of evidence which we are bound to administer are contained in the Evidence Act (I of 1872) and it is so because of the preamble to that enactment, but a consolidated enactment repeating all rules of evidence other than those saved by the last part of section 2 of that enactment—*Per Mahmood J* in the *Collector of Goralhpur v. Palakdhari Singh* 12 A 11 B at p 35

**Interpretation of Statutes** A Statute is the will of the Legislature and the fundamental rule of interpretation to which all others are subordinate is that a Statute is to be expanded according to the intent of them that made it *1 Inst 210* *Sussex Peerage* 11 Cl & F 113 It is the fundamental principle of the interpretation of Statutes that their language must be understood in its most ordinary and popular reception *Per Mahmood J* in *Queen Empress v. Abdul* 7 A 35 (195) (I B) The language of a Statute taken in its plain ordinary sense and not its policy or opposed intention is the safeguard in construing enactments *Philpott v. St George's Hospital* 6 H L C 1 35=1 Jur N S 1269 See also *Income Tax Commissioners v. James* (1891) A C 731 *Giles v. Patterson* (1902) 2 Ir R 660 at p 667 *Forlye v. Bailey* 5 H L C 1 *Later Wear Commissioners v. Hampson* 2 App Cas 743 (188) In *M'Whin v. Hart* (1851) 25 L J C P 108 (111) *Jerry C J* observed "We ought to give to an Act of Parliament the plain fur literal meaning of its words where we do not see from its scope that such meaning would be inconsistent or would lead to manifest injustice In construing Will and indeed Statutes and all written instrument the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be

able

modified so as to avoid that absurdity, repugnance, or inconsistency, but no further' *Per Lord Wensleydale*, in *Grey v Pearson*, 6 H L C 106 = 6 L J Ch 481, & also *Rhodes v Rhodes*, (1882) 7 App C 15 (P C) 19 (205) *Vestry, St John's Hamstead v Cotton* (1896) 12 App C 15 at p 6. In reporting this canon in *Abbott v Middleton*, (1878) 7 H L C 114 115, *Lord Wensleydale* observed 'This rule was in substance laid down by *Mr Justice Berton* in *Warbarton v Loreland* (1 Hud & Bro 648). It had previously been described by *Lord Ellenborough* in *Doe v Jessop* (12 E 4293) as a rule of common sense as strong as can be.' It has been stated by *Lord Cranworth* (when Chancellor) as 'a Cardinal Rule from which, if we departed we should launch into a sea of difficulties not easy to fathom' [*Gundry v Primiger* (1852) 1 De G M & G 502 21 L J Ch 40], and is the **Golden Rule** when applied to Acts of Parliament by *Jarvis C J* in *Mattison v Hart*, 23 L J C P 108 at p 114 *Marucll* p 5. It is a cardinal rule governing the interpretation of Statutes that when the language of the Legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice. *Khan Gul v Lakha Singh*, A I R 1928 Lih 609 (F B). The Court should struggle against repugnancy and should construe an enactment as far as possible in accordance with the terms of the other Statutes which it does not expressly modify or repeal. *Ibid* A Statute ought to be so construed that if it can be prevented no clause sentence or word shall be superfluous, void or insignificant. *R v Bishop of Oxford* 4 Q B D 245, *Hough v Windus*, 1 Q B D 224, *Vasanbai v Radhubai* A I R 1928 Sind 118.

**Rules of Construction, When language is plain** It is not allowable says *Vattel*, to interpret what has no need of interpretation (Law of N S 24) *Absoluta sententia expositioe no indiget* (2 Inst 533) Such language binds & declares without more, the intention of the law giver and is decisive of it. [*Per Buller J* in *R v Hodnett*, 1 F R 966, *Sussex Peerage* (1844) 11 C & F 143, *U S v Hartucll* 6 Wallace, 395, *U S v Willberger*, 5 Wheat 9]. The Legislature must be intended to mean what it has plainly expressed and consequently there is no room for construction. *Per Park J* in *R v Bandury* 1 A & E 142 *Isher v Blight*, 2 Cranch 330-*Mazucll* p 6. A Court is bound to construe a section in a Statute according to the plain meaning of the language used, unless it finds, either in the section itself or in any part of the Statute anything that will either modify or qualify or alter the statutory language even if the result of such construction leads to anomalies or be productive even of absurdity. *Rayb v Lakhan* C 11-3 C W N 660 following *Bail of England v Iagliono*, L R App C 15 (1891) p 145 *St John Hamstead v Cotton*, 12 App C 15 6 (1896) *Alfred v Wilkinson* 47 B 843 *H v City of London Court* (1892) 1 Q B 273 *Meisey Doels v Turner* (1893) A C at p 177, *British Farmers & Co*, *In re* 48 L J Ch 56 *Crauford v Spooner*, 6 Moo P C 9, *R v Steen*, 25 L J M C 91, *Afley v Dale* 21 L J C P 101. The duty of the Court is not to make the law reasonable but to expound it as it stands according to the real sense of the word. *Biffin v Yorle* 63 R R 337 *Dennis v Toull* 42 L J M C 33, *Plasterers Co v Parish Clerks Co* 20 I J F 362. A Statute need not be interpreted in the light of what is just and expedient where it is otherwise clear from plain and unambiguous language. *Guyne v Branell* 7 Cl & F 512. Our decision, says *Lord Penrden* in *R v Barham* 8 B & C 99 may in this particular case operate to defeat the object of the Act but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to have been the intention of the Legislature. 'The Act' says *Lord Abinger* in *Lockwood* 9 M & W 395 has practically had a pernicious effect not at all contemplated but we cannot construe it according to that result. 'I cannot doubt' says *Lord Campbell* in *Coe v Lawrence* 22 L J Q B 149 'what the intention of the Legislature was but that intention has not been carried into effect by the language used. It is far better that we should abide by the word of a Statute than seek to reform it according to the

supposed intention" "It may have been an oversight in the framers of the Act," observed *Parke B* in *Aixon v Phillips* 21 L J Lx 88, 'but we must construe it according to its plain and obvious meaning.' See also *R v Mabe* 3 A & E 531, *York & N Midland Railway Co v R* 22 L J Q. B 225, *Guyne v Bunnell* 51 R R 42, *Exp St Sepulchre's* 33 L J Ch 372, *Allins v Jupe*, 2 C P D 375, *Coxhead v Mullis*, 3 C P D 439, *Palmer v Thatcher*, 3 Q. B D 353, *Rothschild v Int Rei* (1894) 2 Q. B 145

The intention of the Legislature must be ascertained from the words of a Statute and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute *Fordyce v Bridges*, 1 H L C 1=11 Jur 157 Because the Court knows nothing of the intention of an Act, except from the words in which it is expressed and is applied to the facts existing at the time *Logan v Cooloun* (1812), 13 Bea 22=20 L J Ch 347, *Achal Singh v Shaghunath*, 2 O W N 713=90 Ind C 1 470 *Nanal Ram v Mehun Lal* 1 A 487, *Madhusudan v Banacharan* 1 Hyde, 100, *Madhusudan v Raja Mohesh*, 3 B L R A C 200, *Jagodishhurry v Kailash* 24 C 725 (T B)=1 C W N 374 *Gucebulu v Mohan Lal* 7 C 127=8 C L R 109, *Kuar Nugshar v Kuar Mathura* 25 O C 189=9 O L J 235, *Mirza Sadique v Mohomed Karim*, 9 O L J 456=(1922) Oudh 289 Statutes should be interpreted as simply as possible *The Collector of Rangoon v Abdul*, (1922) L B 27=67 Ind. Ca 640 The duty of a Court is to construe the law as it stands and not to make a new though it may be a better law *Ram Churn v Kumud Mohun*, 25 C 571=2 C W N 297 The rule that a word used in a Statute is to be understood in the same sense throughout, is only a rule of presumption, by no means inflexible and certainly not of such a character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words or reasons and objects whereof any special section is enacted *Per Mahmood J* in *Baynath v Sital Singh*, 13 A 224, but see *Babu v Jaswant*, 35 B 404

The meaning of an Act is not to be interpreted with reference to what its framers intended to do but with reference to the language which they did in fact employ 7 Loh L J 201=26 P L R 501=90 Ind C 1 254=A I R 1925 Lah 436 *Fool Kumari v Khurod*, 31 C W N 502=102 Ind C 1 115=A I R 1927 C 1 474 But it is more reasonable to hold that the Legislature expressed its intentions in an unguarded manner than that a meaning should be given to them which could not have been intended *Ram Chunder v Gouri*, 53 C 492=97 Ind C 1 376=A I R 1926 C 1 927 In a word then it is to be taken as a fundamental principle, standing as it were on the threshold of the whole subject of interpretation that the plain intention of the Legislature, as expressed by the language employed is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice If the language admits of no doubt or secondary meaning, it is to be obeyed *Gopal Chandra v Guru Charan*, A I R 1929 Cal 141=32 C W N 1136

A construction which leads to an anomaly can be given effect to only if the words of the Statute are clear and unambiguous and admit of no other interpretation *Dial Singh v Gurdwara* A I R 1928 Lah 324

Where the construction of a rule of law is clear a Court cannot go behind the rule by any enquiry into the reason of the rule *Aruna Chala v S R Baltrishna*, 48 M 579=48 M L J 134=86 Ind C 1 201

**No Addition or Omission** In *Delors Evans*, 79 L J K B 955 Lord Loreburn L C observed 'We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself' The observation of Lord Mersey in *Thompson v Gould* 79 I J K B 911 also runs as follows "It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is a wrong thing to do" See also *Eicrett v Wells*, 2 M & Gr 277 *Davis v Marlborough*, 53 R R 29 *Exp St Sepulchre's* 33 L J Ch 375 *Re Cherry's Estate*, 31 L J 351 When the language of a Statute is plain in itself it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardship, in particular cases if it be read in its ordinary sense The words themselves alone must be considered to see the intention of the lawgiver *A v Ahmad v Chhote Lal*, A I R 1928 All 241=26 A L J 298, see also

amble

*See Statute Law* (1925) 11466 *Broom's Legal Maxims* (1921 Ed) p 34. Court cannot and the Legislature's defective phrasing of the Act, they cannot add and cannot subtract a fraction make up the deficiencies which are left there. Whether or not the Act flowed from forgetfulness of the draftsman or was intentional is no concern of the Courts and it is well settled that omissions cannot be supplied by a Court of law for that would be to make law. *Craigford v. S. 1901 6 M. & L. C. 1* *Gopul Singh v. Mangal Singh* A I R 1928 Loh 357 (1929). It is undesirable to import into a section when the Court duty is to apply to language of the section to the facts before it any expression which suggests that in *Mopham v. Saur* 11 A I R 1925 All 67. The words of a Statute should not be departed from on the ground that something was omitted to be enacted and it is bad policy to add to codified law some of the provisions of the English common law on the ground that the codified law is silent as to them. *Leatham v. Leatham* 1929 M. & L. W. 210 = 1929 M. & L. W. N. 51.

**Construction according to Context and External Facts.** If the words are sufficiently flexible it may be construed in the sense which if less correct numerically is more in harmony with the intention of the Legislature. *Maruelli v. Holtung* 11 L. J. 109 *Caledonian R. Co. v. A. & A. R. Co.* 6 App. C. 114 *Edinburgh Tramways Co. v. Forbairn* 1 App. C. 68 *Easton v. Easton* 11 L. J. 109 *Comptroller of Patents* (1898) A. C. 371, *Port v. S. & C. Co. v. A. & A. R. Co.* (1877) 2 App. C. 394, *W. & L. v. S. & C. Co.* (1881) 17 Ch. D. 746. The literal construction, then, has, in general, but *prima facie* preference. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object to the whole Act, to consider accordingly to *Lord Cole* (*Hepburn's Case* 3 Rep. 76, *Marshalsea Case*, 19 Rep. 75) (1) What was the law before the Act was passed, (2) What was the mischief or defect for which the law had not provided, (3) What remedy Parliament has appointed and (4) the reason of the remedy. *Maruelli v. Holtung* p. 39. The same view is reiterated by *Lindley J.* in *Mayfair Property Co. v. L. & C. Co.* (1898) 2 Ch. 28 at p. 35 in the following words: "In order properly to interpret my Statute it is necessary now as it was when *Lord Cole* reported [*Hepburn's case* (1794) 3 Rep. 7 (1)] to consider how the law stood when the Statute to be construed was passed what the mischief was for which the old law did not provide, and the remedy provided by the Statute to cure that mischief."

It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself. *Co. Litt.* 351 (a) *Lincoln Coll. v. L. & C. Co.* 3 Rep. 59 (b) *Furquand v. Board of Trade*, 75 L. J. Q. B. 417, *W. & L. v. S. & C. Co.* 51. The true meaning of any passage is that which best harmonizes with the subject and with every other passage of the Statute. *Maruelli v. Holtung* p. 39. An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject matter, unless there is some very strong ground derived from the context or reason why it should not be so construed. *Hornsey Local Board v. Monarch Insurance Building Society* 21 Q. B. D. 1 = 59 L. J. Q. B. 105. Ordinarily, a clause in a Statute should be construed so as to give some meaning to every part of it. *Huon v. H. & C. Co.* 22 C. 833, *Suamatha v. Vaidya* 15 M. & L. J. 116 (F. B.) = 25 M. & L. 466. It is a well known rule of construction that each part of a Statute must expound every other part. *Tah v. Emperor* 5 P. L. J. 18 = 1 P. L. F. 147 = (1920) Pat. 12 = 54 Ind. C. 894 = 21 Cr. L. J. 100. The Court must in each case apply the admitted rules of interpretation to the case in hand not deviating from the liberal sense of the words without sufficient reason or more than is justified yet not adhering slavishly to them where to do so would obviously defeat the intention which may be collected from the whole Statute. *Rim Singh v. Debi Din* 24 A. L. J. 915 = 97 Ind. C. 177 = A. I. R. 1926 All 617 (F. B.) *Ruer v. Ruer* Commissioner v. *Adams* 2 A. C. 713.

It is a well established canon of interpretation that any question of context or repugnance in the subject can arise only if the same expression that is defined occurs or is repeated in any particular section. *Commissioner of Income Tax*

v *T K S Ibrahimsa*, A I R 1928 Mad 473 (F B) = 51 M L J 524 = 27 M L W 601 = 1928 M W N 313

**Same expression used in same meaning** It is a well settled rule of construction that the same words are to be *prima facie* construed in the same sense in different parts of the same Statute. *Per Chitty J* in *Spencer v Metropolitan Board of Works* (1883) 22 Ch D 142 = 52 L J Ch 249 = 47 L T 459. See also *Court auld v Leg*, L R 4 Ex 130, *R v Poor Law Commrs* 6 A & L 68, *Re Kirlstall Brewery*, 5 Ch D 535, *Khan Gul v Lalha Singh*, A I R 1928 Lah 609 (F B).

**Beneficial Construction** It is said to be the duty of the Judge to make such construction of a Statute as shall suppress the mischief and advance the remedy. *Heydon's Case*, 3 Rep 76, *Thurle v Hartwell* 6 T R 429, *Frycross v Grant*, 2 C P D 530. Even where the usual meaning of the language falls short of the whole object of the Legislature a more extended meaning may be attributed to the words if fairly susceptible of it. If there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning that sense is to be given to it. *Per Lord Esher J* in *Barlow v Ross* (1890) 24 Q B D 381 at p 389. *Gross in the goods of* (1904) 73 L J P 82. In *Madura Duasthanam v Madura Municipality* A I R 1928 Mad 569 at p 571 *Wallace J* observed. This result is also in consonance with the well known principle of interpretation of fiscal enactments, that if the language is at all ambiguous it must be interpreted in the manner most beneficial to the subject.

**Special Act not affected by General Act** A general Act should not so be construed as repealing a particular one by implication. *Garnett v Bradley*, 3 App Cas 950. A general later law does not abrogate an earlier special one by mere implication. *Per Page Wood V C* in *London & Blackwall Ry v Lime House*, 2 K & J 123. *Thorpe v Adams*, L R 6 C P 125. *R v Champneys* Ibid 384. *Kutner v Phillips* (1891) 2 Q B 272, *Ashton-under-Lyne v Pugh* (1893) 1 Q B 41, *Burd v Tunbridge Wells* 64 L J Q B 151, *Lodge v Hudlidsfield Corp* (1893) 67 L J Q B 565. This rule is founded on the maxim *Generalia specialibus non derogant*. *Mazuel*, 314. "Where general words in a later Act are capable of receiving a sensible and sensible application without extending them to subjects specially dealt with by earlier legislation that earlier and special legislation is not to be indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so." *Per Lord Selborne* in *Seaward v The Vera Cruz* 10 App Cas at p 68, *Haulins v Gathercole* 6 D M & G at p 31. *Lyn v Wyn Bridge* 122 *Thames Conservators v Hall* L R 3 C P 421, *Dodd's v Shepherd* 1 L R D 75. *Mazuel* 314. Where a special enactment deals with a particular thing or class of things a more general enactment even though its terms would cover the particular thing or class of things is excluded from application thereto by reason of the particular enactment. *Kala v Sahg*, A I R 1928 All 536, *Ho Munng Gye v Dun Fo*, A I R 1928 Rang 249 = 6 L J 474.

**Construction to avoid inconvenience, etc** — Where the language of a Statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. *Myers v Ramsay v Venkata Chelu Mudali* 51 M L J 51 = (1916) 2 M W N 296 = 20 M L T 391 = 1 I W 507 = 10 M 959. Where the Legislature has expressed itself in clear and unambiguous terms the consequence of the enactment ignorance of which cannot be attributed to it, and any consideration of hardship or supposed hardship cannot affect the interpretation. *Fool Kumar v Khurod Chaudia* 21 C W N 502 = 102 Ind C 115 = A I R 1927 Cal 471. It is one of the cardinal rules of construction of a Statute that in construing it absurdity should be avoided. *Secretary of State v Jaffer Mohammad* 15 C L J 185.

**Retrospective operation of Statutes** Every Statute which takes away and impairs vested rights must be presumed not to have a retrospective operation,



struction is more firmly established than this that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." *Per Wright J in Athlumney In re* (1898) 2 Q B 551. Enactments dealing with procedure have an immediate effect and must unless the contrary is expressed apply to all actions whether commenced before or after the passing of the Act. A party has no vested right in mere procedure. *Nisar Hussain v Sundar Lal* 104 Ind C 292 = AIR 1927 All 657, see also *Kelar Nath v Aetram*, 23 NLR 50 = 101 Ind C 284 = AIR 1927 Nag 127. While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. *Dellu Cloth etc Mills Co v Income Tax Commissioner Dellu* 54 IA 421 = 8 Pat. L 1 791 = 25 A L J 964 = 33 M L J 819 (P C) = A. I R 1927 P C 242. In *Ram Singh v Shanwar Dayal* A I R 1928 All 437 (F B) a suit for arrears of rent for less than Rs 200 was filed in the Court of the Assistant Collector under the Agrar Tenancy Act when the old Tenancy Act, was in force. Before it could be decided the new Act came into force by which the right of appeal was taken away. The point of law that arises before the Full Bench therefore is whether the coming into force of the new Tenancy Act, under which no appeal is provided deprives the defendant of his right of appeal, which he would have had if the old Tenancy Act had continued to be operative. The Full Bench answered the question in the following terms: "It is clear to us that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and that the right to continue that proceeding cannot be affected by a new Act unless it expressly says so. The point is also concluded by the pronouncement of their Lordships of the Privy Council in the case of the *Colonial Sugar Refining Co Ltd v Irving*, (1905) A. C 369 = 74 L J (P C) 77 = 21 T L R 513 = 92 L J 738. In that case ordinarily an appeal lay to their Lordships of the Privy Council from an order of the Supreme Court. While the matter was pending in that Court the law was amended so as to allow an appeal to the High Court. Their Lordships of the Privy Council held that the new Act could not deprive the party of his right to appeal to the Privy Council. Lord Macnaghten remarked at p 372 "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him is of right is a very different thing from regulating proceeding. See also *Dellu Cloth and General Mills Co Ltd v Income Tax Commissioner, Dellu*, A I R 1927 P C 242 = 9 Lah 284 = 54 I A 421 (P C). This principle has also been followed by a Full Bench of the Madras High Court in the case of *Dananayaga Reddayar v Rendambal Ammal*, A I R 1927 Mad 977 = 50 Mad 857 (F B). *Datal J* has taken the same view in *Bala Prosad v Shyam Behari Lal*, A I R 1928 All 163. Thus the earlier case of *Zamin Ali Khan v Genda*, 26 A 375 = 1 A L J 105 which decided otherwise, must be deemed to have been overruled by the pronouncement of their Lordships of the Privy Council in (1905) A C 369 and in A I R 1928 All 437 (F B). So it is now authoritatively settled that the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. *Kripa Singh v Rasulllar*, A I R 1928 Lah 627.

**Codifying Act, Construction of.** In *Fagbano v Bank of England*, 60 L J Q B 145 = 61 L T 353 = 39 W R 657 = 55 J P 676 = (1891) A C 102 at p 107, Lord Halsbury, L C said "I am wholly unable to adopt the view that, where a Statute is expressly said to codify the law you are at liberty to go outside the Code so created, because before the existence of that Code another law prevailed." In the same case at p 144, Lord Halsbury also observed "The proper course is in the first instance to examine the language of the Statute and to ask, what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave



and the language clearly supports a contrary construction. *Makar Ali v. Sanjuddin* 36 C L J 121 (1911) 18 N L R 80-19. *Nag* 227. *Sedh Lal v. Chand v. Bujrao*, 5 N L R 251; *Promotho v. Mohan* 17 C L J 163=21 C W N 1011=58 Ind Cas 37. *Atmar v. Bhagmat* A I R (1925) Nag. 117=8 N L J 17. *Champak v. Kumbhar* 5 Ind Cas 102-A I R 192, Nag. 219. The Succession Act, 1925, was not retrospective and did not apply to Wills made before the passing of that Act. *Leahad Buss Shanner v. Durga Prosad* 31 A 239-41. *A W N* 11-12. Ind Cas 66. *Sarles v. Prosonomoyee*, 6 C 791. The Legislature in effect certain Statute as a retrospective operation rest upon the presumption that the Legislature does not intend what is unjust. This rule is based on the maxim *Novus constitutio futuris formam imponere debet non praeferre*. (A new rule ought to be prospective, not retrospective, in its operation). Retrospective laws are, as a rule of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought when introduced for the first time to be clothed with *fit* and ought not to change character of past transaction. *Principle* upon the faith of the then existing law. *Per Willes J in Phillips v. Eye* L R 6 Q B 23. The case of *Moon v. Durden*, 7 Ex. Ch 2, is a leading case on the subject. That was a case in which the plaintiff claimed money on the basis of a wagering contract. During the pendency of the suit Stat. 8 and 9 Vict. C 109 was passed. That Statute made all wagering contracts null and void and all suits brought on such contracts, not maintainable. The question raised was whether it operated to defeat the plaintiff's claim. The Court of Exchequer decided it did not. *Parke B.* in delivering the judgment observed. The language of the clause if taken in its ordinary sense, as in the first instance we ought to take it, applies to all contracts both past and future and to all actions, both present and future on any wager past or future. But it is as *Lord Coke* says, a rule and law of Parliament that regularly, *novus constitutio futuris formam imponere debet, non praeferre*. This rule which is in effect that enactments in a Statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons is deeply founded in good sense and strict justice and has been acted upon in many cases. But this rule, which is one of construction only will certainly yield to the intention of the Legislature and the question in this and in every similar case is, whether that intention has been sufficiently expressed.

So it is abundantly clear that in the absence of clear words, a Statute will not be construed as taking away a vested right of action acquired before it was passed. *Knight v. Lee* (1893) 1 Q B 41, *Wright v. Greenough*, 1 R & S 758. *Larpent v. Bibbe* 5 H L Cas 481. *Jackson v. Hooley* 8 E & B 797, *West v. Gurney* (1911) 2 Ch 15, *Smith v. Callander* (1901) A C 597. *Lauri v. Renad* (1892) 3 Ch 421. Every Statute it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new disability in respect of transactions or considerations already past, must be presumed out of respect to the Legislature to be intended not to have a retrospective operation. *Dash v. Van Klief* 7 Johnson 502. *Marcell*, 383. *Tamynessa Khatun v. Purna Chandra*, 103 Ind Cas 853=A I R 1927 Cal. 821. *Kedar Nath v. Netram* 23 N L R 50=101 Ind Cas 284. *Shiba Kishi v. Chumilal* 31 C W N 1007, *Apen v. Syer Piamant*, 103 Ind Cas 66=A I R 1927 Cal 763. *Della Cloth etc Mills v. Income Tax Commissioner, Delhi* 54 I A 421=8 Pat L T 791=25 A L J 964=53 M L J 819=A I R 1927 P C 242.

The general principle, indeed, seems to be that alterations in the procedure are always retrospective unless there be some good reason against it. *Gardner v. Lucas* 3 App Cas 603. *Kimbray v. Draper* L R 3 Q B 160. So no suitor has a vested interest in the course of procedure or a right to complain if during his litigation the procedure is changed provided no injustice be done. *Costa Luca v. Erlanger* 3 Ch D 69. *Turnbull v. Forman* 15 Q B D 75, see also *Wright v. Hale* 6 H & N 227. *I G v. Sillem* 10 H L C 1763, *Curtis v. Storm*, 22 Q B D 513. *The Idam*, (1899) P 236. "No rule of con-

struction is more firmly established than this that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only.' *Per Wright J in Athlumney In re* (1898) 2 Q B 551. Enactments dealing with procedure have an immediate effect and must unless the contrary is expressed apply to all actions whether commenced before or after the passing of the Act. A party has no vested right in mere procedure. *Nisar Husain v Sundar Lal* 104 Ind C 292 = AIR 1927 All 657, see also *Kelar Nath v Netram*, 23 N L R 50 = 101 Ind C 281 = AIR 1927 Nag 127. While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. *Delhi Cloth etc Mills Co v Income Tax Commissioner Delhi* 54 I A 421 = 8 Pat L J 791 = 25 A L J 964 = 33 M L J 819 (P C) = A I R 1927 P C 242. In *Ram Singha v Shanjar Dayal*, A I R 1928 All 137 (F B) a suit for arrears of rent for less than Rs 200 was filed in the Court of the Assistant Collector under the Agra Tenancy Act when the old Tenancy Act was in force. Before it could be decided the new Act came into force, by which the right of appeal was taken away. The point of law that arises before the Full Bench, therefore is whether the coming into force of the new Tenancy Act, under which no appeal is provided, deprives the defendant of his right of appeal, which he would have had if the old Tenancy Act had continued to be operative. The Full Bench answered the question in the following terms. It is clear to us that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and that the right to continue that proceeding cannot be affected by a new Act unless it expressly says so." The point is also concluded by the pronouncement of their Lordships of the Privy Council in the case of the *Colonial Sugar Refining Co Ltd v Irving*, (1905) A C 369 = 74 L J (P C) 77 = 21 T L R 513 = 92 L J 738. In that case ordinarily an appeal lay to their Lordships of the Privy Council from an order of the Supreme Court. While the matter was pending in that Court, the law was amended so as to allow an appeal to the High Court. Their Lordships of the Privy Council held that the new Act could not deprive the party of his right to appeal to the Privy Council. Lord Macnaghten remarked at p 372 "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating proceeding. See also *Delhi Cloth and General Mills Co Ltd v Income Tax Commissioner, Delhi*, A I R 1927 P C 242 = 9 L J 284 = 54 I A 421 (P C). This principle has also been followed by a Full Bench of the Madras High Court in the case of *Duranayaga Jeddigar v Renulambal Ammal*, A I R 1927 Mad 977 = 50 Mad 857 (F B). *Datal J* has taken the same view in *Bali Prasad v Shyam Behari Lal* A I R 1928 All 168. Thus the earlier case of *Zamin Ali Khan v Genda*, 26 A 375 = 1 A L J 107, which decided otherwise must be deemed to have been overruled by the pronouncement of their Lordships of the Privy Council in (1905) A C 369 and in A I R 1928 All 437 (F B). So it is now authoritatively settled that the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. *Kripa Singh v Rasuiddar*, A I R 1928 I L J 627.

**Codifying Act, Construction of.** In *Vaghrao v Bank of England* 60 L J Q B 115 = 64 L J 333 = 39 W R 657 = 55 T P 676 = (1911) A C 102 at p 107, Lord Halsbury I C said "I am wholly unable to adopt the view that, where a Statute is expressly said to codify the law you are at liberty to go outside the Code so created because before the existence of that Code another law prevailed." In the same case at p 141, Lord Herschell also observed "The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to turt with enquiring how the law previously stood and then assuming that it was probably intended to leave

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it unaltered to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that it will be almost destroyed and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from a saying that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate, or again, if in a Code of the law of negotiable instrument words be found which have previously acquired a technical meaning, or have been used in a sense other than their ordinary one, in relation to such instruments the same interpretation might well be put upon them in the Code. I gave these examples merely, they, of course do not exhaust the category. What however I am venturing to insert upon is that the first step should be to interpret the language of the Statute and that in appeal to earlier decisions can only be justified on some special ground." See also *Ganpat v Sopana*, A I R 1928 B 33=30 Bom L R 1. In a recent case [*Bristol Tramways Co., v Fiat Motors* (1910) 4 L J K B 1103] *Cous Hardy* M R also observed "I rather deprecate the citation of earlier decisions. The object and intent of the Statute was no doubt simply to codify the unwritten law applicable to the sale of goods, but in so far as there, in express statutory enactment, that alone must be looked at and must govern the rights of the parties even though the section may, to some extent, have altered the prior Common Law. But see the judgment of *Farwell* L J *Harris v Perth*, (1910) 79 L J K B 102.

The object of codification of a particular branch of law is that, on any point specifically dealt with by it such law should be sought for in the codified enactment and ascertained by interpreting the language used. In interpreting a Statute, the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with the view. *Larendra Nath v Kamalabasi* 23 C 563=23 I A 15=6 M I J 71 see also *Kadir Bulsh v Bhauani* 14 A 145 *Empress v Lal Gangadhar Lal* 22 B 112, *Golul v Padmanand*, 29 C 707 (P C)=29 I A 196=6 C W N 825=4 Bom L R 793 *Hulum Chand v Kamalanand* 33 C 927=3 C I J 67. In a body of codified law no one enactment should be so construed as to render the express provisions of another enactment absolutely nugatory. *Pundit v Bhagwant Rao*, 96 Ind Cas 893=A I R 1926 Ang 491. A codifying Statute does not exclude reference to earlier case law on the subject covered by the Statute for the purpose of throwing light on the true interpretation of the words of the Statute where they are open to rival constructions, but matters outside the Statute can not be invoked not by way of construing the provisions but of adding to it something which is not found in it. *Tiru Vengada v Tripart Sundari* 19 M 728=96 Ind Cas 978=27 Cr L J 1026. Courts are bound to construe a section of an Act according to the plain meaning of the language unless either in the section itself or in any part of the Act anything is found to modify, qualify or alter the statutory language even if absurdity or anomaly be the result of such interpretation. The proper course in interpreting an Act intended to codify a particular branch of the law is first to examine its language for its natural meaning, uninfluenced by any consideration derived from the previous state of the law and to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, & see if the words of the enactment will bear an interpretation in conformity with this view. *Alfred Wilkinson v Wilkinson*, 17 B 813=25 Bom L R 91=1973 Bom 321.

When law has been codified it can not be modified gradually from day to day as the changing circumstances of a community require by rules of practice made to meet these imperceptibly changing conditions. Any modification, however small, must be made by legislature, when a suitable opportunity arrives. *Ribati v Emperor*, A. I. R. 1929 Cal 57

**Consolidating Act** In construing an Act of Parliament which is a consolidating Act and does not profess to amend or alter the provisions of the Acts consolidated, *prima facie* the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. *Mitchell v Simpson*, 25 Q. B. D. 183 = 59 L. J. Q. B. 355 = 63 L. T. 405 = 38 W. R. 565 = 55 J. P. 56. In *In re Bdgell, Cooper v Adams* (1894) 2 Ch. 557 at p. 561 Chitty J observed: "I referred yesterday to the Lord Chancellor's observations in *Bail of England v Vagliano*, (1891) A. C. 141 with reference to the *Bills of Exchange Act*. Those observations do not apply to the *Bankruptcy Act* of 1893. The substance of what fell from the Lord Chancellor is, that when there is an Act such as the *Bills of Exchange Act* codifying the law the proper rule of interpretation is to read the Act and to interpret its provisions without reference to previous decisions or to previous legislation, that being a *prima facie* rule only to which there would be reasonable exceptions. As the Lord Chancellor said 'I am of course far from ascertaining that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code.' Then he gives some examples which I need not cite at length. But I have here to deal not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law, and therefore it is I say those observations do not apply and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature." When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms the Legislature is deemed to have adopted that interpretation. *Campbell Erparte*, *In re* 5 L. R. Ch. 703 = 23 L. T. 289 = 18 W. R. 1056

**Construction imposed by Statutes** The Legislature must be presumed to have known the interpretation put by Courts and others on the terms of a Statute and when a provision of an earlier Statute is re-enacted in practically the same language in a latter Statute it is legislative recognition of the correctness of the earlier interpretation. *Parneshur v Emperor* 3 Pat. L. J. 537 = 19 Cr. L. J. 281 = 44 Ind. Cis. 185 = (1918) Pat. 97 = 4 Pat. L. W. 157, *Nagendra v Peary*, 21 C. L. J. 605 = 20 C. W. N. 312, *Kent County Council Erparte* (1891) 1 Q. B. 725 = 60 L. J. Q. B. 435 = 65 L. T. 213 = 39 W. R. 465 = 55 J. P. 647, *per Lord Blackburn* in *Young v Leamington*, (Mayor) 8 App. Cts. 526 *per James L. J.* in *Dale's Case* 6 Q. B. D. 453 *Greaves v Tofield*, 14 Ch. D. 571 *Clark v Hallond* 52 L. J. Q. B. 322, *Jay v Johnstone*, (1893) 1 Q. B. 25 *Narain v Gahrial* 4 Pat. L. W. 189 = 44 Ind. Cts. 262 = (1918) Pat. 131. "When construction placed upon the provisions of the Code has been reproduced by the Legislature in successive Codes without alteration the inference is that this constitutes a legislative affirmation of the construction adopted by the Courts." *Pratab v Sarat*, 33 C. L. J. 201 = 25 C. W. N. 544 = 62 Ind. Cts. 348. In *Kalimuddin Mollah v Sahibuddin Mollah* 24 C. W. N. 4 (F. B.) at p. 14 *Mudherjee J.* observed: "It is a well settled principle of construction that the Legislature is presumed to know not only the general principle of law but also the construction which the Courts have put upon particular Statutes and therefore, where a section of an Act, which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as legislative recognition of that construction. [*Jogendra v Shyam Das*, 36 C. 549 = 9 C. L. J. 276 *Gocool v Dibendra* 14 C. L. J. 136 *Nandlal v Bank of Bombay* 2 Bom. L. R. 316]. The Legislature knows what the law is and has the power to alter the phraseology, if it transpires that its true contention has not been given effect to in judicial decisions the absence of such action on the part of the Legislature during a period of time may well be taken to indicate that the Courts have rightly ascertained its intention specially if, in the interval, the Statute has been amended in other respect." See also *Monohar Singh v Sheo Saran*, 25 A. L. J. 345 = 103 Ind. Cts. 271 = A. I. R. 1927 All. 369

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Where an Act received judicial interpretation putting a certain meaning on its words and the Legislature in a subsequent Act in *pari materia* uses the same words there is a presumption that the Legislature uses those words intending to express the meaning which it knew had been put upon the words before, unless there is something to rebut the presumption the Act should be construed, even if they are such as might originally have been construed otherwise. *Indian v Sufiulla* 25 C W N 703 = 5 C L J 36 = (1922) Cid 331 - 68 Ind C 219, *Mutally* 127 L J M C 1 *Jones v Mersey Dock*, 11 H L C 480, *Exp Phoin* 3 Ch D 47 *Attwater Exp*, 5 Ch D 27, *Exp Campbell*, L R 3 Ch 706 *Bullock v Lecl* 15 Q B D 105, *Avery v Wood*, (1891) 3 Ch 118, *Colonial Land v Wilm* 30 Ch D 285

**Previous State of Law** Where a Statute is to be interpreted it is necessary to consider what the law was before the passing of the Statute, but what the Legislature has and is to be the law after the passing of the Statute. *Chab v India Sugar Prosd* 25 C 517 = 5 C W N 640 But where intention is not clear pre-existing law can be referred to. *Janki v Ram*, 30 C 325 So reference to previous state of Law is permissible for solving doubts in construing. *Rogers v Pitt Siding Co v Secretary of State*, 52 C 1 = 82 Ind C 273 = A I R 1925 Cal 41 Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of the Statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English Law upon which it is founded. *Mt Ramani v Mt Kailash* A I R 1928 P C 2 *per Lord Sinha*, see also *Hem Raj v Krishan L*, A I R 1928 Lah 361

**Legislative Proceedings** An enquiry into the vicissitudes which a measure experienced in the course of its passage as a Bill through the Legislature is not a legitimate mode of ascertaining the intention of the Legislature. *Halpi Karm v Jayannath* 2 B 81 In construing an Act, the proceedings in the Legislative Council cannot be referred to. *Sarat Sundari v Uma Prosd* 31 C 625 = 5 C W N 775 It is a mistake to refer to the debates on the Bill, when before the Legislative Council for the purpose of construing an Act. *Gopal v Sakhepar* 15 B 13 = P J 1593 42 *Queen Empress v Suchan*, 20 C 1017 (F B) *Kadir Bilsh v Bhoutani Prosd* 14 A 145 = A W N 1892 5, *Dinonath v Raji Sati Prosd* 27 C W N 115 = 36 C L J 220 *O Ruse & Co*, 5 Ind C 119 12 J W 92 = 56 Ind C 163 = 47 I A 33 (P C) *Firm of Jatan Chaud v Sukham* 13 S I R 23 = 52 Ind C 139 The Court is not authorized to look into the proceedings of the Legislature to see what took place there during the passage of the Bill which passed into law or what was the reason why a particular clause was put in for the purpose of interpreting a Statute. *Gangul v Watson* 33 C 929 = 11 C L J 330 = A I R 1927 Cid 149 = 98 Ind C 116 Court while interpreting an Act cannot seek the assistance of the debates in the Legislative Council or the report of the Select Committee. *Gurdial Singh v Central Board and Local Committee* A I R 1928 I Ch 337 *Re v West Riding Yorkshire County Council* (1906) 2 K B 676 It is not proper to refer to the proceedings of the Legislative Council in order to determine the interpretation of the language of a section. *Abdul Khan v Shalima Bibi* A I R 1925 All 121 = 25 A I J 1061

**Objects and Reasons of a Bill** One of the presumptions is that Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication or, in other words beyond the immediate scope and object of the Statute. *Marcell* p 141 citing *Arthur v Boleham* 11 Mod 150 *Herbert v Case*, 3 Rep 136 But in India where a Court has to construe a Statute it is the Statute alone which the Court is entitled to look to. They are not entitled to look to the reports of the Select Committee. *Kadir Bilsh v Bhoutani* 14 A 145 = A W N 1892 5, *Firm v Hiram* 101 Ind C 661 = 28 P L R 795, *Gopal Pandey v Firm* A 121 (I B) = A W N 1882 128 *Sup Krishan v Bha* *Account* (1922) Lah 211 *Zamindar of Fftaniparam v Chudambaran* 13 M C 1 = 1 M L J 203 = 28 M L T 75 = (1920) M W N 160 = 12 L W

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amble notes nor the punctuation appeared on the roll, they formed no parts of the Act. *Borington Obs on Stat* 391, see *Baron v Wallin* 21 B & 327, *R v Obbott* 21 L J M C 131. This practice was discontinued in 1819, since which time a copy of each Act, printed on vellum by the King's printer, is preserved in the House of Lords and constitutes the official record of Statutes (*May, Parliam J* 12th Ed Chap 15 p 599). Both marginal notes and punctuation now appear on the rolls of Parliament; nevertheless, it has been said they are not to be taken as parts of the Statute. But as regards marginal notes, the rule as to their rejection for the purposes of interpretation is now of imperfect obligation. For the purpose of interpretation a marginal note was used by *Martin B in Nicholson v Fields*, 31 L J Ex 233 and by *Collins M R in Bushnell v Hammond* 73 L J K B 851. In *Bushnell v Hammond ubi supra Callus M R* observed: "The side note, although forming no part of the section is of some assistance, in as much as it shows the drift of the section" vide *Marshall p 77* see also *Gola v Emperor A I R 1929 Nag 17 (F B)*. It is settled that the marginal notes are no part of the enactment (*Claydon v Green* 3 C P 511, *Attorney General v Great Eastern Railway Co* 11 Ch D 449, *Bhagya v Emperor* 100 Ind C 820 *Sutton v Sutton*, 22 Ch D 511, *Dukhumullah v Haluhy* 23 C 33, *Bahadur v Ismail* 52 C 463=29 C W N 151=41 C L J 41). They cannot be referred to for purposes of construing the section. *Punardas Naram v Ram Sarup* 2 C W N 577=25 C 878 *Junna Das v Damodar Das*, 20 Bom L R 418 C I *Stayambhu v The Municipal Council of Nagapattam*, 1 M L J 37, *Queen Empress v Hari* 21 L 391 *Balraj Kunwar v Jagat Pal Singh* 26 A 393=8 C W N 699=31 I A 132=1 A L J 384=11 Bom L R 266=7 O C 248 (P C) *Nauab v Gopinath*, 13 C L J 625 (631) *Sheikh Chamman v Emperor* (1919) Pat 463=1 Pat L T 11 *Ramlal v Emperor* 1 Luck C 5, 7 *Jaylam Kesava v The Secretary of State*, 12 M 151=36 M L J 222=51 Ind C 16 *Claydon v Green*, L R 3 C P 521. When the language of a section is not very clear it is legitimate to look at the marginal note to see what the drift of the section is. *Smith In re*, 45 M L J 731, *Gajendra v Durga*, 46 A 637=33 A L J 561 (F B), *Bahadur v Ismail* 52 C 463, *Lahore Bank v Kedar*, 31 Ind C 746=36 P R 1916 *Emperor v Lalman* 27 Cr L J 1233=98 Ind C 49=A I R 1927 Sind 39, *P Natesa Mudaliar, In re*, 51 M L J 704. The marginal note is not a part of the Act. *Sholapur Spinning and Weaving Co Ltd, v Pandharinath* A I R 1928 Bom 341. The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the Legislature. *Ram Saran v Bhagwan*, A I R 1929 All 53.]

**Punctuation** In England before 1849 bills were engrossed on parchment without punctuation as such they formed no part of the Act. Since 1849 punctuations appear on the rolls of Parliament, nevertheless it has been said they are not to be taken as parts of the Statute. *Iude, Claydon v Green* 3 C P 521, 1 G v G I R Co 11 Ch D 465, *Sutton v Sutton*, 22 Ch D 511, *Duke of Devonshire v O'Connor*, 24 Q B D 478. It is an error to rely on punctuation in construing Acts of the Legislature. *The Maharaja of Burdwan v Krishna Kamru* 14 C 365=14 I A 30 (P C), *Mani Lal v Trustees for the Improvement of Calcutta* 45 C 343=22 C W N 1=27 C L J 1=44 Ind C 770. But see *Blanche Somersel v Charles George*, 17 Bom L R 56=39 B 18=27 Ind C 494.

**Proviso** Arguments from a proviso which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive Act. *West Derby Union v Metropolitan Life Assurance Co* 1897 A C 647, *Ramchandra v Gouri Nath* 53 C 492=A I R 1926 Cal 927=97 Ind C 376.

**Schedule** A schedule is as much part of the Statute and is as much an enactment as any other part. *Per Brett L J in Att Gen v Lamplough* (1878) 3 L J D 229. Forms in schedules are inserted merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit. *Per Tindall C J the Barlett v Gibbs* (1843) 5 M & G 96. But when there are contradictions between the schedule and the enacting portion, "it

would be quite contrary to the recognised principles upon which the Courts of law construe Acts to enlarge the conditions of enactment and thereby restrain its operation by any reference to the words of a mere form given for convenience's sake in a schedule" *Per Lord Penzance in Dean v Green* (1882) 8 P D 89, *Allen v Fisher* 10 A & E 640, *R v Russell*, 18 L J M C 106, *Interpretation of Deeds, Wills etc*, p 206, see also *R v Baines*, 12 A & E 227 Schedules annexed to an Act and the headings under which they are placed are parts of the enactment, but they are not to be taken into consideration if the language of the enactment is clear 30 C W N 334

**Illustrations** *The Law Commissioners say*—"The illustrations are not mere examples of the law in operation, but are the law itself showing by examples what it is. The statements that 'the definitions and the enacting clauses contain the whole law,' and that 'the illustrations make nothing law, which could not be law without them,' are correct if understood as merely importing that in view of the Legislature the illustrations determine nothing otherwise than what without them would have been determined by a right application of the rules to which they are annexed—*Report of the Law Commissioners—vide Gazette of India Extraordinary*, dated 1st July 1864 p 53 The Law Commissioners who were in charge of framing Penal Code observed The illustrations make nothing law which would not be law without them. They only exhibit the law in full action and show what its effects will be on the events of common life. Thus the Code will be at once a Statute book and a collection of decided cases in the English Law Books in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the Judges but by the Legislature, by those who make the law and must know more certainly than any Judge can know what the law is which they mean to make

"The power of construing the law in cases in which there is any real reason to doubt what the law is, amounts to the power of making the law. On this ground the Roman Jurists maintained that the office of interpreting the law in doubtful matters necessarily belonged to the Legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a Code

"The decisions on particular cases which we have annexed to the provisions of the Code resemble the Imperial Rescripts in this, that they proceed from the same authority from which the provisions themselves proceed. They differ from the Imperial Rescripts in this most important circumstance, and that they are not made *ex post facto*, that they cannot therefore be made to serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons, and that, therefore whatever may be thought of the wisdom of any judgment which we have passed there can be no doubt of its impartiality" *Report of the Indian Law Commission* dated the 14th October 1837. In *Mahamed Syedol Ariffin v Yeoh Ooi Gail*, (1916) A C 575=43 I A 256=21 C W N 257 (P C) at page 264, *Lord Shaw* in delivering the judgment of the Court observed "On the second point their Lordships are of opinion that in the construction of the *Evidence Act*, it is the duty of a Court of law to accept—if that can be done—the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of Jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnance to the sections themselves. The great usefulness of the illustrations, which have, although no part of the sections been expressly furnished by the Legislature as helpful in the working and application of the Statute should not be thus impured. In *Lala Balla Mall v Shah Sha*, 35 M L J 614=16 A L J 905=29 C L J 163=23 C W N 23 (P C) at p 237, *Lord Atkinson* observed "Four illustrations are given. These are to be taken as part of the Statute. The illustrations represent cases decided by the highest authority i.e. the Legislature" *Charlesworth v McDonald* 23 B 103 (112). In *Satish Chandra Chakravarty v Ramdayal De*, 32 C L J

31-24 C W N 902 (86 957) Mr Justice Malherjee observed "We are not unmindful that illustration is useful so far as it helps to furnish some indication of the probable intention of the Legislature and does not bind the Courts to place reliance on the section which is inconsistent with it." *Singh v. Khyat Singh* 7 C 132, *Goyy v. Iatleh*, 6 C 171 E. *Chetda v. A. 573 Dubey v. Ganeshu* 1 A 34 (36) *Janoo v. Heap* 46 Ind C 197=11 Bur L R 1 Queen Empress v. *Kalwapa*, 15 B 491 (496), *Amal v. Whistal* 1 A 187 (493) *Satya v. Gobinda* 11 C W N 111, *Raj v. Lohani*, 1 B 11 *Chotay Lal v. Emperor* 85 Ind C 722=192 All 190 *Omud v. Nalla* 22 W R 367 *Suryo v. Bissambhar*, 23 W R 311, *Gurukul v. Thapamal* 28 M 7 (61), *Balaram v. Mangla* 31 C 950 *Haye Jan v. Williams & Co* 23 M L R 320=1 Ind C 912 K K Janoo v. *Joseph H. d. Sons Ltd* 46 Ind C 197, *Lalmalund v. Sohano*, A. I R 1929 Pat 141 But see *Pra Krishna Suman v. Ingappa* 24 Ind C 924 If the meaning of the enactment itself were doubtful, reference to the illustration in order to elucidate the meaning would be justifiable. But if there be any conflict between the illustrations and the enactment itself the illustrations must give way to the latter. *Upadhyay v. Hidayat Hussain* 22 A L J 425=80 Ind C 896=194 All 748

**Illustrations and Marginal notes, which is to be preferred** Illustrations do not bind on the same footing as marginal notes. Marginal notes may not be noted by the Legislature and the commonly accepted view now is that they cannot be referred to for the purpose of construing the enactment. *Pradip v. Emperor* A I R 1928 Oudh 15=1 L C 579 In *Thuluram Balraj Kumar v. K. Jagat Lal Singh* 26 A 393=11 I A 132=7 O C 248, Lord Macarty said thus laid down the value of marginal notes in interpreting a Statute "It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament." On the other hand illustrations in part and parcel of enactment and it seems that when the Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same the Court is not justified in rejecting the illustration as irrelevant to the interpretation of the substantive provision. *Ram Lal v. Emperor* *supra* see also the observation of Lord Shaw in *Mahomed Syedol Irifan v. Yeshu Chai Garh* A I R 1916 (P C) 242=13 I A 256 (P C)

**May**—May mean shall. The word "may" in certain circumstances means shall. There may be something in the nature of the thing to be done, in the object for which it is done or in other circumstances which may convert the option into a duty. *Bengal v. H. Indray v. Special Manager Court of Wards* 12 O L J 112=89 Ind C 199=A I R 1925 Oudh 419

**Or And** In construing Statutes it is sometimes necessary to read the conjunctions "or" and "and" one for the other. *Arayan v. Chairman of Haridwar Municipality* 57 Ind C 229=A I R 1925 Cal 1065

**New words to be read in a Statute** Words not to be found in a section may be supplied by necessary implication if the context so requires. 90 Ind C 190=1 I R 6 A 601 A I R 1925 All 610 (J B)

**Every word should receive proper connotation** In a statutory enactment every word should receive its full and proper connotation in the construction of *Opporhulla v. Dutt Gulla* A I R 1927 Mad 998 In the interpretation of every section of a Statute a reasonable construction must be given to every word contained therein. *Emperor v. Shesha and others* A I R 1925 All 207 (J B) 20 A L J 21 9 I L R Cr 31=9 A I Cr 762 When two distinct words are used in the same section the ordinary rule of construction is that they do not mean identically the same thing. *Emperor v. Phuchan* A I R 1929 All 33 (J B)

**Statutes ousting jurisdiction—Construction of** It is an elementary rule of a Statute which purports to oust the jurisdiction of a Civil Court must be strictly construed. *Shankar Prasad v. Gollumugha* (1919) 1 at 117=4 Ind C 41

see also *Ganesh Das v Harilal*, 90 Ind Cis 279. An Act by which the jurisdiction of the ordinary Court is taken away must be strictly construed. *Cheta v Bayu*, 105 Ind Cis 507 = A I R Lah 452 (F B), *Sheelarum v Ghulam*, 103 Ind Cis 440, *Baldeo v Lal* A I R Pat 1928, 615 = 9 P L F 731. Jurisdiction vested in a superior Court is not ousted except by express language in or obvious inference from the provisions of a Statute. *Mahamed Abdul v Emperor*, 101 Ind Cis 171 = 28 Cr L J 439, see also *Burma Oil Co. v Baynath*, 59 Ind Cis 960 = 3 U B R 212, *Kama v Bhajanlal* 45 Ind Cis 654, *R v Abbot*, (1780) Dowg 553.

Pream

**Repeal by implication** 'Repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute Book, or on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation is not to be adopted, unless it is inevitable. Any reasonable construction which affords an escape from it, is more likely to be in consonance with the real intention.' *Maxuell* p 296 cited in *Gola v Emperor*, 1929 Nag 17 (F B) at p 20 = 24 N L R 158, see also *Foster's Case*, 11 Rep 63 (1). 'The Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, (*Wither v Brolenham*, 11 Mad 150, *Harberts Case*, 3 Rep 13 b) either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual or their natural sense would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually be construed as being limited to the actual objects of the Act, and as not altering the law beyond *Minet v Leman* 20 Beav 278. *Ruer Hear Commissioners v Adamson*, 1 Q B D 561, *St 1 G v Exeter Corp.*, (1911) 80 L J K B 636." *Maxuell* pp 149—150. So a general later law does not abrogate a special one by mere implication. It is remarked by *Lord Selborne* in the case of *Marey Seuard v The Vera Cruz*, (1884) 10 App Cis 59 "Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of general words without any indication of a particular intention to do so."

**Application of the maxim—Expressio unius est exclusio alterius**—A general rule of construction of Acts of Parliament is *expressio unius est exclusio alterius*. (The express mention of one thing implies the exclusion of another) *Per Sir Barnes Peacock in Blacburn v Blacelle*, (1881) 6 App Cis 628 at p 631. In *Dunt water v Arthur*, (1879) 10 Sup Ct N S W 103, *Hargrave*, observed "If there be any one rule of law clearer than another as to the construction of all Statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this that where the Legislature or the parties to any instrument have expressly authorised one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode except as specially authorised." This rule or, as it is otherwise worded, *expressum facit cessante tacitum* (Co Litt. 210 a, 183 b) enunciates one of the first principles applicable to the construction of written instruments. *Broom's Legal Maxims* 7th Ed p 491. An implied covenant is to be controlled within the limits of an express covenant. *Notes Case* 1 Rep 80, *Merril v Emme* 1 Taunt, 329. *Gainsford v Griffith*, 1 Sand R 78, *Mathew v Blacmore*, 1 H & N 762. So also where a lease contains an express covenant by the tenant to repair, there can be no implied contract to repair arising from the relation of landlord and tenant. *Standen v Chasmas*, 10 Q B 135, 141, *Church v Ford* 2 H & N 116. *Gott v Grundy* 12 L & R 517. *Cornish v Cliff* 3 H & C 451. In *Stafford Steel Co v Ward* L R 3 1 x 177, *Hilles J* thus laid down the rule. "If authority is given expressly, though

able by affirmative words upon a defined condition the expression of that condition excludes the doing of the Act authoritatively, under other circumstances than the defined. *Expressio unius est exclusio alterius*."

Provisions sometimes found in Statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution, and if the law be different from what the Legislature supposed it to be, the implication arising from the Statute, it has been said, cannot operate as a negation of its existence, (*Molloy v. Court of wards* L R 1 P C 419, 437, *Shrewsbury v. Scott*, 6 C B N S 31) and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so. *Marucll* p 548. The above dictum was reiterated by *Justice Mooljee* in *Krishna Kamm Dasi v. Ahmednabad Shik* 73 Ind C 312 at p 316 = A I R 1923 Cal 66 in the following words. But it is important to bear in mind that the method of construction summarised in the maxim cannot be applied without limitation for a failure to make an expression complete, may easily arise from the accidents of legal procedure and it is common to find provisions put into Statutes *ex abundanti cautela* and at the instance of the parties interested. Consequently provisions sometimes found in Statutes enacting imperfectly or for particular cases only, that which was already and more widely the law have occasionally furnished ground for a specious argument, based on the maxim that an intention to alter the general law was to be inferred from the partial or limited enactment. But the maxim is plainly inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which often find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution."

This point of view is lucidly explained in the following passage from the judgment of *Furnell J* in *Leue v. Darling*, (1906) 2 K B 772 = 75 L J K B 1019. Acts of Parliament are not in my experience expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of the maxim *'expressum facit cessare tacitum'* which was relied on renders caution necessary in its application. It is not enough that the expressions and facts are merely incongruous; it must be clear that they cannot co-exist.

In *Colquhoun v. Brooks* 19 Q B D 406, *Halliday J* says: "I may observe that the method of construction summarised in the maxim *'expressio unius est exclusio alterius'* is one that certainly requires to be watched. Perhaps few well-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the expression complete very often arises from accident very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind and the application of this and every other technical rule of construction runs so much under differing circumstances and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant."

In the same case (reported in 21 Q B D 72) in the Court of Appeal *Lord J* observed "the maxim *'expressio unius est exclusio alterius'* has been put upon us in connection with what is said in the Court below by *Halliday J* about the maxim. It is often a valuable servant but a dangerous master to follow in the construction of Statute and documents. The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied when it applies having regard to the subject matter to which it is to be applied leads to inconsistency or injustice. See *Colquhoun v. Brooks* 21 Q B D 661 and its application to the Privy Council in (1889) 14 A C 493.

The warning given by Lord Halsbury in following the maxim is expressed in the following words: "It might be that modern Statutes were drawn up with great particularity and minuteness. The misfortune in the framing of those Statutes was that any body of persons seeing a possibility of liability on their part, apply to Parliament to have special provisions inserted in their protection. That application was occasionally complied with and then the argument arose which their Lordships had heard that day, namely that any body who is not included in the enumeration of the particular persons so interested must be taken to be excluded by the operation of the Statute from protection just because they were not excluded and others were. The doctrine applicable to such cases was that a great many things were put into a Statute *ex abundanti cautela* and it was not to be assumed that any body not specifically included was for that reason alone, excluded from the protection of the Statute." *Mac Laughlin v Westgarth* 75 L J P C 117=91 L T 831=22 F L R 591

**Penal Statutes Construction of** A penal Statute, when its language is ambiguous should be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the enactment is of an exceptional character. *Reg v Blusabin Malanna*, 1 B 308 (F B). It should be construed very strictly. *In re Ganesh Narayan* 13 B 600. *Q v Norottam* 13 B 681. A penal Statute must be construed very strictly, that is nothing is to be regarded as within the meaning of the Statute which is not within the letter—which is not clearly and intelligibly described in the very words of the Statute itself. *Empress v Kola Lalang*, 8 C 214=10 C L R 155. Penal provisions have to be strictly construed, nor can the liability to punishment for the neglect of a statutory obligation be extended by inferential reasoning. *Kazi Zeamuddin v Queen Empress*, 28 C 504=5 C W N 771. In construing a Statute which affects the liberty of the subject, the Court should not only adopt the natural and ordinary construction but should construe strictly every expression occurring therein. *Bissumilur Singh v Queen Empress*, 5 C W N 108. In interpreting Statutes of a penal character, it is important to see that the powers conferred upon the Magistrate are duly exercised with reference to the rendering unlawful acts that would be otherwise lawful. *Queen Empress v Sheodin*, 10 A 115=A W N 1888. Penal Statutes must have a strict interpretation by which in every case shall be deemed to fall within them which do not fall within the reasonable meaning of their terms and their spirit. *Lalram Chand v The Emperor*, 96 P L R 1901=24 P R 111 C L. In a penal Statute, if the Legislature has not used words comprehensive to include within its prohibition all the cases which would be mischief intended to be prevented it is not competent to extend the prohibition. *Queen Empress v Kya Ban* L B R (1893—1900) 279. *Queen Empress v Nga Kyau* L B R (1872—1892) 279. *Queen Empress v Nga Shui* L B R (1893—1900), 284. *Aye v Queen Empress* L B R (1893—1901), Vol I 291. *Emperor v Naga Tima* 14 B 111=13 C L J 853—17 Ind Cas 789. Penal Statutes must be strictly construed. In a penal Statute, duties cast upon bodies with delegated powers are to be construed as imperative rather than directory. *Emperor v Naga Tima* 14 B 111=13 C L J 853—17 Ind Cas 152=A I R 1926 Lah 447.

Where an Act is ambiguous and the construction of it is in doubt, the construction which would mitigate the penalty should prevail. *Emperor v Ahmed* 12 C 111=12 F L R 111=12 Ind Cas 1926 Sind 273 (F B). The person charged although within the letter of the Statute is not within the spirit of it. *Ram Chander v Gouri Nath*, 13 C 111=13 F L R 111=13 Ind Cas 1926 Sind 273 (F B). Statutes and fiscal enactments ought to be adopted. *Emperor v Ahmed* 12 C 111=12 F L R 111=12 Ind Cas 1926 Sind 273 (F B). *Bulwant Singh* 102 Ind C 111=102 F L R 111=102 Ind Cas 1927 Lah 276. *Emperor v Ahmed* 12 C 111=12 F L R 111=12 Ind Cas 1927 All 336. *Emperor v Ahmed* 12 C 111=12 F L R 111=12 Ind Cas 1927 All 336.

**Rule 5.** No violence should be done to its language in order to bring people within it but care must be taken to see that no one is brought within it who is not within its true language. Where in equivocal word or ambiguous sentence leaves room for doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt must be given to the subject and against the Legislature which has failed to explain it clearly and properly. *Ismael v Emperor*, 26 Cr L J 1387=89 Ind C 15 523.

The rule is slightly different in England. "The rule which requires that penal and some other Statutes shall be construed strictly was more rigorously applied in former times when the number of capital offences was very large." *Maxwell p 462*. "I cannot concur" says *Day J* in *Newby v Sims*, 63 L J M C 229 in the contention that because these Acts impose penalties, therefore their construction should, necessarily be strict. "I think that neither greater nor less strictness should be applied to these than to other Statutes."

"The degree of strictness applied to the construction of a penal Statute depended in great measure on the severity of the Statute. When it merely imposed a pecuniary penalty it was construed less strictly than where the rule was invoked in *procurator's case*." *Maxwell p 466*.

**Ejusdem Generis Principle of** When two words or expressions are coupled together one of which generally includes the other it is obvious that the more general term is used in a meaning excluding the specific one. *Maxwell p 461*. Though the words "cows, sheep" and "horses" for example standing alone comprehend heifers, lambs and ponies respectively, they would be understood as excluding them if the latter words were coupled with them. *R v Col*, 2 L J P C 616. *R v Loom* 1 Moo C C 160. So also the word "land" does not include buildings when it is coupled with the word "building." *Dechur v Tilden* 66 R R 696, *Peto v West Ham* 28 L J M C 240. "It is in the sense that the maxim occasionally misapplied in argument, *expressio unius est exclusio alterius* finds its true application." *Maxwell p 573*. In construing expressions used in a section of a Statute it must first be ascertained from the language of the section the class of cases which were intended to be affected. If the intention is clear the occasion for the introduction of the *ejusdem generis* rule of interpretation would not arise. *Hallingdal Woosa v Secretary of State for India* 13 M 65=37 M L J 332=53 Ind C 15 345.

"I accede to the principle said Lord Campbell in *R v Edmundson* 8 L J M C 213, 'laid down in all the cases which have been cited, that where there are general words following particular and specific words, the general word must be confined to things of the same kind as those specified.' See also *Kala v Aeshu* 51 Ind C 15.

**Stare decisis Scope of the doctrine** The maxim of *stare decisis* (to stand by matter decided) is closely allied with another maxim *viz Communis error facit jus* (common error some times passes as law). The law so favours the public good that it will in some cases permit a common error to pass for right. *Jay v Sussex* 2 B & S 680. *Jones v Topping* 12 C B N S 846. See 11 H L C 290. *Wellham v Sparle* 1 Ld Ryum 12. *Broom's Legal Maxims p 112*. *Communis error facit jus* is a sound maxim. *Jagdish v Sheo* 28 I A 100. *W N 602=23 A 369*. See also *Bhaquan Singh v Bhaquan Singh* 36 I A 173 (166)=21 A 412=3 C W 151=1 Bom L R 311. *Kedar v Hari* 43 C 1 (10). Though 15 Rich II enacted that the Admiralty should have no jurisdiction over contracts made in the bodies of counties nevertheless seamen engaging in England have always been admitted to sue for wages in that Court (*Smith v Tilly* 1 Keb 712) where the remedy is easier and better than in the Common Law Courts on the ground it has been said (*Per Lord Holt, Clay v Sulgrave* 1 Salk 13) that *communis error facit jus* or rather as was observed by Lord Kenyon (in *L v F* ser 41 R 791) not *communis error* but uniform and unbroken usage. *Maxwell p 533*. Where the language is obscure instead of being clear it would not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty if it could be successfully contended that all laws and statutes have been mistaken as to the true meaning of an old Act of

Parliament *Per Lord Campbell in Gorham v. Inlet*, 15 Q B 73, see also *Hebbert v. Purchase*, L R 3 P C 650 *Morgan v. Crauspay*, L R 5 H L 301, 320

The maxim of *communis error facit jus*, although well known must be applied with very great caution. 'It has been sometimes said,' observed Lord Lushington in *Shierwood v. Oldham*, 3 M & S 396-397 '*communis error facit jus*' but *is by communis opinio* is evidence of what the law is—not where it is in opinion merely speculative and theoretical floating in the minds of persons but where it has been made the ground work and substratum of practice."

The judicial rule *Stare decisis* does however admit of exceptions, where the former determination is most evidently contrary to reason. *Broom's Legal Maxims* p 121. In *Crintra Bond v. Sherriff Hill But*, 24 C W N 818 at p 854 *Justice Milverjee* observed, 'We are sensible of maintaining, wherever possible the authority of long established decided cases but this doctrine is manifestly not of universal application. In *Young v. Robertson*, 1 Mac H L C 511 Lord Cranworth observed 'There is another duty incumbent upon a Court of ultimate appeal which has been invariably observed namely, that as regards those rules which regulate the settlement and devolution of property those Courts which have to interpret the instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon induce him to alter it so as to endanger the security of property and titles.

In *Mersey Docks v. Cameron* 11 H L C 443 at p 510 Lord Chelmsford observed, 'The Courts rightly abstain from overruling cases which have been long established, because if they did so, they would only disturb without finally settling the law. But when in appeal from any of their judgments it is made to this House however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination the House cannot, upon principle of *stare decisis* refuse to examine the foundation upon which they rest' Equally explicit is the pronouncement of Lord Loreburn in *Wesham Union v. Edmonton Union* (1908) A C 1 (4) where he observed "Great importance is to be attached to the old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and specially where the subsequent course of judicial decision had disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, I consider it is the duty of the House to overrule them if it has not lost right to do so by itself affirming them.

In a matter of final enactment where the question is in doubt the rule of *stare decisis* should apply. *Moti Singh v. Harbajan Singh*, 103 Ind C 57 = A I R 1927 Lah 635

**Rules of Interpretation of Evidence Act** In considering the rules of evidence it is necessary to look to the reason of the matter. *Gajju Lall v. Fatch Lall*, 6 C 171 (182) *Beharce Lall v. Kaminee Soondaree* 14 W R 519 (320) In construing the Indian Evidence Act the following statement of Mr Justice Jackson in *Gajju Lall v. Fatch Lall* 6 C 171 (F B) at pp 183 184 should be borne in mind 'In order to a conclusion on this point (i.e. on a question of construction) it seems to me a relevant fact that the Indian Evidence Act 1872 was passed by the Legislature of this country under the direction of a skilled lawyer, for the express purpose of consolidating defining and amending the law of evidence in India that the construction of the Act, is marked by careful and methodical arrangement, and many of the more important expressions used in it are plainly interpreted. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in or deducible from one or more other rules relating apparently to topics quite distinct, which rules should at the same time be so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude' In the same case *Garth C J* observed at page 188 'I suppose it must be generally acknowledged that with some few exceptions the Indian Evidence Act was intended to and did in fact, consolidate the English law of Evidence and I can not help thinking with all deference to the



opinions of those learned Judges who have expressed a contrary opinion, that if it had been really the intention of the Legislature to depart entirely from English rule they would have expressed their intention more plainly. In *Empress v. Ashutoh Chaudhary* 1 C 183 at pp 191 192 Mr Justice Jackson observed. In considering such questions as these, it appears to me that embarrassment and difficulty will be greatly lessened, if instead of assuming the English Law of Evidence and then inquiring what changes the Evidence Act has made in it, we regard as I think we are bound to do, the Act itself as containing the elements of the law the principles and the application of these principles to the circumstances of the most frequent occurrence. It may be that, as observed by Mr Norton in his Preface (Law of Evidence 8th Edition), the framers of the Act overestimated what had been done, when he claimed to have reproduced within the compass of the 167 sections the whole of Tylor's Work that was applicable to India, and there can be no doubt that cases must arise for which no positive solution can be found in the Act itself and in such cases we shall probably be justified and shall always be safe in adopting English rules in so far as they follow or are in accord with the general tenor of the Act. But in respect of matters expressly provided for in the Act, we must so to say start from the Act and not deal with it as a mere modification of the law prevailing in England. See also *R v. Gopal Das* 3 M 271 179 283 *Ranchodas v. Bapu* 10 B 439 (442), *Probhatas Bhat v. Vishwanath Pandit* 8 B 313 (321).

In *Amrit Nathuram v. Emperor* (1915) M W N 229 = 17 M L T 21 = 28 M L J 329 = 16 Cr L J 294 = 28 Ind C 5 518 = 39 M 449 *Seshagiri Iyer* observed. The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether we can involve the aid of the principle of jurisprudence or of English Law in supplementing and explaining the rule of evidence given in the Act. The high authority of *Edge C J* in the *Collector of Goralpur v. Palat Dhan Singh*, 12 A 1 can be cited for the proposition that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act itself contained. Such a practice has the authority of every eminent Judge in India and I am not prepared to depart from it. See also *Manchar Shao v. New Dharamsey S. W. Co.*, 4 B 576 (581) 1 C 1 *Jann Reddi* 5 M 52 *Manchar Shao Beroni v. New Dharamsey Spinning and Weaving Company* 4 B 576 (581) *K v. Jayant Lal*, 1 C L R 508, *Pramp v. Mohan Singh*, 18 B 279 *R v. Jalirapa*, 15 B 502, *R v. Jama Buapa* 3 B 16 *I v. Abdullah* 7 A 400 *Smith v. Ludhna Ghella* 17 B 129.

In *Queen Empress v. Jayam* 16 B 114 at p 433 *Blang J* observed. According to the principle, there fore stated by *R. Couch C J*, in *Hamah v. Jammay* 7 Bom H C Rep (A C J) p 61 we are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence which the Judges in England have admitted and juries have acted upon must be held to be clearly within the terms of sections 11 14, 15. In *Pramp v. Mohan Singh* 18 B 280 reference was made to American Case Law and in *P v. Effendi* 18 B 114 Sup vol I B 459 English, American and Scotch law were referred to.

**Mandatory provision.** There is no universal rule that disobedience of a mandatory provision in a Statute has the consequence of nullification of the proceeding irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. *Torbes v. the Haider* 12 C L J 131 = 26 Cr L J 124.

**Means and include.** When a definition is intended to be exhaustive the Legislature uses the word "mean" and not the word "includes". *Queen Empress v. Virat*, A W N 1901 10.

**Proviso.** The office of a proviso is either to except something from the main clause or to qualify or restrain its generality or to exclude some part of the ground of interpretation of its extent. *Jey v. Jyandatsami* 2 B H C 106. In case of repugnancy between a proviso and an enacting part, the former repeals the latter. *Id v. Chelsea* 14 L 29 165.

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**Saving clause** A saving clause cannot properly be looked upon as the purpose of extending an enactment nor can it give a new or different effect to the previous sections of an enactment. *Queen Empress v. Satharam* 11 B 657. Where the enactment and the saving clause (which reserves something which would be otherwise included in the words of the enacting part) are repugnant, the saving clause is to be rejected, because otherwise the enactment would have been made in vain. *Per Lord Coole in Allon Wood's Case* 1 Rep 17, see *Yarmouth v. Simmons*, (1878) 10 Ch D 518, *Clelland v. Ker* (1814), 6 Ir Lc Rep 35. "But it may be questioned says *Maxwell* whether there is any solid ground for this distinction between a saving clause and a proviso in a Statute. The latter of two phrases in a Statute being the expression of the latter intention should prevail over the earlier as it unquestionably would if it were embodied in a separate Act" *Maxwell*, 6th Ed p 253.

**English Cases** English cases on construction of English Statutes are of great assistance sometimes in construing Acts of the Indian Legislature but of course, it is always necessary to see that the Indian Statute and the English Statute resemble one another in their purposes and not only in a portion of a section which, for convenience of drafting has been adopted by the draft men of the Indian Act. *Perhad Singh v. Ram Patab Roy* 22 C 77. Where in Indian Act was passed for the purpose of extending to India the provisions of the English Act English decisions may be referred to as a guide to the Act. *Ganesh v. Harihar* 26 A. 299 P C = 31 I L J 116 = 8 C W N 521 = 11 M L J 190 = 6 Bom L R 705. *Seth Utom Vasoomal v. Seth Haridas* 18 L R 26 = 7 Ind C 597. *Mulchand v. Sunga Chand*, 1 B 23 but see *Mahamed v. Ali Haudar*, 12 O L J 1. "In construing a section of an Indian Act which is professedly based on English enactment, which in fact reproduces word by word the language of the English enactment, which in fact reproduces word by word the language of the English enactment, we are in practice if not in theory, bound by the decisions of the English Court. *Per Mookerjee J in Ramendra v. Brojendra*, 21 C W N 794 = 41 Ind C 914. "When we are construing an Act which in many instances is taken, word for word, from an English Act and when we are dealing with a branch of law which is essentially English law, though we may not be actually bound by it, yet we ought certainly to pay the greatest respect to the decisions of the English Court of appeal" *Per White C J in the Mercantile Bank of India Ltd v. The Official Assignee of Madras* 39 M 270 = 35 Ind C 942. In interpreting an Indian Act, help may be derived from the English cases which are as much authoritative as the decisions of the Superior Courts of India, and where the Indian Law is similar or the same their authority is conclusive. 12 Q. B D 721, see also *Loveloel and Lewis v. Malabar Timber and saw mills* 13 M L J 282. Unless the English Statute, and the Act of the Indian Legislature are in *pari materia* references to English decisions instead of affording any help will tend to confuse the consideration of the matter in issue. *Ebra v. The Secretary of State*, 30 C 36 = 7 C W N 249. In construing a section of the Indian Act, cases bearing upon the construction of the similar provisions of an English Act, different in its language can be of little or no assistance. *Collector of Dinapore v. Gurya Nath*, 25 C 316. A Judge should not interpret Statutory law when it provides for a specific procedure by reference to a decision pronounced under a different system of procedure. *Radha v. Lakshmi* 31 C L J 283 = 24 C W N 451 = 36 Ind C 511. But where the point to be decided arises under the law of India reference to English law is unnecessary. *The India General Navigation v. The Delapara Tea Co* 28 C W N 302 = 34 M L J (P C) 33 = 1921 M W N 178 = 22 A L J 173 = 5 C 304 = 26 Bom L R 571 = 80 Ind C 1038 = A. I R 1924 P C 40. So also rules relating to procedure under an Indian Act should not be interpreted by a reference to decisions relating to another Statute in England even where the language of the two Statutes is the same. *Brojotai v. Sharayubata*, 51 C 715 = 1921 C L 864, see also *Radha Kessen v. Lakshmi* 21 C W N 151. The Statute law in India is no doubt based on the principle of English law but in its application the Courts should follow the opinion of Indian Courts acquainted with Indian ways of life and thought and not of English Courts which deal with people widely different from Indians in their social habits and intellectual development. *Syed Mohd. Umair v. Syed Ali Hyder* 1 O W N 803.

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American Cases, Value of In *Scaramanga v Stamp*, 5 C P D 293, p 393, *Coelburn C J* observed "Although the decisions of the American Court are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence in our part." In *Del v Diron*, *Thy J* in relying upon American authorities made the following observations. In coming to that conclusion as I do upon principle I am much strengthened by the American authorities to which my attention has been called. The following observations of *Sir John Woodroffe, J* in the preface to the Edition of his Evidence Act should be taken into consideration while interpreting the same. Amongst the text books laid under contribution we will particularly indicate the work of *Professor J H Wigmore*, a valuable and exhaustive book written in an original and modern spirit and thus free of what Bentham called "grubbing nonsensical reasons" for the rules of evidence. The law of Evidence as it obtains in the Courts of the United States, is founded upon the English Law and is in nearly every respect identical with the law which prevails in England and in India, and though it is not binding authority upon Indian Judges, yet the decisions of those Courts are as *Lord Chief Justice Coelburn* said in England (*Scaramanga v Stamp* L R 5 C P D 293, 303), and *Sir Laurence Peel* observed in India (*Braddon v Abbot* 1 Indur and Bills Reports, 312, 359, 360, *Walton v Smith* *ibid* 283, 285) of great value to a correct determination of questions for which our own or the English law offers no solution. But in the connection the advice given by *Lord Halsbury L C* in *Re Missouri Steamship Co* 12 Ch D 321, (330) should also be borne in mind. In that case he observed "We should treat it with great respect the opinion of eminent American lawyers on point which arises before us but the practice which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own Court is wrong. Among other things it involves an inquiry, which often is not in every case one whether the law of America on the subject in which the point arises is the same as our own."

English Law of Evidence, its origin, growth and peculiarity. "At once when a man raises his eyes says *Prof Thayer* 'from the common law system of evidence and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a great mass of evidential matter logically important and prohibitive is shut out from the view of the judicial tribunals by an imperative rule while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a law of evidence, but no other country has it, we have generated and evolved this large elaborate, and difficult doctrine. We have done it not by direct legislation but, almost wholly, by the slowly accumulated rulings of Judges made in the trying of cause during the last two or three centuries—rulings which at first were not preserved in print, but in the practice and traditions of the trial Court—and only during the last half or two-thirds of this period have they been revised, reasoned upon, and generalized by the Courts in *bank*."

"When one has come to perceive these striking facts, he is not long in finding the reason for them. Indeed the very structure of the system thus produced points to the reason when we observe its conservatism and over-anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled, to refrain from dealing with question which it has no right to deal with. It might seem a truism and not worth while to keep alive so long a tribunal which has need of much wit and an almost insuperable safeguard if one did not recall the immense importance of the jury in our institutions and in ours, as well as the deep political significance of the jury and its relation to what is most valued in the national history and tradition of the English race. It is this institution of the jury which accounts for the conservatism of the law of evidence—an institution which English speaking people regard as one of the most important parts of their public affairs, ever since the days of the Old English law. It is only in quite recent times, and in fact only since the last century, that we have begun with it to waver, and then allowed it to be gradually kept it and in a strange fashion."

"This institution the jury, which is thus the occasion of our law of evidence and which is also at the bottom of our system of pleading and procedure, and of very much in all branches of the substantive common law, has a peculiar interest for us

I hope that those who attentively consider the long and strange story of the development of the English jury and the immense influence it has had in shaping our law, will find here a basis for conclusions as to the scope and direction of certain much needed reforms in the whole law of evidence and procedure

"A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes, not created or greatly changed until lately, by legislation, not the fruit of any man's system the reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with nice definitions, or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding, and they are seeking to determine not what is or is not, in its nature prohibitive, but rather passing by that enquiry what, among really prohibitive matters, shall nevertheless for this or that practical reason, be excluded and not even heard by the jury. From the diversity and multitude of the casual rulings by the Judges—rulings often hastily made, ill considered, and wrong,—from the endeavour to follow these as precedents and to generalize and theorize upon them, from the forgetting by some Courts in making this attempt, of the accidental and empirical nature of much in these determinations and the remembering of this fact by others there has resulted plenty of confusion. The pressure under which a ruling must be made is often unfavourable to clear thinking and the law of evidence largely shaped at *non prout*, took on a general aspect which was vague, confused, and unintelligible. One thing in particular added greatly to the confusion, namely, the habit of assuming, whenever evidential matter was rejected or received, that the result was attributable to some principle of the law of evidence, while very often indeed, the reason lay wholly in the rules of pleading procedure, or substantive law which happened to control the case. In this way the law of evidence came to be monstrously overloaded and was made to swallow up into itself much which belonged to other branches of law, or to the wide regions of logic or legal reasoning. Thus, not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was in tolerably perplexed." *Thayer's Preliminary Treatise on Evidence* pp 1—4

**Gradual change in the Law of Evidence as Jury system changed** The old forms of trial were chiefly these (1) Witnesses, (2) The party's oath with or without fellow Swearers (3) the ordeal (4) Battle Trial by witnesses appears to have been one of the oldest kinds of 'one sided' proof. To such witnesses, no cross-examination was allowed. They were to state the facts on oath only (*Thayer* pp 16-17) "In my opinion says Brunner (Schw 205) 'undoubtedly we are to include under the head of the formal witness proof these (1) the proof of age (2) the proof of death (3) the proof of property in a moveable chattel. In Bracton's Note Book III case 1131 (A D 1234) and case 1362 (in 1220) we find that age of a particular plaintiff was proved by twelve legal men produced by him. Now these twelve men are not at all a 'jury, for the party selects them himself (*Thayer Pre Tre* p 19) In a peculiarly interesting part of his great work on the jury, Brunner points out that the old witness proof was in some cases transformed at the hands of the royal power into an inquisition so that the witnesses were selected by the public authority, as they were in ordinary jury (*Thayer* p 19) A witness to prove age must be 42 years of age. By 1515 A D it was settled that a trial of a person's age "shall be by twelve jurors, but in giving their verdict every juror should show the reasons inducing his knowledge of the age, such as being son, gossip, or that he had a son or daughter of the same age or by reason of an earthquake or a battle near the time of the birth, and the like" (*Kilway*, 176-177) Gradually "the peculiar function of the jury—as being triers—grew to be thus chief, and finally, as centuries passed then only one while that of the other witness was more and more defined refined upon and hedged about with rules. It is surprising to see how slowly these rules came about. The attempt, which long held its place as the only way of remedying a false verdict, proceeded on the theory that the first jury had wilfully falsified, and so was punishable. An independent original knowledge of the facts was attributed to the jury



How important a part the jury played in the development of the Law of Evidence may be realised when one considers such a decision as that in *Bell v. Waller*, 74 N. W. 617, where it was held that the admission of improper evidence in a case tried without a jury is not ground for reversal, and every practitioner is familiar with the custom prevailing where cases are tried before the Judge alone, or a referee, of taking little account of the ordinary rules of evidence.

**Other Factors, having influence to shape the Law of Evidence** With the expansion of the work of the Courts and the ever increasing volume of business brought before them, a necessity arose for the shortening of trials and the expediting of the work in every possible way. This influence was a powerful one in its effect upon the admission of evidence. Much that was logically relevant, and indeed worthy of consideration, if minute inquiry were possible, became inadmissible upon the theory that it was too remote or of slight importance. Collateral matters—these were in the main,—matters likely to lead to prolonged collateral inquiry with a meagre result in the way of inference—compelling proof when finished. Other things operated to make it easy and natural for the Courts to establish rules relating to the use of evidence. The policy of the law in respect to persons charged with wrongs, which extends to them the extreme limit of fairness is responsible for the growth of an important class of excluding rules. Such rules shut out from the consideration of the jury any facts bearing upon character or habit, and this, although in many instances previous character would be logically a most important piece of evidence from which to infer the truth as to the facts in issue. We may thus get some idea of the elements which have for centuries been at work moulding forms into which matters of evidence for judicial tribunals must be cast, building barriers within which they must be confined, and wearing grooves along which the wheels of judicial inquiry must run. *McKelvey's Law of Evidence* p. 10

**Law of Evidence, what it is** "What is our Law of Evidence?" asks *Prof. Thayer*. Then he answers the question in the following words: "It is a set of rules and principles affecting judicial investigations into questions of fact for the most part, controverted questions. It is concerned with the operations of Courts of Justice, and not with ordinary inquiries *in pais*, and even within this limited range it does not undertake to regulate the processes of reasoning or argument, except as helping to discriminate and select the material fact upon which these are to operate." *Thayer's Pica Tica* p. 263. 'The law of evidence,' says *Sir James Fitz Stephen* in his Introduction to his monumental Digest of the Law of Evidence, "is that part of the law of procedure which with a view to ascertain individual rights and liabilities in particular cases decides I. What facts may, and what may not, be proved in such cases II. What sort of evidence must be given of a fact which may be proved III. By whom and in what manner the evidence must be produced by which any fact is to be proved." After defining under the first head facts in issue and facts relevant to the issue, he names four classes of facts which are excluded from his definition of relevancy to the issue. "1. Facts similar to but not specifically connected with, each other (*Res inter alios acta*) 2. The fact that a person not called as a witness has asserted the existence of any fact (*Hearsay*) 3. The fact that any person is of opinion that a fact exists (*Opinion*) 4. The fact that a person's character is such as to render conduct imputed to them probable or improbable (*Character*). To each of these four exclusive rules there are however important exceptions which are defined by the law of evidence." As to the second division, he points out that some facts prove themselves, some require proof orally or by documentary evidence, and that such documentary evidence is furnished either primarily by the production of the document itself, or secondarily by a copy or an oral account of it. Under the third main division the person by whom, and the manner in which the proof of a particular fact must be made, he lays it down that when a fact is to be proved, evidence must be given by the person upon whom the burden of proving it is imposed except he is estopped from proving it by his conduct or relation to the opposite party, that the witnesses must be competent that the evidence must be given upon oath and in certain cases without oath that the witness may be examined and cross-examined and his credit tested. That brief statement says the learned Judge will show what he regards as constituting the Law of Evidence properly so called. With such

**Preamble** valuable *dicta* for comparison the statutory definition of the Law of Evidence seems to cover all the ground necessary for the guidance for its administration. In the California Code of Civil Procedure section 1525 and *Hort's Ontario Laws*, section 687 which may be taken as fair types of code definition, it thus comprehensively dealt with

- "The Law of Evidence is a collection of general rules established by law
- "1 For declaring what is to be taken as true without proof
- "2 For declaring the presumptions of law, both those which are disputable and those which are conclusive
- "3 For the production of legal evidence,
- "4 For the exclusion of what ever is not legal
- "5 For the determining in certain cases, the value and effect of evidence"

*The Blue Book of Evidence* § 1

**Things excluded from the Evidence Act**—This brief statement says *James Fitz James Stephen* in his Introduction to his Digest of the Law of Evidence "will show what I regard as constituting the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows—

"I regard the question What may be proved under particular issues? (what many writers treat as a part of the Law of Evidence) as belonging partly to the subject of pleading and partly to each of the different branches into which the substantive Law may be divided

Again I have dealt very shortly with the whole subject of presumption. My reason is that they all appear to me to belong to different branches of Substantive Law and to be unintelligible except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that speaking generally ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular covenants and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which in my opinion ought to find a place in the Law of Evidence, are those which relate to facts merely as facts and apart from the particular right which they constitute. Thus the rule that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of a marriage in action of ejectment by a reversioner against a tenant *pro tunc* the admissibility of a declaration against interest, and many other subjects after careful consideration I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law

"Practice again appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered etc have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in Codes of Civil and Criminal Procedure. I have however noticed a few of the most important of the matters

"A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of Public Documents, *Mr Taylor*, gives amongst other things a list of all, or most of the Statutory provisions which render certificates or certified copies admissible in particular cases

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel and the law relating to the interpretation of written instrument both run into the Law of Evidence. I have tried to draw the line in the case of estoppels by dealing with estoppels *in pais* only to the exclusion of estoppels by deed and by matter of record which must be pleaded as such, and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence

# PART I

## RELEVANCY OF FACTS

### CHAPTER I

#### PRELIMINARY

Short title

1 This Act may be called the Indian Evidence Act, 1872 S 1

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts-martial, (other than Courts-martial convened under the Army Act)\* (or the Air Force Act)† but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator,

Extent

and it shall come into force on the first day of September, 1872

Commencement of Act

The Law of Evidence—*lex fori*. "The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not whether certain evidence proves a certain fact or not that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and the Court sits to enforce it" *See Lord Brougham in Bain v Whitehead and Furness Junction Railway Company* 3 H L C 1 at p 19 *Hampden & Co v Talslar Distillery*, (1891) A C 203. It would seem however where evidence is taken in one country in aid of a suit or action elsewhere either on ordinary commission or with the assistance of the local Courts that the prevailing law must be the law of the country where the suit is actually pending for which the evidence is taken as being the true *forum*. *See per Cockburn C J in Dessau v Iels*, 10 L T R 123—*Footes Private International Law* p 530, but *see* the observation of *Woodroffe J* in *In the matter of Rudolph Stallman*, 39 C 165, 15 C W N 1033 at p 1065 cited under the head *the Act is not a Complete Code* under section 2 *infra*.

Extent and application of the Act. Act I of 1872 has been declared in force in Upper Burma generally (except the Shan States) by the *Burma Law Act*, 1898 (XIII of 1898)—see the First Schedule *Burma Code in the Hill District of Arakan* by the *Arakan Hill District Laws Regulation*, 1874 (6) of 1874) S 3, and Reg I of 1916 S 2 in *British Baluchistan by the British Baluchistan Laws Regulation* 1890 (I of 1890) S 3 and Reg II of 1915, S 3 in the *Sinthal Parganas* by the *Sinthal Parganas Justice and Laws Regulation* (III of 1872) as amended by the *Sinthal Parganas Justice and Laws Regulation* 1899 (III of 1899) in the *Angul District* by the *Angul District Regulation* 1891 (I of 1891) S 3 and Reg 3 of 1913 S 3, in the *Chittagong Hill tracts* by the *Chittagong Hill tracts Regulation* 1900 (I of 1900), in the *Kachin Hill tracts* by the *Kachin Hill District Laws Regulation*, 1895 (I of 1895).

\* Inserted by Act XVIII of 1919

† Inserted by s 2 of the *Repeal and Amendment Act*, 1920



**S 1** S 3, and in the Chh Hills as regards Hill tribes, by the Chh Hills Regulation 1896 (V of 1896) S 3 also (by notification under S 3 (4) of the Scheduled Districts Act 1874 (11 of 1874) in the following Scheduled Districts, namely, the District of Hazaribagh Lohardigha (now the Ranchi District—*Caleutta Gazette* 1899 Pt I p 11) and Munbhum and Pargana Dhalbhum the Kolham in the District of Singhbhum—see *Gazette of India*, 1881 Pt p 504 (this Lohardigha or Ranchi District included at this time the Pabna District separated in 1894) and the Jaru of the Province of Agra and Pt I p 505 Gunjam and Veragupatam—See *Gazette of India*, 1899 Pt p 730 and under ss 3 and 5 of the same Act it has been declared in the Pargana of Mampur—see *Gazette of India* 1899, pt II, p 419 powers of a Local Government and those of a High Court were at the same time conferred on the Agent Governor General, Central India for the purpose of the Act—*rule* Government Edition, 1921, p 9

**British India** For definition of "British India" *vide* section 3 Cl (1) of the General Clauses Act (X of 1897). The following places are within British India—Aden, Laccadive Islands (*Queen v Cheria Koya* 13 M 333) A man and Nicobar Islands (*Freeman v B B & C I Ray Co*, 9 B 1) Island of Pem (Queen v Mangal Telchand 10 B 258) and Ajmer Murwara (*Freeman v Bombay Baroda and Central India Railway Co*, 9 B 244). The Native States and Tributary Mahals are not within British India *vide* *Emp v Raghunath Rao* 5 Bom L R 873, *Muhammad v O* 25 C 20 P C. *Queen v Abdul Latif* 10 B 186, *Empress v Keshab* 8 C 1, *Belutanand v Bhugbut*, 16 C 667, *Empress v Chumanlal*, 37 B 152

**Application of the Evidence Act in places outside British India.** A complete list of places into which the Indian Evidence Act (I of 1873) has been declared to be in force is given in the Appendix. The Evidence Ordinance Ceylon is merely the application to Ceylon of the Indian Evidence Act—*Vanasapillai Gabriel v Flutambay* 52 I A 372=A I R 1925 P C 229

**Judicial proceedings** "An enquiry is judicial if the object of it is to determine a legal relation between one person and another or a group of persons or between him and the community generally but even a judicial proceeding without such an object in view is not, if it is judicially conducted." *Queen Empress v Tulja* 12 B 36. *Alexander John Forbes v Amirulissa Begum* 10 M 1 A. According to section 4 (m) of the Criminal Procedure Code "judicial proceeding" includes any proceeding in the course of which evidence is or may be taken on oath. A proceeding under s 318 of the Criminal Procedure Code 1861 was held to be a judicial proceeding. *Bapuji v Magistrate of H* 1 B H C A C 153

The proceedings under Chapter XXXVI of the Code of Criminal Procedure 1895 are judicial in their nature and must not be conducted as if they were merely ministerial matters. The notes of evidence, therefore, must be adequate and vague and the order recorded must be based on the findings of fact. *Imathi v Ram Dial* 5 A 224=A W N 1882 220 A. A writ order under Ch XX of the Criminal Procedure Code is a judicial proceeding. *Jog v Ganpatrao*, Rat Un Cr C 59 (F B). An execution proceeding is a judicial proceeding. *Khondra v Panchdora* 12 C L J 614-8. *Ind C* 110. *C L J* 21, see also *Bahadur v Eradatulla* 37 C 642 (F B). *Empress v Shoo Santarpuri* 10 N L R 177. *Chaman v Crown* 1 P R 1910. *Bholi v Imperor* 10 C W N 75. *Dakhneswar v Harish Chandra* 10 C L J 1. An enquiry in which evidence is legally taken is for the purposes of the Act included in the term "judicial proceeding." *Queen Empress v Tulja*, 12 B 36. Where the Legislature has authorised the formation of a judgment on a writ or the withholding of a certificate on that judgment, the inquiry is a judicial enquiry. *Queen v Prince* L R 6 Q B 418, see also *Atcha Ganappa* 15 M 135 (F B).

An enquiry conducted by a Magistrate into the truth of allegations against a subordinate official contained in a petition presented to a District Commissioner is a judicial proceeding. *Emperor v Kuma Sah* 28 A W N 1905=2 A L J 717=2 Cr L J 454. The test whether

to be applied to a particular proceeding before a Court to determine whether it is or is not a judicial proceeding for the purposes of s 476, is, whether, in the course of that proceeding, the Judge has power legally to take evidence on oath, not whether he has actually taken such evidence. *Chaman v Crown* 1 P R 1910 Cr = 161 P L R 1910 = 5 Ind Cas 257 = 11 Cr L J 90

An enquiry under the Legal Practitioners Act is a judicial proceeding. *Subba Chetti v Queen*, 6 M 252, *Gouri Saital v King Emperor* 9 A L J 156, *Nalluswami v Ramalingam* 32 M L J 402 = 18 Cr L J 785. So also is an enquiry by a Magistrate before issuing an order under section 144 of the Criminal Procedure Code. *Queen Empress v Timmasinha*, 19 M 15. The proceeding of a Court holding a preliminary enquiry under s 476 of Criminal Procedure Code is a judicial proceeding. *Abdulla v Emperor*, 27 C 52.

An enquiry under s 8 of the Reformatory Schools Act is a judicial proceeding. *Queen Empress v Manaji* 14 B 381. See also *Queen v Manaji* Rat Un Cr C 491. An enquiry on an application under s 100 Cr Pro Code to issue a search warrant is a judicial enquiry. 34 P R 1916 = 36 Ind Cas 171. A proceeding in which the statement of a witness is recorded under s 161 Cr Pro Code is a judicial proceeding. *Emperor v Vishwanath*, 8 Bom L R 589. *Crown v Andal*, 55 L R 174. Investigation proceeding under s 202 of the Criminal Procedure Code is a judicial proceeding. *Kanchan v Ram Kishan*, 36 C 72. Enquiry by a Registrar of the Presidency Small Causes Court, as to the proper service of summons is a judicial proceeding. *Lal Chand v Rural Nath*, 18 C W N 1328. A proceeding under section 283 of the Cantonment Code 1899 is a judicial proceeding. *Mangai Ram v King Emperor*, 9 P R 1909 Cr = 37 P L R 1910 = 11 Cr L J 17 = 1 Ind Cas 611 = 30 P W R 1909 Cr. The Collector hearing objections to assessment under the Income Tax Act is a Revenue Court and his proceedings are judicial proceedings. *Emperor v Rup Singh*, 41 P R 1901 Cr = 187 P L R 1901 = 3 Cr L J 128. The announcement of an order under s 107 of the Criminal Procedure Code is a stage in a judicial proceeding. *Queen Empress v Salig Ram*, 18 P R 1897 Cr. A magistrate making an enquiry before the issue of an order under s 114, is acting in a stage of a judicial proceeding. *Queen Empress v Tinn Narasimha Chari*, 19 M 15 = 2 War 791 = 5 M L J 219. An investigation by the police under s 161 Cr Pro Code is a stage of a judicial proceeding. *Aga Po Ke v Queen Empress*, U B R (1897) 1901 Vol I 31. An order made under s 202 of the Bengal Municipal Act is a judicial proceeding. *The Nabadwip Municipality v Prana Chandra* 27 C W N 817.

**Judicial Proceedings—what are not** An enquiry about matters of fact where there is no discretion to be exercised and no judgment to be formed, but something is to be done in a certain event as a duty, is not a judicial but an administrative enquiry. *Queen v Price*, L R 6 Q B 118, see also *Mohiya v Gangappa* 15 M 138 (1 B). *Queen Empress v Fulha* 12 B 36, *R v Choham Ismail* 1 A 1 (13). *Alexander v Annamiasa* 10 M I A 340. An enquiry by a Collector under the Land Acquisition Act is not a judicial proceeding. *Ira v The Secretary of State* 30 C 36. *Durga Das v Queen Empress* 27 C 820. Enquiry by District Magistrate into a crime alleged about to be committed is not a judicial enquiry. *Chandiasingh v Mohan Singh* P C I J 181 = 8 Bom L R 70 (P C) = 30 B 521 = 1 M L F 301. A departmental enquiry under section 197 of the Bombay Land Revenue Code is not a judicial proceeding. *In re Chola Lal* 22 B 936. An order passed by a first class Magistrate under sections 518-520 of the Criminal Procedure Code 1872 was held not to be a judicial proceeding. *Inference No 62 of 1877*, Rat. Un Cr C 129. A Magistrate cannot be said to be acting judicially in directing a search to be made without any proceeding having been instituted before him which he would be called on to determine judicially. *(Urke v Brojendra Kishore)* 30 C 433-13 C W N 178 = 9 C L J 291 = 5 M I F 367 = 2 Ind Cas 46. It is doubtful whether the proceeding under the Land Registration Act is a judicial proceeding. *Hara Nand Ojha v Emperor*, 9 C W N 127.

**Court.** For definition of the term vide s 3 infra

S 1

**Courts Martial** This Act applies to Native Courts Martial (*Ind. A. V* of 1869). It is also applicable to proceedings before the Indian Military Courts (vide S 64 of Act XIV of 1897). Courts martial under the Army or Air Force Act must adopt the same rules of evidence as those followed in the Courts of ordinary jurisdiction in England, and therefore no witness before a Court martial can be compelled to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a criminal Court (*Pouell* p 23). This is an exception to the general rule that the *lex fori* determines the law of evidence (*Woodroffe* p 101).

**Affidavits** Order XIX of the Civil Procedure Code lays down the rules regarding affidavits under rule 1 of this Order discretionary powers are vested in the Court (i) to order any particular fact or facts to be proved by affidavit (ii) to allow the affidavit of any witness to be read at a hearing or trial on such condition as it may think reasonable, with this proviso, that when the opposite party *bona fide* desires to cross-examine a witness, and the witness can be produced, such witness's evidence shall not be allowed to be given by affidavit. The full use of these powers, which can be exercised by the Court, even against the wishes of both parties, can be advantageously employed to the manifest saving of expense in proof of formal matters. The second which, subject to the proviso, can be exercised by the Court at the instance of one party but against the wish of the other, enables, in proper cases, the evidence of an absent witness to be brought before the Court without the expensive interposition of a commissioner or examiner (*Pouell* p 63). An affidavit is ordinarily not evidence, unless the party seeking to use it complies with the requirements of order XIX. *Arishna v. Madhava* 63 Ind. Ca. 238. Where the opposite party desires to cross-examine a witness who can be produced, the affidavit cannot be read at the trial if the cross-examining party objects. *Bl. H. v. Brookes* 7 Ch. D. 68. An affidavit once filed cannot be withdrawn for the purpose of preventing the deponent being cross-examined thereon. *In re Quire Hill* etc., 21 Ch. D. 612. This rule is applicable to a foreigner resident out of jurisdiction making an affidavit. *Strauss v. Goldschmidt* (1892) 8 T. L. R. 239. *The Parisian*, (1887) 13 P. D. 16. But the Court has a discretion to refuse to order the attendance of a witness for cross-examination. *La Trinité v. Laroche* W. N. (1897) 203, *Strauss v. Goldschmidt* (1892) 8 T. L. R. 239. Where it is not possible to cross-examine the deponent the Court may yet upon the affidavit. *Shea v. Green*, (1866) 2 T. L. R. 533. It is essential where evidence by affidavit is given that every case is taken by the solicitors and others engaged in their preparation that the affidavits shall represent the real facts in order that they may be thoroughly relied upon, vide the remarks of *Lie J* in *Rimmens v. Leet* (1910) 129 I. J. 263. An affidavit of information and belief not stating its source of information and belief is inadmissible in evidence, whether on a interlocutory or a final application. *Re, J. L. Young Manufacturing Co v. Young* (1900) 2 Ch. 753 C. A.

**Proceedings before Arbitrator** As to proceedings before arbitrator vide Schedule II of the Civil Procedure Code. The Indian Evidence Act is not applicable to proceedings before an arbitrator. *In Hamard v. Wilson* 1 C. 231, it was questioned whether an award made in accordance with the law on the ground that the arbitrator used in evidence a letter written by a party's attorney and stated to be a *bona fide* document. An application to confirm the award was refused by the learned Judge of the first instance upon the ground that the defendant had not properly in using the letter. In the Court of Appeal *Garth, C. J.* (dissenting and concurring) in delivering the judgment observed: "Then as regard the letter itself upon which the learned Judge in the Court below has laid so much stress it is perfectly true that it was a very improper thing for the defendant's attorney to use a letter in evidence which was written without prejudice, and otherwise in the course of negotiation between the attorneys on both sides for an amicable adjustment of the plaintiff's claim. Communications such as these are inadmissible in evidence. They are excluded on grounds of public policy and convenience and the rule of law which excludes them is as binding upon the arbitrator as upon Courts of Justice notwithstanding s. 1 of the Evidence Act (*see Tylor on Evidence 7th edition s. 79*), and the authorities cited therein."

One is only surprised that a rule, so well known amongst professional men should have been transgressed, in this instance by the defendant's attorneys. After all, the utmost that can be said is, that the arbitrator made a mistake in receiving and using as evidence a document which, according to law, ought not to have been received. It is not suggested that he knew he was doing wrong nor does it even appear that the plaintiff's advisers, who were present, objected to the letter being received, upon the ground that it was written *without prejudice*. They objected upon a different ground. Under these circumstances we think there was no sufficient reason to justify the learned Judge in refusing to confirm the award. His decision will therefore be reversed and our order will be, that judgment be given in accordance with the award in the usual way. The same view was taken by *Farwell L J* in *Enoch and Zurek Jy, In re*, 79 L J K B 363 at p 367 = (1910) 1 K. B. 327 where he observed "Where a case is referred to two arbitrators and an umpire, I think it is well understood that the arbitrators act as counsels who try and settle a case without going into Court, but the umpire or a single arbitrator occupies a judicial position and exercises judicial powers and, is bound, as far as practicable to follow legal rules."

So where the arbitrator allows to be given and acts upon, evidence which is absolutely inadmissible and goes to the very root of the question before him the award may be set aside, notwithstanding the parties may have agreed that he should not be bound by the strict rules of evidence. *Walford Baler & Co v Macfie & Sons* (1915) 84 L J K B 2221

In *in re, Keighley Marsted & Co* (1893) 1 Q. B. 405 Lord Esher said "The parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a Court, and to be bound by his decision, and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence but should consider whether something has been discovered since the award which the arbitrator might think material and which might alter his decision."

This rule is of course contrary to the decision laid down by Chief Baron Alexander in *Attorney General v Davison*, 4 Mele & Y 160 166 where he observed "But I have already understood, that arbitrators are bound by the same rules of evidence as the Courts of law." But in India an award of the arbitrators cannot be set aside on the ground that they have not acted in strict compliance with the rules of evidence. *Sappu v Gourinda Charyan*, 11 M 85 (87) The view expressed by Lord Esher in *In re Keighley Marsted & Co, ubi supra* is scarcely in accord with the decision of the House of Lords in the case of *East & West India Dock v Kirk and Randall*, 12 App Cas 738 57 L J Q. B. 295

If in intending to decide rightly, an arbitrator come to a wrong decision as to the competency of a witness the admissibility of documentary or oral testimony, or the relevancy and propriety of allowing proof of particular facts it is now settled law, that the Court will not review his decision, or set aside an award for the mistake. *Hagar v Baker* 14 M & W 9, *Armstrong v Marshall* 4 Dowd 593, *Perriman v Steggall*, 9 Bing 679, *Wilson v King*, 2 C & M 689, *Campbell v Tuelow* 1 Price 81. But an award may be set aside when an arbitrator refuses to hear evidence on a matter referred to arbitration. *Samuel v Cooper* 2 A & E 753, *Brophy v Holmes* 2 Moll 1, *Raghobar v Yuna Koor*, 12 C L R 564 P 566. An award cannot be set aside by receiving by the arbitrator evidence of collateral matter. *Lastern Counties Rail Co v Robertson* 1 D & L 498. An arbitrator ought not to hear or receive evidence from one side in the absence of the other. If he does so he must give the other side an opportunity to meet his opponent's case. *Cursetji v Crowder*, 18 B 299 (311) It is the duty of the arbitrator in hearing evidence to act according to the terms of the agreement in pursuance of which the dispute is placed before him. *Krishna v Bidya* 2 B L R Ap 25. Where an arbitrator has taken no evidence upon matters referred to for arbitration and has not allowed a party an opportunity of proving his contention, he is guilty of misconduct. *Deoki v Jaykumar*, A W N 1889 121

S 2

Repeal of enactments

2 On and from that day the following laws shall be repealed --

- (1) all rule of evidence not contained in any Statute, Act or Regulation in force in any part of British India,
- (2) all such rules, laws and regulations as have required the force of law under the 25th section of the Indian Councils Act, 1861,\* in so far as they relate to any matter herein provided for, and
- (3) the enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed

**Repeal of enactments** Where an Act is repealed, and the repealing enactment is repealed by another, which manifests no intention that the first shall continue repealed the common law rule was that the repeal of the second Act revived the first, and revived it, too *ab initio*, and not merely from the passing of the reviving Act. *Mazuel* p 727 citing 2 Inst. 686, 1 Inst. 320, *Case of Bishops*, 12 R p 7 *Phillips v Hopwood* 10 B & C 39, *Tattle v Gramwood* 3 Bing 196 *Kuller v Redman*, 29 L J Ch 321, *Kemp v Waddingham*, (1866) 1 Q B it p 358 But this rule does not apply to repealing Acts passed since 1850. So the mere repeal of a Repealing Act, or the repealing portion of a Repealing Act does not by itself revive the original Act or the repealed portion thereof. 1 Weir 781=7 M H C App 8 see Stat 52 & 53 Vict. c 63, s 11 In the absence of a contrary intention in a new Act, the repeal of an old Act cannot be deemed to affect any proceedings commenced before the new Act came into force. *Mulund v Ladu*, 3 Bom L R 534 In India, the rule of estoppel based on a *datum in foeder* v *Small*, 1 R R 212, viz, that a mortgagee is not at liberty to dispute the title of his mortgagor does not apply, and section 2 (1) of the Evidence Act expressly repeals all rules of evidence which are contained in any Statute Act or Regulation in force in British India. *Aur Mahmood v Kesumal*, 7 S L R 11=20 Ind Cas 523

**Repeal by implication** Statutes are not to be considered as repealed by implication, unless the repugnancy between the new provision and a former Statute be plain and unavoidable. *Sripathi v Queen* 6 M 32 One Statute may be impliedly repealed by a subsequent Statute necessarily inconsistent with it but the inconsistency must be so great that they cannot both be to their full extent obeyed. *Emperor v Mulshankar*, 12 Bom L R 750=7 Ind C 963=11 C L J 548 For such a repeal the provisions of the latter Act must be so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together. *Co Litt* 112 *Shep Touchet* 88 *West Ham v Fourth City* (1892) 1 Q B 674 *O Flaperty v McDouell* 6 H L C 142 *Brown v G B R Co* (1885) 9 Q B D 753 *Sims v Doughty* 5 Ves 243, *Constantine v Constantine* (1801) 6 Ves 100

**The Act is not a complete Code** The Indian Evidence Act is not a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of this section. *Collector of Goralpur v Laladhar* 12 A 35 The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation. *Lakshay v Mahipal Singh* 7 I A 63=5 C 744 This section in effect prohibits the employment of any kind of evidence not especially authorized by the Act itself. *Per Mahmood J in Queen Empress v Abdulla* 7 A 385 (399) F B

"The Evidence Act does not contain the whole law of evidence governing this country. Section 2 of the Act says rules of evidence contained in any Statute, Act or Regulation in force. The law of evidence is contained in the Evidence Act and in other Acts and Statutes which make specific provision on matters of evidence. One of such Statutes is the English Extradition Act which is applicable to this country, is as much part of the *lex fori* as the Evidence Act." *Per Woodroffe J* in *In the matter of Rudolph Stallman*, 39 C 165=15 C W N 1053 at p 1065. In the same case the learned Judge continued "Where evidence is taken in this country the evidence receivable must be governed by the rules of procedure here in force. It has however been argued that where evidence is received from abroad its admissibility depends on the law under which it has been taken and that though the English cases do not deal specifically with hearsay evidence yet the language of the judgment is sufficiently comprehensive to warrant the statement that evidence taken abroad, whatever be its nature and however it may have been taken must be admitted and that such a rule is necessary to give effect to the treaty obligations though the weight to be attached to the evidence is naturally a matter for the consideration of the investigating Court (*See Pigott's Extradition* pp 153, 159, 97, 98 and cases there cited). The matter is one which may on a future occasion require consideration but though disposed to assent to the argument of the Advocate General I desire to reserve a final decision on the point as such a decision is not necessary for this judgment." The Evidence Act is, as it was intended to be, a complete code of the law of Evidence for British India. *Queen Empress v Kartic Chunder Das* 14 C 721 (728).

The rule under Mahomedan Law prescribing 2 years as the period of "gestation" is a rule of evidence within the meaning of this section. When this is read with s 5 of the Punjab Laws Act, the result is that the Courts are not bound by that rule under that Act. *Waras v Ali Balsh* 76 P R 1891, see also 1 P R 1854. It is not open to Court to apply the principles of justice, equity and good conscience inconsistent with the Act. *Meer Jangoo v Chote Sahub*, 6 N L R 161—8 Ind Crs 1124.

The Evidence Act is a separate Statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another Statute. *Rannun v Emperor*, 7 Lah 84=94 Ind Crs 901=27 Cr L J 709=27 P L R 583=A I R 1926 Lah 58.

**Clause I.** All rules of Hindu and Mahomedan Law relating to evidence are repealed by clause (1). *Mauroj v Abdul*, 19 A L J 713. *Yusuf Ali v Ayub Beg* 11 A L J 355. *Dhondu v Ganesh* 11 B 433. *Marhar Ali v Budh Singh* 7 A 297, *Parameswar v Bisheshwar*, 1 A 53, *Alladad Khan v Ismail*, 10 A 289. This clause also repeals the English common law on the subject of evidence. *Lelhray v Mahpal* 7 I A 70=5 C 751.

**Clause II.** This clause refers to various rules as to evidence issued by the Government in "Non Regulation" provinces previous to the India Council's Act, 1861, 24 & 25 Vict c 67, which became law by virtue of section 25 of that enactment. In the Punjab for instance there was a special rule as to the production of a day book and ledger for proof of book debts. Other provisions of a like nature were in force in other "Non Regulation" provinces—*Cunningham* p 77.

**Proviso.** There are various Statutes of the British Parliament and Acts of the Indian Legislature which contain provisions relating to evidence. Those Statutes and Acts of Indian Legislature which were passed before the Indian Evidence Act, (I of 1872) are unaffected by this Act. *In re Rudolph Stallman* 15 C W N 1053. *Lelhray Kuar v Mahpal Singh* 7 I A 70=5 C 751, *Queen Empress v Kartic Das* 14 C 721. A complete collection of such Statutes and Acts are made in Whitely Stokes' Anglo Indian Codes Vol II pp 822—827. So in *Ower v Ower* 19 B 365=27 Bom L R 231=A I R 1925 Bom. 231, it has been held that s 58 of the Evidence Act has no application to the Indian Divorce Act.

§ 3 3 In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context —

“Court” includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence

**Interpretation clause** “A definition is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition therefore is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it. And when it is unnecessary to define it is also dangerous because an incorrect definition will confound the correct use — vide *Solicitors’ Journal* Vol XX p 869

**Subject to contrary intention in Context** “A definition clause does not necessarily in any Statute, apply in all possible contexts in which the word may be found therein. If defined expressions are used in a context which the definition will not fit then the words may be interpreted according to their ordinary meaning” *Per Lord Justice General in Strathern v Padden*, (1926) S C (D) 9—*Q* of Justs, see also *Uda Begam v Imamuddin*, 2 A 71 (86), *Jokha v Jam* Dm 3 A 419 (425)

**Court** The definition of Court in this Act is framed only for the purpose of the Act itself and should not be extended beyond its legitimate scope. Special laws must be confined in their operation to their special subject-matter. *Queen Empress v Tulja*, 12 B 36. The definition of the word Court in the Act is not meant to be exhaustive. *R v Ishutosh*, 4 C 488 (193). So in a trial by Jury the Court does not exclude the jury. In such a case it means and includes both Judge and Jury. *Ibid*. A Sub Registrar is a public officer, his proceedings are judicial proceedings within the meaning of section 229, Penal Code, and his Court is a Court within the meaning of that word in the Evidence Act. In *Sudhakar Lal* 22 W R Cr 10 = 13 B L R App 40 The Court means all persons except arbitrators, legally authorized to take evidence. *Atchappa v Gangappa* 15 M 138 (147) = 2 M L J 64 (T B). So the definition of Court applies to a Registrar holding an enquiry and taking evidence under the Registration Act. *Ibid* at p 14, *In re Venkata Chela*, 10 M 154, but see *R v Ramlal*, 141 (143) *R v Tulja* 12 B 36 (43), *Attorney General v Moore*, 3 Ex D 270. A commissioner appointed under order XXXI r 1—r 10 of Civil Procedure Code and ss 503—508 of Criminal Procedure Code is a person legally entitled to take evidence and as such he is a Court. *Atchappa v Gangappa* 15 M 138 (147). The term Court includes all Magistrates. *Queen v Alagu*, 16 M 421 (422).

**Includes** Where in an interpretation clause it is stated a term includes so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include. *The official Assignee Bombay v Firm of Chandabai*, A I R 1924 Sind 89, see also *Bilas Singh v Emperor* 23 A L J 845 = 69 Ind Cas 630.

**Judges** No definition of the word ‘Judges’ is given in this Act. The word ‘Judge’ means the presiding officer of a Civil Court in accordance with the definition of the term given in the Civil Procedure Code—*vide* s 2(8) of the Code. The word is also defined in section 19 of the Indian Penal Code. Section 3(1a) gives the definition of the term ‘District Judge’. The word ‘Judge’ in its ordinary and normal sense means a Judge of the High Court. *Elschy v Kirby* 12 L J Ex 97. A District Judge acting in the capacity of a District Registrar is not a Court. *Dina Nath v Acl Ram* 21 A L J 88.

**Magistrate** No definition of this term also is given in the Act. The General Clauses Act (X of 1897) lays down the following definition of the term Magistrate. “Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force”

Vide s 3(31) It is doubtful whether a Village Magistrate in the Madras Presidency is or is not a Magistrate within the meaning of the General Clauses Act 27 M 223=2 Weir 203=14 M L J 74 A Magistrate as such is not a Court unless he is acting in a judicial capacity *Clarke v Bijendra Kishore*, 36 C 433 The Court of a Police Patel is not a Court under s 6 of the Criminal Procedure Code *Queen-Empress v Ramia*, Rat Un Cr C 317 A Magistrate is not a Court while he is passing an order under s 141 of the Criminal Procedure Code *Natarajan v Ranga suami* 44 M L J 328

Judicial interpretation of "Court" in connection with other Acts The Collector is not a Court of Justice, under s 3 of the Majority Act *Brymohun Lal v Perlash*, 17 C 941 A Deputy Collector's Court is a Court of Justice within the meaning of s 237, Act VIII of 1879 *Johun Couie v Barbara* 10 W R 43 A tribunal of Commissioners appointed by the Viceroy and Governor General of India in Council for enquiring into, and reporting upon the truth or otherwise of an imputation against the *Rules of a Native State* is not a Court *In re Maharaja Madhara Singh*, 42 C 1=31 I A 239=8 C W N 841 A Registrar of the Presidency Small Causes Court of Calcutta, who is entitled to decide the question of service of summons, and in doing so is entitled to receive evidence in order to come to a finding on that matter is a Court *Balchand v Taral nath* 18 C W N 1323=16 Cr L J 151 There is a difference of opinion as regards whether a registering officer is a Court or not. In *Queen v Ramlal* 15 A 141, he was held not to be a Court. In *Queen Empress v Tulja* 12 B 36, the enquiry contemplated by sections 73, 75 of the Registration Act (III of 1877) appears to have been regarded as administrative and a reference is made to the case of the *Queen v Prince*, L R 6, Q B 418 But a Full Bench of the Madras High Court in the case of *Atchayya v Gangayya*, 15 M 138 held it otherwise. In delivering his judgment *Collins C J* observed at p 145 "It is therefore clear to my mind that the Registrar exercises more than mere administrative functions—in the examination of witnesses he is bound to observe the rules of evidence, and he is to consider the weight and credibility of the evidence and form his own conclusions. The learned Judges in *Queen Empress v Tulja*, 12 B 36 appeared to consider the Registrar's functions purely administrative and the fact appears to have mainly influenced their judgment." See also *Venkata Chala In re* 16 M 154, *Kristo Nath v T F Broun and others*, 14 C 176 A District Registrar is not a Court within the meaning of section 622 of the Code of Civil Procedure of 1882 *Manabala v Goundan*, 30 M 326 Under the Land Acquisition Act the proceedings of the Collector regarding the measurement and valuation of the land and resulting in his award are administrative and not judicial *Era v The Secretary of State*, 1 C L J 227=32 C 605=9 C W N 454 affirming 5 C W N 131, *Durga Das v Queen*, 27 C 820, *Galstaun v Banka*, 31 C W N 825 A Collector acting in appraisal proceeding under ss 69 and 70 is a Court *Raghu bans v Kokil*, 17 C 872 So also a Certificate officer holding an enquiry under s 6 of the Bengal Public Demands Recovery Act (Ben Act I 1895) *Sunder v Sital* 28 C 217 but see *Jharu Lal v Mohant* 2 Pat 257 Similarly a Deputy Collector is a Court, when he is holding an enquiry under the Bengal Land Registration for registering the name of a person *Ranga Singh v Hara Khud*, 47 Ind Crs 710, see also *Queen Empress v Munda*, 24 M 121 A tribunal constituted under the Calcutta Improvement Act (V of 1911) is also a Court *Aundo Lal v Khetra Mahan* 45 C 585 So also is an Income Tax Collector *Nataraja v Emperor*, 36 M 72, *In re Punam Chand* 38 B 642 A District Judge is a Court while he determines election disputes under s 22 of the Bombay District Municipalities Act (Bom Act III of 1901) *In re Nanchand*, 37 Bom 865

A commissioner appointed to take down evidence of a witness is not a Court *Seadul Ali v Emperor*, 11 C W N 909 Neither an arbitrator appointed by a Court is a Court *Mula Mal v Chiranjy*, 3 P R 1914 *Puttiah v Veera Sami*, 17 M L J 420

As regards the meaning of the word "Court" in s 195 of the Criminal Procedure Code vide *Kanhayalal v Bhagwan Das* 48 A 63, *Bilas v Emperor*, 47 A 934, *Galstaun v Banhu* 31 C W N 825, *Nunda v Khetra*, 45 C 585



S 3

Fact

"Fact" means and includes—

- (1) any thing, state of things, or relation of things capable of being perceived by the senses,
- (2) any mental condition of which any person is conscious.

## Illustrations

- (a) If there are certain objects arranged in a certain order in a certain place is a fact
- (b) That a man heard or saw something is a fact
- (c) That a man said certain words is a fact
- (d) That a man holds a certain opinion, has a certain intention, acts in truth or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation is a fact
- (e) That a man has a certain reputation, is a fact

Facts, different meanings of "Fact" and its other form *factum* stand in English Law books for various things e.g. (a) for an act (b) that completed and operative transaction which is brought about by "doing" executing a certain sort of writing, and so for the instrument itself the *(factum)* (c) As designating what exists in contrast with what should fully exist—*de facto* as contrasted with *de jure* (d) And so generally, a citing things event, actions, conditions, as happening, existing really to place. This fact is the notion which concerns us now. It is what Law expresses (*vide Human Understanding Book IV C 16 s 5*) when he speaks of some particular existence or as it is usually termed matter of fact. A fundamental conception is that of a thing as *existing*, or *being true*. It is limited to what is tangible or visible or in any way the object of sense, the invisible mere thoughts, intentions, fancies of the mind, when conceived as *existing* or *being true* are conceived of as facts. The question of whether a thing be a fact or not is the question of whether it is, or whether it exists whether true. All inquiries into the truth the reality, the actuality of thing, arise into the fact about them. Nothing is a question of fact which is a question of the existence, reality truth or something of the *re veritas*. *The Pre Treat Pt p 191*. Ordinarily, a fact is something done or which has to pass, an act or deed or event, an effect produced or a result achieved, thing regarded as strictly true or actually existent whether material or mental reality actuality. *Standard Dictionary*. These dictionary definitions found support in several American cases which adopt the idea of mere achievement and accomplishment with respect of it. *Vide Gates v Hare Ind 570=50 N E 299, Lacey v Vanderbilt 10 How Pr (N Y) 153*. "A fact is something fixed unchangeable" *Huber v Guggenheim, 89 Fed 598*.

Fact legal meaning of The legal meaning of the term fact is not limited to what is tangible or visible or in any way the object of sense. It has also been stated, things invisible mere thoughts intentions fancies of the mind when conceived of as existing or being true, are conceived of as facts. *Thayer Pre Treat I p 191*. Mr Stephen in the first two editions of his *D of Evidence* defined fact in the following words 'Fact means (1) a thing capable of being perceived by the senses (2) every mental condition of which every person is conscious. For this definition he was kindly criticised by a very able writer in vol XX of the *Solicitors Journal* at pp 863, (September 9 1876) who said the proper subject of affirmation and negation is not fact but propositions and among other valuable remarks in regard to how it was with such matters is negligence custom, ownership, the defamatory quality of a writing, and qualities of persons and things generally. phrasology he added is really applicable only to the rudest form of jurisprudence. The writer himself thought no definition was necessary. The

claims took effect in his third edition, and all later ones. Stephen dropped any attempt at definition, and substituted in art 1, this "I act includes the fact that any mental condition of which any person is conscious exists," and in his preface to the third edition, after saying that he 'had been led to modify the definition of fact by an acute remark made on this subject in the Solicitors' Journal,' he added that, 'the real object of the definition was to show that I used the word "fact" so as to include states of mind' *Thayer's Pre Treat* Li p 192

A 'fact' as the term is used in legal proceedings is an event or thing done or said, an act or action which is the subject of testimony. The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, the feeling is a fact. If the operations of the mind produce an effect as knowledge, skill, intention, this effect on the mind is a fact. When the mental process is led up to and produce a desire or intention to do a certain thing such state of mind is a fact. Wilfulness is a desire or intention to produce a certain result, hence wilfulness is a fact. This, at least, is the general rule. We ascertain the existence of a fact by means of evidence. The evidence, and each item of the evidence are not necessarily such facts as call in operation of the law. *Burr Jones Li* § 10 (a)

**What is the real meaning of the word "fact"** The popular acceptance of the term 'fact' does not include any mental condition of which any person is conscious. It stops at a fact-being an existing or true thing. The legal meaning is not limited to what is tangible or visible or in any way the object of sense. *Burr Jones Li* § 10 (1). The framer of the Evidence Act also intended that the word be not understood only in its popular sense as denoting some event which occurred or something which was done, as opposed to something said or some opinion or feeling of mind or body. So under this definition statements, feelings, opinions and states of mind are just as much facts as any other circumstance of which through the medium of the senses or by ourself consciousness, we become aware, and all, if they comply with the requirements of the Act is to relevancy are equally admissible for the purpose of proving or disproving the matter to which they relate. *Cunning Li* p 80, see also *Stephen's Dig Li Preface to Third Edition*. The state of a man's mind is as much a fact as the state of his digestion. *Bowen L J in Edgington v Fitzmaurice* 29 Ch D 193 cited in *Field's Evidence 7th Ed* p 15

**Bentham's definition** Bentham defines fact as follows—"By fact is meant the existence of a portion of matter, inanimate or animate either in a state of motion or in a state of rest." This is very unimstructive. Mr Best has given no definition but he seems to have indorsed the definition given by Bentham. But all such definitions including that of Bentham indorsed by Best labour under the disadvantage that no accurate definition has yet been given of what is legally understood by the term 'fact' and in defining the term evidence. Mr Justice Stephen (*Dig Law Li 3rd Ed art 1*) has abandoned the attempt at definition contained in his two earlier editions and contents himself with the statement that 'fact includes the fact that any mental condition of which any person is conscious, exists'. *Wheelton v Wilson*, 44 Me 1, *Stevens v Stevens*, 130 Mass 557, *Bornhart v Full* 119 93, Cal 497, *Oer v Schuyling*, 102 Ind 191, *Homan v Corning*, 60 N H 418, *Jefferds v Alford*, 151 Mass 91, *Humburg v Wool* 66 Pen 168, *Mutual Life Ins v Hillmon*, 145 U S 285, *Chamberlayne v Notes on Best*, 8th Ed p 19

**Bentham's division of Facts** Bentham divides facts into (1) physical and psychological (2) events and states of things (3) positive and negative. This division of course does not accord with the definition given by him. *See Thayer's Pre Treat Li* p 191

**Physical and Psychological facts** A physical fact is a fact considered to have its seat in some inanimate being or if an animate being by virtue not of the qualities by which it is considered inanimate but of those which it has in common with the class of inanimate things. A psychological fact is considered to have its seat in some animate being and that by virtue of the qualities by which it is constituted animate. Bentham, *Jud Li* C 3, *Best Li* §12. Thus the existence

S 3 of visible objects the outward acts of intelligent agents the *res gestae* of a law suit, et cetera range themselves under the former class while to the latter belong such as only exist in the mind of an individual, as, for instance, the conceptions or recollections of which he is conscious, his intellectual assent to any proposition the desires or passions by which he is agitated, his animus or intention in doing particular acts, et cetera. *Best on Evidence* art 12 Mr. Stephen in his Introduction to the Evidence Act classifies facts stated in clause (1) as external facts and those stated in clause (2) as internal facts. 'During the whole of our waking life' he says 'we are in a state of perception. Indeed consciousness and perception are terms synonymous for one thing according as we regard it from the passive or active point of view. We are conscious of everything that we perceive, and we perceive whatever we are conscious of. Moreover our perceptions are distinct from each other—some both in space and time as is the case with all our perceptions of the external world others in time only as is the case with all our perceptions of thoughts and feelings of our own minds. "External facts"—Whatever may be the objects of our perceptions they make up collectively the whole sum of our thoughts and feelings. They constitute in short, the world with which we are acquainted without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed first, of our perceptions, and secondly, of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. The human body supplies an illustration of this. No one doubts that his own body is composed not only of the external organs which he perceives by his sense but of numerous internal organs, most of which it is highly improbable that either he or anyone else will ever see or touch, and some of which he never can, from the nature of things see or touch as long as he lives. When he affirms the existence of the organs, say the brain or the heart, what he means is that he is led to believe from what he has been told by other persons about human bodies or observe himself in other human bodies, that if his skull and chest were laid open, the organs would be perceived by the senses of persons who might direct their senses towards them. "Internal facts"—There is another class of perceptions, true in their duration and not perceived by the five best marked senses, which are nevertheless distinctly perceptible and of the utmost importance. Those are thoughts and feelings—love, hatred, anger, intention, will, wish, knowledge, opinion, are perceived by the person who feels them. When it is affirmed that a man is angry that he intends to sell an estate that he knows the meaning of a word that he struck a blow voluntarily and not by accident each proposition relates to a matter capable of being as directly perceived as a noise or a flash of light. The only difference between the two classes of propositions is this when it is affirmed that a man has a given intention, the matter affirmed is one which he and he alone can perceive, when it is affirmed that a man is sitting or standing the matter affirmed is one which may be perceived not only by the man himself but by any other person able to see and favourably situated for the purpose. But in circumstances that either event is regarded as being or as having been capable of being perceived by some or the other is what we mean and all that we mean when we say that it exists or existed or when we denote the same thing by calling it a fact. The word fact is sometimes opposed to theory sometimes to opinion sometimes to feeling but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy it implies something which exists and it is as difficult to attach any meaning to the assertion that a thing exists which neither is nor under any conceivable circumstances could be perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist. *Stephen's Introduction* pp 19 to 21.

**How psychological events are proved.** It was formerly considered that psychological facts were incapable of direct proof by the testimony of witnesses and their existence could only be ascertained either by confession of the party whose mind is their seat, or by presumptive inference from physical facts. *L. J. v. F. art 12* But it is now recognised that the state of a man's mind is as much a subject of evidence as the state of his digestion (vide *per Bouvier L. J. in Feltton v. Feltmaurice*, 29 Ch. D 483) and accordingly witnesses are permitted

testify directly as to their own mental condition, although not generally to that of others (*Best on Ev* § 12) S 3

**Events and states of things** There are two other divisions of facts which deserve to be noted. One is that they are either events or states of things. By an "event" is meant some motion or change, considered as having come about either in the course of nature, or through the agency of human will, in which latter case it is called "an act" or "an action." The fall of a tree is "an event," the existence of the tree is "a state of things," but both are alike "facts." (*Best on Evidence* § 13)

**Positive or Negative facts** The remaining division of facts is into *positive* or *affirmative*, and *negative*. In this may be seen a distinction, which belongs not, is in the former case, to the nature of the facts themselves, but to that of the discourse which we are under the necessity of employing in speaking of them. In the existence of this or that state of things, designated by a certain denomination we have a positive, or say, an affirmative fact. In the non-existence of it a negative fact. But the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact, and unless this sort of relation be well noted and remembered, great is the confusion that may be the consequence. The only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more. though, in many instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised. Thus, by health, is meant nothing more than the absence, the non-existence, of disease, by minority, the individual's non-arrival at a certain age, by darkness, the absence of light, and so on—(*Bentham Jud Ev Vol 1 p 50*)

**Meaning of fact in understanding the Statute** "In the first place what is a fact? The question is answered by s 3, which defines 'fact to mean and include anything state of things or relation of things capable of being perceived by the senses' and, 'any mental condition of which any person is conscious.' This then, is the only sense in which, in interpreting the Statute, I can understand the word fact." *Per Mahmood J in Queen Empress v Abdullah*, 7 A 38, (399) F B. "A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a 'fact' within the meaning of section 3 of the Evidence Act." *Emperor v Soma*, 36 Ind Crs 851 (854) = 17 P R 1916 Cr = 18 Cr L J 18, see also *Re N Jaladu*, 36 M 452. The word 'fact' used in s 157 of the Evidence Act, does not mean merely "event" but also a continuing fact such as possession. *Muthalagiri v Pappi Nuelan*, 25 Ind Crs 510.

**Matter of fact Matter of law** "Matter of fact is anything which is the subject of testimony, 'matter of law' is the general law of the land, of which Court will take judicial cognizance." (*Best Ev 8th Ed p 19*) The true question of law is used in three distinct though related senses. It means in the first place a question which the Court is bound to answer in accordance with a rule of law—a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. All other questions are questions of fact—using the term fact in its widest possible sense to include everything that is not law. The term question of fact has more than one meaning. In its most general sense it includes all questions which are not questions of law. Everything is matter of fact which is not matter of law. *Salmond's Jurisprudence 7th Ed p 79*. "It is enough for our present purpose says Prof Thayer 'to say, that unless there be a question as to a rule or standard which it is the duty of a judicial tribunal to apply there is no question of law. The enquiry whether there be any such rule or standard the determination of the exact meaning and scope of it the definition of its forms, and the settlements of a written constitution are all naturally and justly classed together and allotted to the same tribunal, and these are called questions of law.' Thayer *Prel Treat Fo p 19*." The right inference or conclusion, in point of fact, is itself matter of fact. (*Ibid p 191*)

S 3

**Illustrations** Illustrations (a), (b), and (c) are illustrations of the first clause and (d) and (e) of the second. This division which was made by Bentham has been adopted in the Code to prevent any metaphysical doubts as to 'mental conditions' being facts. *Norton p 93, Stephen's Dig Pt 3rd Ed Introduction*

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

**Relevant facts** The relevant facts are facts other than facts in issue which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable, or throw light upon them. Relevancy may indeed be considered as synonymous with 'connection' a word which frequently appears in discussions on the subject. Of course both words must be taken in their legal meaning which is generally restricted. Common sense or logical relevancy is, as a rule, wider than legal relevancy. A Judge might in ordinary transactions take one fact as evidence of another, and act upon it himself when in Court he would rule that it was legally irrelevant. And he may exclude fact although relevant if they appear to him too remote to be really material to the issue. *Corle Case 56*. Every fact which is the basis of an inference is evidence and is thus frequently termed is "evidentiary" fact while the fact which is inferred from it, is called the "ultimate" or "principal" fact. The first condition which a fact, proof of which, is an evidentiary fact, must fulfil is that it must be evidential of the main fact. It must furnish a basis from which the main fact can be inferred. The first duty of the Court in England is to apply the underlying principle of the law of evidence namely logical relevancy for the purpose of determining whether or not the fact offered can be evidence. If the fact meet this test it may or may not be admitted. For strike around the general principle in the law of evidence that what is logically relevant is admissible, we have numerous excluding rules which say that this or that fact though logically relevant is inadmissible. *McClellan's Law of Evidence p 1*. The word relevant in the Indian Evidence Act means admissible. *Per Lord Hobhouse in Lala Lalram Chand Harder, Sha 3 C W N 268 (notes)*. So a fact in order to become relevant must be admissible in evidence under any one of the sections 5 to 55. Such facts which are themselves in issue may affect the probability of the existence of facts in issue. *Stephen's Introduction p 13*

**English Law—Test of relevancy** The meaning of the term according to Scottish law comes nearer to the conception of the term according to English lawyer namely the sufficiency in law of what is alleged in support or defence of an action. (*Standard Dictionary*). The word comes from the French *relevet* to raise. So whatever testimony is offered which would assist in knowing which party spoke the truth of the issue was relevant and when admitted it did not override other formal rules of evidence it ought to have been taken. *Hunter v Hunter 78 N Y 90 Prior v Oglesby 50 Fla 248*. It is necessary however that it should itself be directly upon the point in issue, if it be but a link in the chain of evidence tending to prove the issue by reasonable inference it may nevertheless be relevant. *Schuchowitz v Allen 1 Wall (U S) 139 Hunter v Harris, 131 Ill 482 Huntington v Attrill 118 N Y 40*. Relevancy is that which conduces to prove a pertinent theory in a case. *Levy Campbell (Tex) 20 S W 196*. But there is no definition or Statute or theory of relevancy which can very greatly aid in solving the constantly recurring problem whether a given fact offered in evidence is relevant to prove the proposition in issue. *Burr Jones § 13*. Prof Thayer who seems of all the writers on evidence have acquired a giant grasp of his subject says: There is a principle not much a rule of evidence, a presupposition involved in the very conception of rational system—which forbids receiving anything irrelevant not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy. For this it tacitly refers to logic and

general experience, — assuming that the principles of reasoning are known to its Judges and ministers just as a vast multitude of other things are assumed as already sufficiently known to them. There is another precept which should be laid down as preliminary, in stating the law of evidence, namely that unless excluded by some rule or principle of law, all that is logically prohibitive is admissible. These rules of exclusion have had their exceptions, and so the law has come into the shape of a set of primary rules of exclusion and then a set of exceptions to these rules." *Preliminary Treatise Evidence* pp 263—266

**Reasons of the exclusionary rules** The qualification to the general rule is that it does not always follow, merely because a fact is logically relevant that it is always admissible. There may be a very great number of minute details all logically relevant, but which if they existed in many cases would take such a long time to be given in evidence, that the business of the Court would be clogged. In *Amoskeag Co., v Head* 59 N H 332, *Doe C J* thus stated the reason. "The trial to which parties are entitled is not in endless one nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense but not so unimportant when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed, upon collateral issues in equal range amply sufficient for the purposes of justice, under the circumstances of the particular case, they are not necessarily entitled as a matter of law to go further in that direction. But there is another reason for the exclusion of logically relevant evidence. It is thus stated by *Prof Thayer* "Some things are rejected as being of too slight a significance or as having too conjectural and remote a connection, others, as being dangerous in their effect on the jury, and likely to be misused or overestimated by that body, others as being impolitic or unsafe on public grounds, others on the ground of precedent. It is this sort of thing as I said before,—the rejection on one or another practical ground, of what is really prohibitive,—which is the characteristic thing in the law of evidence, stamping it as the *child of the jury system*" *Thayer Pre Treat Ex* p 266

'Facts in issue' The expression "facts in issue" means and includes---

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

**Explanation**—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records in issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

#### Illustration

A is accused of the murder of B

At his trial the following fact may be in issue —

that A caused B's death,

that A intended to cause B's death

that A had received grave and sudden provocation from B

that A, at the time of doing the act which caused B's death was by reason of an soundness of mind incapable of knowing its nature.

**Facts in issue what are they** Facts in issue are those facts which are alleged by one party and denied by the other on the pleading in a civil case or alleged in the indictment and denied by the plea of "not guilty" in a criminal case so far as they are in either case in issue. There is then a little difficulty in ascertaining what are the facts in issue. *Coelle Case* 76 Mr Stephen in his introduction to his Evidence Act, explains "facts in issue" in the following

**S 3** words "They may by themselves, or in connection with other fact, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B there arises of necessity the inference that A is by the law of England the heir at law of B, and that he has such rights as that status involve. From the fact that A caused the death of B under certain circumstances and with a certain intention or knowledge, there arises of necessity the inference that A murdered B and is liable to the punishment provided by law for murder. Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed. *Introduction to the Evidence Act* p 12. A "relevant fact" is often called the evidentiary fact and "a fact in issue" as the 'ultimate,' 'main' or 'principal fact'. *Vide Melchies Evidence* p 5.

"Document" means any matter expressed or described upon any

Document ' substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter

#### Illustrations

A writing is a document

Words printed, lithographed or photographed are documents

A map or plan is a document

An inscription on a metal plate or stone is a document

A caricature is a document

**Documents** The term "document" is one of difficult definition. Many so-called documents being more properly classed under the head of real evidence. *Best* defines "document" as including "all material substance on which the thoughts of men are represented by writing or any other species of conventional mark or symbol" and expressly includes milk man's score, exchequer tiller and the like. (*Best* p 213). *Stephens*'s definition is similar, though more restricted: "Any substance having any matter expressed or described upon it by marks capable of being read" (*Dig Law Part 1*). Within those definitions, a ring or hammer with an inscription, a musical composition, and a savage tattooed with words intelligible to himself, would all be documents. Photographs, caricatures, woodcut tillers, and the like would probably be excluded under *Stephens*'s definition, not apparently under the others. *Best* p 213. The definition given in this Act is wider than the definition mentioned in *Stephens*'s Digest. This definition seems to include all those things mentioned above. This definition is in record with the definition of the term given in s 29 of the Indian Penal Code and s 3 (16) of the General Clauses Act (X of 1897). Where a draft petition was prepared with the intention of being used as evidence of a matter it was held that it fell within the terms of this section. *Q v Shufait Ally* 10 W R Cr 61=2 B L R 12. An agreement in which some of the executants signed is a document. *Ham v Suami Lynn v Emperor*, 41 M 589=43 Ind Cas 593=19 Cr L J 177. Letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger are documents. *Emperor v Krishappa Khandappa* (1925) A I R 327=27 Bom L R 599=26 Cr L J 1014=87 Ind Cas 539.

*Harton* defines a document as "an instrument upon which is recorded by means of letters, figures or marks matter which may evidentially be used. In this sense the term applies to writings, to words printed, lithographed or photographed, to seal plates or stones on which inscriptions are cut or engraved, to photographs and pictures, to maps and plans. So far as concerns admissibility it makes no difference what is the thing on which the words or signs are recorded, may be recorded. Thus may be on stones, or gems or on wood as well as on paper or parchment. *Harton v F* § 614 see also *Leg v Daye* (1908) 2 K R 27. A book is, of course, a document. *Arnold v Lauchez Val Water Co* 2 Ad 55.

'Evidence'

'Evidence' means and includes—

S 3

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry  
such statements are called oral evidence,

(2) all documents produced for the inspection of the Court  
such documents are called documentary evidence

**The ambiguity of the word evidence** The meaning of the word 'evidence' in English Text Books is ambiguous. It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice. At other times it means the facts proved to exist, by those words or things and regarded as the ground work of inferences as to other facts not so proved. Again it is sometimes used as meaning to ascert that a particular fact is relevant to the matter under enquiry.

**Evidence—Different meanings of the words** 'The ambiguity of the word is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes—(1) The testimony on which a given fact is believed, (2) the facts so believed, and (3) the arguments founded upon them. In judicial inquiries however, the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole should be classified. I mean the distinction between the relevancy of facts and the mode of proving relevant facts.

"The use of the one name 'evidence' for the fact to be proved and the means by which it is proved has given a double meaning to every phrase in which the word occurs." Thus, for instance the phrase 'primary evidence' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy. 'Circumstantial evidence' is opposed to 'direct evidence'. But circumstantial evidence usually means a fact from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought. The evil, however, goes beyond mere clumsiness of expression. People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be laid down, as to the conditions which they ought to satisfy before the Court is convinced by them. Thus, I think confuses the theory of proof and is an error due entirely to the ambiguity of the word 'evidence'. *Stephen's Introduction* pp 4, 5, 8, 9

**Evidence,—meaning of the word generally** When we look back to the derivation of the word 'evidence' we are awed by the vast area the subject embraces, and from its original conception of 'that which is seen out (*ec-out* *video*—I see) necessity imperatively demands the alteration and limitation of the general definition to the specific subject of treatment. In its ordinary acceptance evidence is understood to be anything that makes evident or clear to the mind or such things collectively any ground or reason for knowledge or certitude in knowledge, proof whether from immediate knowledge or from thought, authority or testimony, a fact or body of facts on which a proof, belief or judgment is based that which shows or indicates (*Standard Dictionary*) "Evidence is and must be the test of truth, and I suppose, the ultimate ground on which we believe anything." *Wright—Nature and Thought* "In this wide and universal sense it embraces all questions by which any alleged fact, the truth of which is submitted to examination may be established or disproved." *Hubbel v. Linn*, 1 States (U S) 15 Ct. of Cl 516, 606



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**Evidence—Meaning of the word in the Act** In this Act the word 'evidence' is used to mean words uttered and documents exhibited by whom before a Court of Justice. *Wade Step Intro p 11* The English Law divides evidence into personal (oral) and real, which it subdivides into the evidence of documents and things. But as the Act uses the term "evidence" to signify only the instruments by means of which relevant facts are brought before the Court, which are witnesses and documents, a thing such as a struggle etc. in the case of murder [see post section 7, illustration (b)] is not evidence in the sense in which the term is used in the Act, but a 'relevant fact' to be proved by evidence, the oral testimony of those who saw it. *Norton I, p 97* So the definition of evidence in this Act is defective. When in a controversy between a tailor and his customer involving the fit of a coat, the customer put on the coat and wears it during the trial, (as in *Brown v Foster* 113 Miss. 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

The word "evidence" as defined in this Act does not include the whole material of the Judge's belief for instance, a Magistrate or Sessions Judge may question the prisoner, and the prisoner's answers to the Magistrate may be used against him, but they are not "evidence" under the definition is not being made by a witness. *The Nyan v Q L B R* (1893—1900), 368. Where however the answers of an accused person are used against him, they may be in another trial, the record of them would be strictly "evidence" as being a "document produced for inspection of the Court". So also would be the examination of the accused before the committing Magistrate when given in evidence at the Sessions trial. When one of the several accused persons makes a confession involving himself and some of the co-accused, it may be taken into consideration, as involving all the persons so involved. (*vide s 30 infra*) Such statement will be excluded from the definition of the word "evidence". *Cun Li p 81*. The term "evidence" in its ordinary sense signifies that which makes apparent the truth of a matter. It is no doubt more frequently applied to proof before a judicial tribunal, but it is not necessarily confined to this sense. It applies with equal correctness to information required by any person, who undertakes an enquiry on any matter in question. *Queen v Queen* 4 M 393 (395). The demeanour of a witness in evidence. *vide R v Madhub* 21 W R Cr 13 14. "A consideration of the demeanour of the witness upon the trial" says *Stallie* "and of the manner of giving evidence both in chief and upon cross examination is often times not less material than the testimony itself." *Stallie* Ex 4th Ed 822 823, *Hest* § 21, *Hertrand* L R 1 P 535 see also *Hoomesh v Rashmoni*, 21 C 279.

So it is clear that the definition of "evidence" is incomplete. It does not include the statements and admission of parties, their conduct and demeanour before the Court, and circumstances coming under the direct cognizance of the Court and having a material bearing on the question in issue. It does not include the absence of producible witnesses or evidence as to which evidence is not certain notorious facts of which, without proof, the Court takes judicial notice. (*vide s 57 infra*) and the facts which the Court either must or may presume. These are also not evidence under the Act (*vide Cun Li p 81*). In an action for breach of promise to marry, the fact that the defendant was silent on a certain occasion has been held to be statutory "evidence corroborative of his promise to marry" (*vide Bessela v Stern* 2 C P D 266 C A) though it would not under Stephen's definition. *Phyppson* 6th Ed p 2.

The terms "evidence" and "proof". The terms are often used in such a manner as to include at one time the media by which the facts are established and at another the effect or conclusions produced by the testimony. It is true that attempt has been frequently made but without great success, to distinguish between the terms 'evidence' and 'proof'. The latter term in its popular meaning more often refers to the degree or kind of evidence which will produce full conviction, or establish the proposition to the satisfaction of the tribunal. More accurately, proof is the effect or result of evidence while evidence is the medium of proof. *First Nat. Bank v. State*, 101 Ga. 9-67 Am. St. Rep. 277. *Bohrer v. Manhausen* 79 N. W. 935, *People v. Belushi*, 108 N. Y. 73. "Whenever all of the evidence is of such a character as to convince the intellect and conscience of men of a fact, then that fact is proved. Proof is that degree and quantity of evidence that produces conviction. *Verling v. Commonwealth* 95 Pa. 322 (328). "Proof is that quantity of appropriate evidence which produces assurance and certainty. Evidence therefore differs from proof as cause from effect." *Wills on Civ. Pr.* 2, 3, *Greenl. Pr.* 1.

**Testimony** The dictionary meaning of the word testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Webster. In *Bowyer's Law Dictionary*, the following definition occurs: "The statement made by a witness under oath or affirmation. So testimony is a species of evidence by means of witnesses. The broader term 'evidence' includes that which is given by witness, or offered by documents." *Carroll v. Bincher*, 131 N. Am. 1078. Clause (a) defines testimonial evidence.

**Testimony—Evidence—Proof** The three words, testimony, evidence and proof stand in their order of importance as follows: (1) *Testimony*—that kind of evidence which consists of verbal declarations of a witness. (2) *Evidence*—the means of proof, subdivided into several species or kinds one of which is testimonial evidence. (3) *Proof*—the result of evidence.

The definition must be read with "Proved." The result of a local enquiry by a presiding Judicial Officer does not come under the two heads of the term evidence defined in this Act. Now the question is whether it is a material which a Court can take into consideration in arriving at a conclusion in a case in as much as it is not evidence according to the definition of that word in the Act. In order to decide that question, one should consider the definition of the word "proved" which comes immediately after. It is to this effect: "A fact is said to be proved when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists." It would appear therefore that the Legislature intentionally refrained from using the word, 'evidence' in his definition but used instead the words 'matters before it.' For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not. *Per Miller C. J.* (*Su. Ramesh Chandra*) with *Maclean J.* concurring in *Joy Cooriar v. Bundhola*, 9 C. 363, see also *Alian Rai v. Pungur Tewari*, 16 C. W. N. 426, *Per Maclean C. J.* and *Banerjee J.* in *Duarka Nath v. Prosonno Kumar*, 1 C. W. N. 682.

**Difference between oral and Documentary evidence** Legal Evidence is not confined to the human voice or oral testimony. It includes every tangible object capable of making a truthful statement such evidence being roughly classified as documentary evidence. In the oral evidence the witness is the man who speaks. In documentary evidence the witness is the thing who speaks. In either case the witness must be competent, i.e., must be deemed competent to make a truthful statement, and in either case the competency of the witness must be proved before the evidence is admitted the difference being that in oral evidence the competency is proved by a legal presumption and in documentary evidence the competency must be proved by actual testimony. And the further difference is that in oral evidence the credit of the witness is tested by his own testimony while in documentary evidence the credit of the witness is tested by the contents of the document.

S 3 mination of those who must be called to have this competency " *Per Hume v J the Curtis v Bradby* 65 Conn 49 = 18 Am St Rep 177

**Several classification of Evidence** By the text writer evidence is classified under the following heads (1) Direct or circumstantial evidence, (2) real or personal (3) original or unoriginal

**Direct and circumstantial Evidence** Two of the most important divisions are direct evidence and circumstantial evidence and the latter is also styled indirect evidence while the former is called positive evidence. Direct or positive evidence is evidence to the precise point in issue, as in the case of murder if the witness saw the accused inflict the blow which caused the death or if a prosecution for arson that the witness saw the defendant apply the torch which lighted the fire, or in the case of an agreement that the witness was present and witnessed it. Circumstantial evidence is that which relates to a series of other facts than the fact in issue which by experience have been found so associated with that fact that in relation of cause and effect they lead to a satisfactory conclusion, for example when foot prints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow since it fell, and from the form and number of the foot prints it can be determined whether they are those of a man or a bird or a quadruped. Such evidence therefore, is founded on experience and observed facts and coincidences establishing a connection between the known and proven facts and the facts sought to be proved. *Commonwealth v Webster, 5 Cush (Mass) 29 = 52 Am Del 711 (723)*, see also sections 6-16 of the Act. Direct evidence is that which proves the fact in dispute directly without any inference or presumption and which if itself true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by proving another and which, though true does not of itself conclusively establish the fact but which affords an inference or presumption of its existence. Indirect or circumstantial evidence is that which only tends to establish the fact in issue in proof of various facts, sustaining by their consistency the hypothesis claimed. *Vide Cal Code Civ Pro §§ 1831-1832*. So evidence is either direct or indirect according as the principal fact follows from the evidentiary — the *factum probandum* from the *factum probans* — immediately or by inference. *Vide Bell § 27*. Various cases of circumstantial evidence is collected under §§ 6-16 of the Evidence Act.

**Classification defective** — It is clear from the definition given above the direct evidence means testimony given by a man as to what he has himself perceived by his senses, whereas circumstantial evidence usually means a fact from which some other fact is inferred. These facts are called relevant facts in the Evidence Act. But a relevant fact or a fact which is called circumstantial requires to be proved by some evidence oral or documentary. So it is correct to say that circumstantial evidence must be proved by direct evidence — a clumsy mode of expression which is in itself a mode of confusion of thought. *Vide Stephen's Introduction pp 89*. In direct evidence the facts apply directly to the *factum probandum* while circumstantial evidence is proof of a minor fact, which by induction logically and rationally demonstrates the *factum probandum*. *Beason v State 43 Tex Cr 442*. But in *Hart v Newland 10 N C 122*, a different definition is given of circumstantial evidence. Evidence is of two kinds that which it directly proves the fact in issue and that which proves another fact from which the fact in issue may be inferred. But this definition of circumstantial evidence is against the accepted definition of the term. *Vide Burrill on Circumstantial Evidence 4, Best on Presumptions 12, Walls on Circumstantial Evidence p 19*.

When the existence of any fact is attested by witnesses as having come under the cognizance of their senses or is stated in documents the genuineness & veracity of which there seems no reason to question, the evidence of the fact is said to be direct or positive. By circumstantial evidence on the contrary, is meant that the existence of the principal fact is only inferred from one or more circumstances which have been established directly. *Best on Presumptions p 246*. In *S v Goldborough 1 Hurst C C (Del) 302 Gilpin C J* in charging the jury it defines circumstantial evidence "Circumstantial or presumptive evidence

where some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having actually occurred. It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed, that is to say, it is taken for granted until the contrary be proved. And this is what is called circumstantial or presumptive evidence.

"Direct and circumstantial evidence" says *Burr Jones* "are not different in their nature. For as *Wharton* says, All evidence consists of reason and fact co-operating as co-ordinate factors." Circumstantial evidence is merely direct evidence indirectly applied. And direct evidence, when closely analysed, is found to possess the inferential quality. Direct and circumstantial evidence are not, therefore, in any sense opposed to each other. *Burr Jones* *Et* § 6 b

**Will's explanation** "On a superficial view, direct and indirect or circumstantial, would appear to be distinct species of evidence, whereas, these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence, the distinction is that by 'direct evidence' is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum*, circumstantial evidence is equally direct in its nature but as its name imports, it is direct evidence of a minor fact or facts of such a nature that the mind is led intuitively, or by a conscious process of reasoning, towards or to the conviction that from it or them some other fact may be inferred. A witness deposes that he saw A inflict on B a wound, of which he instantly died. This is a case of direct evidence. B dies of poisoning, A is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper, and of the same kind as that which has caused death the paper is found in his secret drawer, and the poison gone. The evidence of these facts is direct, the facts themselves constitute indirect or circumstantial evidence, as applicable to the enquiry whether a murder has been committed, and whether it was committed by A." *Will* *Cri* *Et* p 20

**Direct and circumstantial evidence—Advantages and disadvantages** As regards admissibility, direct and circumstantial evidence stand generally speaking on the same footing. (*Best* § 294) Direct and presumptive evidence (using the words in their technical sense) says *Mr Best* "being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all." *Best* § 290, see also *R v Buddell*, 1 B & A 95 (123). In direct evidence there are but two chances of error—namely those which arise from mistake or mendacity on the part of the witnesses—while in all cases of merely presumptive evidence there is a third,—namely, that the inference from the facts proved may be fallacious. *Best* § 295, see also *Norton* *Et* pp 14, 18. The proper effect of circumstantial as compared with direct evidence was more accurately stated by *Lord Chief Baron Macdonald* in *Rex v Patch* cited in *Will* *Cri* *Et* p 16. The learned Judge observed, "When circumstances connect themselves with each other when they form a large and a strong body so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct." "So where the proof arises from the irresistible force of a number of circumstances which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under some circumstances direct evidence may be." *Rex v Smith*, cited in *Will* *Cri* *Et* 47.

In *People v Videto*, 1 Park Cr 603 (605) *Halcomb* J thus forcibly set forth the advantages of circumstantial evidence in delivering a charge to the jury.

In most cases of conviction upon presumptive proof or circumstantial evidence there are many different witnesses swearing to several distinct circumstances all tending to the same result each of which circumstances is a necessary link in the chain of evidence required to produce a conviction of the accused, and there is therefore the less danger of perjury in such cases in consequence of the number of perjured witnesses which would be necessary for the prosecution to produce to effect

**S 3** in unjust conviction. For if one perjured witness should swear to a fact forming only one link in a chain of circumstances, the rest of the witnesses being honest, he will be in danger of detection from the discrepancy between his testimony and theirs, when he might be sworn positively, but falsely, to the commission of the crime by the accused, without the possibility of being contradicted. For this reason, although from the imperfection and uncertainty which must ever exist in all human tribunals, I have no doubt that there have been cases in which innocent persons have been convicted on pre-emptive proofs, yet from my knowledge of criminal jurisprudence, both from reading and observation, I have no hesitation in expressing the opinion that when there has been one unjust conviction upon circumstantial evidence alone, there have been three innocent persons condemned upon the positive testimony of perjured witnesses." In *Commonwealth v. Harman* 4 Pa. 269 Chief Justice Gibson of Pennsylvania observed "Circumstantial evidence is in the abstract, nearly, though perhaps not altogether, as strong as positive evidence in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye witness of blemished character is not satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility."

**Circumstantial Evidence**—Two kinds of Circumstantial evidence is of two kinds, *conclusive* and *presumptive* "conclusive" when the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is a necessary consequence of the laws of nature, as where a party accused of a crime shows that at the moment of its commission he was at another place, etc. *presumptive* when the inference of the principal fact from the evidentiary is only probable whatever be the degree of persuasion which it may generate. *Best Ev.* 293

**Real or Personal** Again evidence is either real or personal. By real evidence is meant evidence of which any object belonging to the class of things is the source, persons being also included in respect of such properties as belong to them in common with things. 1 *Benth. Jud. Ev.* 53. This is the '*evidentiæ rei vel facti*' of the civilians. Personal evidence is that which is afforded by human agent. *Best* § 28. Again real evidence may be either immediate when the thing comes under the cognizance of our senses, or reported, where its evidence is related to us by others. *Ibid*

**Real Evidence**—Meaning of. Real evidence is that which is addressed to the sense of the tribunal as where objects are presented for the inspection of the jury. *Prof. Wigmore* styles this class of evidence "Autoptic profference," and says that the term 'real evidence' is not happily applied in this connection, because 'real' is an ambiguous term because the process is not the employment of evidence at all in the strict sense and lastly because the inventor of the term *Benth.* used it originally in a different sense. *Vide Wigmore on Ev.* §§ 1150—1160. The real evidence is known by the name of 'immediate' evidence. For obvious reasons there is no class of evidence so convincing and satisfactory to a Court or a jury as that which is addressed directly to the senses of such Court or jury. Such objects are when it is convenient, brought into the court room for such inspection. If this is not convenient or possible, the Judge or Jury may, if it seems practicable and necessary, leave the court room and take a view of the object or premises in question. Evidence thus addressed directly to the senses of the tribunal has been described as real or natural evidence. That the Court early paid a high tribute to this class of evidence is shown by the fact that, where the point or issue was evidently the object of sense, the Judges sometimes dispensed with a Jury and decided the question in dispute upon the testimony of their own senses. 3 *Black. Com.* 11. It is true that evidence for the most part is by oral testimony of witnesses and by documents, but when the thing to be proved can be seen by the Jury subject always to the control of the presiding Judge concerning admissibility, that if the ends of justice can be furthered by its production, it should be produced by them. It is not calling for any unusual exercise of any of their senses. *Jur. Jur.* § 93. In *Leach v. Territory* 129 Am. St. Rep. 861, *Jurman* P.J. observed "But this does not make them witnesses in the case. They have simply to test the credibility of the witnesses by the personal experience and observation."

of the jurors. A thousand things in the lives and observations of the jurors may influence them in doing this but a knowledge of these things has never been regarded as making the jurors witnesses in this case. In this case the jurors were permitted to smell the contents of the bottle offered in evidence to enable them to decide as to whether the prosecuting witness had told the truth about its being whisky. By this the jurors did not learn any facts in evidence by the use of one of their senses. Or, in other words, they were permitted to hold an autopsy on part of the evidence already before them to test its true character.

Similarly in *Gentry v Mc Ginns*, 3 Dm, (Ky) 382 *Robertson C J* said: "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth and is therefore the first principle in the philosophy of evidence."

Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability and indeed the only perfect and indubitable certainty of the existence of any sensible fact. (Jurors) when they decide altogether on the testimony of others, do so only because the fact to be tried is unsuceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves and much more certainty of truth and justice.

Hence, the policy of having a Jury in the vicinage and hence too jurors have not only been permitted but required to decide on autoptical examination whenever it was practical and convenient.

So the remains of a deceased person may be produced when in a fit condition for the purpose of showing the nature of an injury. So all instruments by which an offence is alleged to have been committed, all clothes of parties concerned, from which inference may be drawn all materials in any way part of the *res gestae* may be produced at the trial of the case. Injury to the person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial to be inspected by the Court and jury while the surgeon who was employed to set it testifies to the injury. When the issue is infamy, on an indictment, the Court and Jury may decide by inspection and so when the question arises as to the colour of a person. On an issue of bastardy, the jury may judge of likeness by inspection, and so on an issue of adultery for the purpose of connecting a child with a putative father. *Wharton on Criminal Evidence* § 312, *vide also* section 60 *infra*.

**Original or unoriginal Evidence.** All evidence is either original or unoriginal. By original evidence is meant evidence, either *ab initio* or *ab extra*, unoriginal also called derivative, transmitted, or second hand evidence is that which derives its force from through or under some other. And of this derivative evidence there are five forms, (1) when supposed oral evidence is delivered through oral this is *hearsay* evidence in the strict and primary sense of the term. (2) When supposed written evidence is delivered through written. (3) When supposed oral evidence is delivered through written. (4) When supposed written evidence is delivered through oral. (5) When real evidence is reported either by word of mouth or otherwise. *Best* § 29.

**Hearsay Evidence.** "There is a great head of the law of evidence comprising indeed with its exceptions, much of the largest part of all that truly belongs there, forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English Court two centuries ago and over, when they checked the attempt of a woman to testify what another woman had told her. The Court, it was quietly remarked 'are of opinion that it will be proper for Wills to *que her own evidence*' [*Fliz Canning's Case* 19 St Tr 383 (106)]. That is to say the objection went to the medium of communication witnesses before the jury in giving ordinary testimony, had by that time been allowed for some three centuries but it must be *un oyan et repant* a hearer and seer as they said in the *Old Year Book*, one who could say as the witnesses to Courts in older times always had to say *quod vidi audivi* it must not be testimony at second hand." *Thayer Prel Treat on Lr* pp 718-519, *vide* § 60 *infra*.

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A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Not proved      A fact is said not to be proved when it is neither proved nor disproved.

"Proved" meaning of Proof said Lord Moulton in *Hawkins v Powell* Co Ltd L R (1911) 1 K B 988 at p 995=80 L J K B 769=104 L T and 'does not mean proof to rigid mathematical demonstration, because that is impossible. It means such evidence as would induce a reasonable man to come to a conclusion. In the same case Lord Wrenbury observed: 'All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done by direct evidence or by inference from facts but the matter must not be left to rest in simple conjecture or guess.' In the ordinary affairs of life men do not require demonstrative evidence because it is not consistent with the nature of the subject and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is that there is no reasonable doubt concerning them. The true question therefore in trials of fact, is not, whether it is possible the testimony may be false, but there is a sufficient probability of its truth that is whether the facts are shown by competent and satisfactorily evidence. Things established by competent and satisfactory evidence are said to be proved. *Greenleaf* Li § 1.

In the *Goods of Gopessan Dutt*, 16 C W N 265 at p 270 *Jenkins C J* thus observed: 'Demonstration or a conclusion at all points logical can not be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commands the Evidence Act in conformity with the general tendency of the law adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof. See also *Prasanna Moyni v Baluntha* 49 C 132, *Ganesh v Lachmi* 23 C L J 209. So none but mathematical truth is susceptible of that high degree of evidence, called demonstration which excludes all possibility of error and which, therefore may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct but all the evidence which is not obtained from intuition, or from demonstration. *Greenleaf* Li § 1.

**Standard of belief** 'There is no standard for the sufficiency of evidence to induce belief and the various degrees of more or less must ordinarily be left to the unprejudiced consideration of the Jury' said Judge *Wardlaw of South Carolina* in *Means v Means* 5 Strobb L (S C) 167, (169). Belief is rarely the consequence of strictly logical process. It is either partially or entirely the outgrowth of education—bias, affection, fear or some other influencing passion. We believe what we wish to believe and what we are in the mood of accepting as true. The same evidence which to one may be convincing to another may seem absurd. *See The Chancellor* *Itney* in *Duval v Duval* 34 Atl Rep 888 at p 896. So there is no standard by which the weight of conflicting evidence can be

ascertained. *Per Sutherland J in People v Superior Ct 5 Wind (N Y) 111 (126)* In estimating the weight of evidence we cannot mark it as so many ounces, pounds, or tons, and yet we know that it may have all degrees of weight from the lightest feather to the most absolute moral certainty. All we can do is to note all the facts and circumstances carefully and estimate its absolute and relative weight by the lights of conscience and experience. *Boylan v Meier 28 N J 271 (333)* We have no test of truth of human testimony except its conformity to our knowledge, observation and experience. *Per Vice-chancellor Van Fleet in Daggers v Van Dyck 37 N J Eq 130 (132)* and in *Jersey City Bank v O'Connell, 40 N J 19 92 (91)* The effect, then, which all evidence has upon the mind is determined by observation and experience the only original instructors of wisdom. *Whitaker v Parler, Per Beet J 12 Iowa, 585 (587)*

**Legal proof, what it is** In *Bhindra Kumar Ghose v The Emperor 11 C W N 1111* at p 1178, *Carduff J* observed. Legal proof is as it seems to me, neither more nor less than what is indicated by the definition of the word 'proved' which is to be found in section 3 of the Indian Evidence Act 1872 that is to say 'a fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists.' When the section speaks of the matters before the Court, it means of course, the matters properly before it whence it follows that, if and when relevant matter has been admitted in evidence, one must be careful—I would here refer to the provisions of section 167 of the Evidence Act—to exclude it from consideration and refuse to be in any degree influenced by it. But, given evidence on the record which is admissible and excluding from consideration any that may have been wrongly admitted I doubt whether it is possible to draw a distinction between 'legal proof and moral conviction'. Section 114 of the Evidence Act enacts a rule of presumption and read with s 1 of the Act it indicates that this is not a hard and fast presumption incapable of rebuttal a *thesumptio juris et de jure*. *Emperor v Shrinivas, 7 Bom L R 963=3 Cr L J 33*

**Suspicion, conjecture, etc., probative force of** ~~Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify inference of a particular fact.~~ *Per Andrews C J in People v Van der 143 N Y 372 (373)* "The ser of suspicion" says *Callwell J in Boyd v Gluecklich (C C A) 116 Fed Rep 1-1* "has no shore and the Court that embarks upon it is without rudder and compass." One must be very careful not to allow conjecture or suspicion to take the place of legal proof. *Per Carduff J in Bindra v Emperor, 37 C 467=14 C W N 1111* at p 1178. In the same case *Jenkins C J* observed "Another matter to which I desire to allude is the general character of the evidence. From the nature of the case it is to a large extent circumstantial and in dealing with it, the rules especially applicable must be borne in mind. There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by Mr Baron Alderson to the jury in *Lucy v Hodges 2 Lewis C C 227*. Where he said the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little if need be to force them to form parts of one connected whole and the more ingenious the mind of the individual, the more likely was it, considering such matters to over reach and mislead itself, to supply some link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete. So rules of evidence cannot be departed from because there may be a strong moral conviction of guilt. *Queen v Boyoo Choudhuree 25 W R Cr 43*

So neither juries nor Courts are permitted to render verdicts or judgments upon guesses or surmises. *Jaggie v Allen 24 N Y App Div 594*, see also *Mahammad v Mandur, 17 C W N 49=31 A 511 (P C)*. "It is not the habit of any Courts of Justice" says *Mr Justice Story in The Ship Henry Fabian 1 Summ (U S) 100* "to yield themselves up in matters of right to mere conjecture and possibilities. A mere conjecture built upon a bare possibility will not



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suffice to transfer the money or property of one man to the possession and the profit of another. *Paulley v Steam Gauge & Co*, 131 N Y 90, *Altar v The* 15 C 1049 P C = 12 C W N 1019. A proposition is not proved until the evidence becomes inconsistent with the negative. *Smith v Lawrence*, 98 Me 9. If a plaintiff has produced sufficient evidence to establish his case he is not to be defeated upon mere surmise or conjecture. Lord Chief Justice Kenyon is remembered in this instance 'bordering on the ridiculous, when in an action on the same law it was suggested that the gun with which the defendant fired was not charged with shot but that the bird might have died in consequence of the fright and the jury having given a verdict for the defendant, the Court refused to grant a new trial.' *Wallinson v Payne* 11 R 160.

In *Mina Kumari v Bejoy Singh*, 11 I A 72 at p 77 = 11 C 662 = 21 C W N 585. Sir Lawrence Jenkins observed that though in cases of alleged bona fide transaction there may be grounds for suspicion, yet the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. See also *Abdul Latif v Abdul Huz* 25 C W N 62 = 81 Ind C 667, *Prasanna Kumar Iyer v Kati Mohan Saha* 27 C W N 305, *Sith Manil Lal v Raja Bhai Singh* 25 C W N 109 P C = 62 Ind C 356, *Sreeman Chander v Gopal Chunder* 11 M I A 29 (43) *Mohomed Mahbub v Bharat Indu* 23 C W 321 (P C). *Iman v Gandharp* 11 I A 127 = 15 C 20 *Lipin Krishna v Iyer* 26 C W N 36 (41) = 34 C L J 276. So it is clear that Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. *Luchram v Radha Chavan*, 31 C L J 107 = 49 C 93 = 66 Ind C 15. *Jasoda Lal v Dalwam* 35 C L J 589 = 69 Ind C 67.

**Mere suspicion of fraud** 'Astute as Courts should be' says Knapp *Munhead v Smith* 35 N J Lq 303 (309) 'in the detection of fraud they are justified in finding it on grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favour of honesty and for dealing, they should receive it.' In a suit to set aside a fraudulent conveyance tangible facts must be proved, from which a legitimate inference of fraudulent intent can be drawn. It is not enough to create a suspicion, wrong, nor should a jury be permitted to guess at the truth. *Pir Chah C J Jucker v Kelly* 52 N Y 274 (276). In *Turner v Hand*, 3 Wall JP (C C) (112) Mr Justice Gier addressed the jury as follows 'you must remember that the burden of proof is on the party who alleges fraud. That fraud, though proved by circumstances can never be presumed for fraud is a crime. It is not enough to show suspicious circumstances. Suspicion is not proof. It does not require great deal of ingenuity to cast suspicion of fraud upon any transaction.' *Sreeman Chunder v Gopaul Chunder*, 11 M I A 28 at p 44, *Lord Westbury*. In matters of this description 'he was dealing with a charge of fraud in connection with a sale in execution of a decree' 'it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony.' So a Court should not rest its decision merely on suspicion supported by legal testimony. *Promode v Kali* 27 C W N 305 = 70 Ind C 555 = 36 C L J 396.

**Suspicion in Will cases** In *Tyrell v Painlon* (1894) P 151 at p 1 *Indley L J* said 'The rule in *Barry v Butlin* 2 Moo P C 480, *Fulton Andru* L R 7 H L 448 and *Brown v Fisher* 63 L T 46, is not in my opinion confined to the single case in which a Will is prepared by or on instructions of the person taking large benefit under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court and wherever such circumstances exist and whatever their nature may be, it is the duty of the person who proposed the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case in which the Will is proved. The suspicion to which allusion is made must, I think, be inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. In the goods of *Gopessur Dutt*, 16 C W N 26. But when a case

impugns a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish the case. In matters of this description it is essential to take care that the decision of the Court rests not upon suspicion but upon legal grounds, established by legal testimony. *Motibai v Jamsethyce*, 20 C W N 15 (P C.) = 80 Ind C 15 777

**Matters before it** "When the section speaks, of the matters before the Court if means of course, the matters properly before it" *Bairudra v Emperor* 11 C W N 1114 (1178). The expression 'matters before it' in this definition includes matters which do not fall within the definition of 'evidence' is given in section 3. *Bhairon Prasad v Lalni Narayan* A I R 1924 Nag 385. Therefore in determining what is evidence other than 'evidence' in the phraseology of section 3 the definition of the word 'evidence' must be read with the definition of the word 'proved'. The result of a local enquiry by a presiding judicial officer does not come under either of the two heads of the definition of the word 'evidence'. But as it is a matter before the Court, the Court is entitled to take it into consideration in deciding a case. For this reason it is clear, that the Legislature intentionally refrained from using the word 'evidence' in this definition but used instead the words "matters before it". For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether a particular fact was proved or not. *Per Miller J in Joy Coomar v Bindhoo Lal* 9 C 363 (366) = 12 C L R 490, *Itari Rai v Jhunger* 16 C W N 426 *R v Asutosh*, 4 C 492 *Duarlanath v Prosonna*, 1 C W N 682

In *Itari Rai v Jhunger Tewari*, 16 C W N 426 the Court observed "What we desire to point out here is that there are in effect three different kinds of local inspections:—(1) Those that are authorised or directed by the Code of Criminal Procedure and which are governed by the rules and limitations imposed by the Code itself. (2) Those which are in the nature of the view by the jury laid down in section 293 of the Code. Magistrates having the functions of both Judge and Jury in cases decided by them may in our opinion view the place in any case in order, as the rulings on the point say to follow or understand the evidence. We are fortified in this opinion by the ruling in *In re Lalji* 19 A. 303. It is as the Judges there say, not only not objectionable, but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. This is the same rule which is applied in the Code itself to the inspection by the jury. But there is a third class of local inspections under which we think the present and very many other cases fall and that is the class referred to in the ruling in *Joy Coomar* case, 9 C 363 above mentioned. See also *A v Gurus* 68 Ind C 33 *Hruday v Emperor*, 52 C 148. So all these local inspections should be considered by a Court in deciding a case, although they are not evidence as defined by the Act. *Rai Kishori v Kumudini*, 15 C L J 138. So also commissioner's report is evidence in the case, but Courts should take care to see that it is filed as an exhibit. *Arjun v Dayanidhi*, 98 Ind Cas 301 = 51 M L J 67. Ordinarily in a boundary dispute commissioner's report is of great importance. *Abdul v Phogendra* 90 Ind C 15 642. In *Babbu Sheikh v Emperor* 37 C 340 = 14 C W N 422 "there are no doubt passages in the judgment of Woodroffe J which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal of the judgment as a whole shows that what is meant is that mere observation cannot be allowed to override the necessity of evidence and a case cannot be decided merely on an observation made by the Court locally. If in looking at a place in order to understand the evidence the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false he is certainly not precluded by the laws of evidence from holding that the facts stated by the witnesses who gave that erroneous or false description are not proved and in so holding he does not make himself a

**S 3** witness but acts as a Judge deciding on matters before him. We have shown that the judicial system in the country of which the Evidence Act is a part is an important factor gives the Court power to adjudicate the existence of facts on matters before it - as well or according as they are deposed to in the evidence. To do otherwise would be in direct conflict with *Joy Kumar's case*, 9 C 363, which is further as we know has never been dissented from" *Attar Rai v. Jhugur Tewari* 16 C W N 126 (129) 39 C 176. But a Judge without giving evidence in a case is a witness and is important into a case his own knowledge of particular facts. *Hanoverside v. Suen Ingal* 26 W R 33 P C - 31 A 286, see also *Mithan Lal v. Bishere Lal* 11 M I A 213 = 7 W R P C 27.

A local inspection by a Magistrate must be held sparingly and only for the purpose of elucidating and understanding the evidence in the case and should never be substituted for evidence in the case. *Ramattan v. Tara* 17 Ind C 19. *Syed Ahmad v. Yagnasree Syndicate*, 25 M L J 598 = 29 Ind C 101. The party against whom the result of the local inspection is used is generally prejudiced and is put to an irreparable disadvantage in not being able to remove the wrong impression from the mind of the Magistrate by cross-examination of him. The danger is intensified if the Magistrate holds the local enquiry *ex parte*. *Ram Sahai v. Daula Singh* 71 Ind C 172 = 1 P L F 369. So where a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the point against him he acts with material irregularity sufficiently to vitiate the trial. *Mohan v. Emperor* 61 Ind C 1794 = 2 Pat L 1 155. If it is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence in order to understand fully the bearing of the evidence given in Court but if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or another. *Laguay v. Emperor*, 61 Ind C 1774.

Under order XVIII rule 18, Civil Procedure Code read with order XXVI rule 9 Civil Procedure Code a Judge in a civil case makes a local inspection in person at his discretion. The decisions in *Rai Kishori Ghosh v. Kumndini Kanta Ghosh* 14 Ind C 18 377 = 15 C L J 138. *Infant Lal v. Golul Sahu* 35 Ind C 314 and *Dutarka Prosad v. Mulhu Lal*, 52 Ind C 241 are cases the decisions of which are based on the omission from order XXVI, rule 9 of the Code of Civil Procedure of the words that occurred in section 392 of the old Code, which provided for the issue of a commission for a local investigation only in cases where it could not be conveniently conducted by the Judge in person. *Safapathy v. Perumal* 61 Ind C 1790 = 44 M 610. As the rule now stands a Judge may issue a commission in any case when he deems it fit to do so irrespective of his own ineligibility. Sometimes the question arises whether the report of a proceeding may be considered by a Court as matter before it. But the report of a proceeding is not admissible in evidence unless he be examined as a witness with regard to it. *Fateh Muhammad v. Halim Khan* 96 Ind C 825 = A. I R 1926 Lah 60. So the Court can take into consideration the following things which do not fall within the definition of the word evidence in deciding a case: (1) any material object brought before it (rule 560 of the Evidence Act and section 215 of the Criminal Procedure Code) (2) the demeanour of witnesses (rule 560 of the Evidence Act and section 215 of the Criminal Procedure Code) (3) the conduct of witnesses (rule 560 of the Evidence Act and section 215 of the Criminal Procedure Code) (4) admissions made by the parties or their pleaders (5) confessions of the accused (6) statement of the accused and (7) local investigation report both in Civil and Criminal Codes either by a Court or by commissioner appointed by a Court. *Vale Simulasa v. Owen*, 1 M 393 (39).

**Proof in Civil and Criminal Cases** Demonstration or a conclusion on all points logical cannot be expected nor even a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commands the Evidence Act in conformity with the general tendency of the day adopted the requirements of a proof in law as an appropriate concrete standard by which to measure proof. The Evidence Act is at the same time expressed in terms which allow full effect to be

given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability though the standard of proof to the exclusion of all reasonable doubt required in criminal cases may not be applicable [cf per *Wills J* in *Cooper v Stale*, 6 H L C 746, *Doe d Devine v Wilson*, 10 Moo P C 502 (531)] Per *Jenkins-C J* in *In the goods of Gopessur Dutt*, 39 C 245=16 C W N 265 (370) "In my opinion" says *Woodroffe J* in *Donald Watson v Peary Mohan* 18 C W N 185 at p 214, "there is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of the terms 'proved' and 'disproved' in section 3 of the Evidence Act. This Act, to use the language of the Chief Justice in the case cited, 'in conformity with the general tendency of the day adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof. The test in each case is, would a prudent man after considering the matters before it (which vary with each case) deem the fact in issue to be proved or disproved? In a matter of this kind the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And speaking for myself where, whatever be the form of proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is the greater of necessity is the force of the evidence required to overcome such presumption. I cannot myself imagine a Court saying to a party, who is in this case may be a person holding high and responsible position with a previous unblemished record, 'It is true that I have reasonable doubts whether you did the grossly criminal acts with which you are charged, but I find that you did so all the same.' And this exclusion of reasonable doubt is all that the so-called 'criminal proof requires.'" See also *Starkie* 1781, *Best* 1776, *Taylor* Ec § 112, *R v White*, 4 Fort & Im 383 *R v Madhub* 21 W R Cr 13, *R v Behare* 3 W R 23 25, *R v Gorool*, 25 W R Cr 36 *Trial of Lord Cornwallis* 77 St Trials 149, *Trial of R T Crossfield*, 26 St Tr 218. The phrase "proof beyond a reasonable doubt" by no means import a proof which call for a mathematical reduction in the shape of the demonstration of guilt but is often far removed from it *Burr Jones* § 5. A reasonable doubt is not to be a mere quibble in idle doubt created by questioning for the sake of a doubt, nor suggested without some foundation in the evidence. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon evidence, using the mind in the same manner as in other matters of importance prevents the jury from coming to a conclusion in which their minds rest satisfied. *Commonwealth v Costley* 118 Mass 1, (16)

Perhaps the best definition of reasonable doubt ever promulgated was uttered by Chief Justice Shaw in *Commonwealth v Webster*, 5 Cush 295=52 Am Dec 711 (730). He observed in that case "Then, what is reasonable doubt? It is a term used probably pretty well understood but not easily defined. It is not mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the mind of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence, are in favour of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability though a strong one arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and settles the reason and judgment, of those who are found to act conscientiously upon it. This we take to be proof beyond reasonable doubt, because if the law, which mostly depends

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Similarly in *Com v Costley*, 118 Mass 1 *Gray C J* said "Proof beyond reasonable doubt is not beyond all possible or imaginary doubt, but such proof preclude every reasonable hypothesis, except that which it tends to support. It is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent, and has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men and applying their reason to the evidence before them that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

The general rule would seem to be that each case must be considered on its merits and that the Court must decide after most careful consideration of the effects of a confession coupled with other evidence on the record whether the degree of proof referred to in s 3 of the Evidence Act has been reached or not. *King Emperor v Nga Po Tha*, U B R (1913) 2nd Cr 170 = 28 Ind Cr 166 = 1 Cr L J 566. The rule of evidence contained in s 133, Evidence Act and in section 114 (b) amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot reasonably be held proved within the meaning of s 3 if there be no other evidence of it than the statement of an unreliable witness. *Crown v Ramchandra*, 6 S L R 195 = 14 Cr L J 262 = 19 Ind Cas 534.

**Stricter degree of proof in criminal cases.** Section 3, lays down what degree of certainty is sufficient to hold that a fact is proved. *What v Crow* 32 P R 1873 Cr Under s 3 a fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case to act upon the supposition that it exists. A stricter degree of proof required in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt. It is the business of the prosecution to bring guilt home to the accused to the satisfaction of the minds of the jury, but the doubt to the benefit of which the accused is entitled must be such as rational, thinking men may fairly and reasonably entertain not the doubt of a vacillating juror that has not the moral courage to decide but shelters itself in a vain and scepticism. There must be doubts, which men may honestly and conscientiously entertain. *In Lol v King Emperor*, 3 L B R 216 = 4 Cr L J 392. "There is a strong and marked difference as to the effect of evidence in civil and criminal cases. In the former a mere preponderance of probability, due regard being to the burden of proof is a sufficient basis of decision. But in the latter, especially when the offence charged amounts to treason or felony a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society the immeasurably greater evils which flow from them from an erroneous acquittal have induced the laws of every wise and civilised nation to lay down the principle though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty, or as an eminent Judge expressed it, 'such a moral certainty as convinces the minds of the tribunal as reasonable men beyond all reasonable doubt?' *Per Parke B in R v Sturges Sum Ass* 1413 *Best* § 95. The expression 'moral certainty' is to be understood in contradistinction to physical certainty or certainty properly so called for the physical possibility of the innocence of any accused person can never be excluded. *What* Moral certainty is in the law of criminal evidence that degree of assurance which induces a man of sound mind to act upon without doubt upon the conclusion to which it leads. *Black's Law Dict*. It is also defined as a high degree of impression of the truth and fact falling short of an absolute certainty sufficient to justify a verdict of guilty even in a capital case. *Burris Cir F* § 1. "In ordinary civil cases a Judge of fact must find for the party in whose favour there is preponderance of proof, although evidence be not entirely free from

doubt In criminal cases no weight of preponderance of evidence is sufficient short of that which excludes all reasonable doubt" *Per Birch J in Queen v Madhub Gur* 21 W R Cr 13 at p 20 Convictions must be based on substantial and sufficient evidence not merely moral convictions *Queen v Sorob Roy* 5 W R Cr 28 When prisoners confess in the most circumstantial manner to having committed a murder the finding of the body is not absolutely essential to conviction *Queen v Petta*, 4 W R Cr 19 see also *Queen v Poorusoolah*, 7 W R Cr 14 A Judge was held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found *Queen v Buddunuldeen*, 11 W R Cr 20, *Abbu Sikdar v Empress*, 11 C 642

The difference between the trial of a civil and a criminal case is that, in the former, it is the duty of the parties to place their case before the Court as they think best, whereas in the latter it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done *Emperor v Janki*, 45 A 283=60 Ind Crs 322

If the Judge of the Appellate Court had any doubt that the conviction was a right one and had any doubt as to whether the offence charged had been committed, whatever the original Court did he should discharge the accused *Milan Khan v Sagai Bepari* 23 C 347, *Protapchandra v Empress*, 13 C L R 25 But in civil appeal an Appellate Court should not set aside the order of the original Court unless he is satisfied that the order is wrong *Ibid*, see also *Protap v Rex*, 11 C L R 25, *Lahjee v Gurdar*, 43 C 838, *Shumnu garoya v Manikka*, 32 M 400, *Imlad v Paleshi*, 32 A 321 The Pathans of the Peshwar district being always disposed to exaggerate and add two charges against the guilty and totally false one against the innocent, Peshwar murder cases invariably introduced into the evidence an element of doubt of a very intangible character But an acquittal cannot be based on this kind of doubt Section 3 of the Evidence Act, lays down what degree of certainty is sufficient to hold that a fact is proved *Abdul Karim v Crown*, 32 P R 1873 Cr

The terms 'evidence' and proof These terms are often used in such a manner as to include at one time the *media* by which the facts are established, and at other the effect or conclusions produced by the testimony It is true the attempt has frequently been made, but without great success to distinguish between the terms "evidence" and "proof" The latter term in its popular meaning more often refers to the degree or kind of evidence which will produce full conviction, or establish the proposition to the satisfaction of the tribunal More accurately, proof is the effect or result of evidence, while evidence is the medium of proof *Burr Jones* § 4 "Whenever all the evidence is of such a character as to convince the intellect and conscience of men of a fact, then that fact is proved Proof is that degree and quantity of evidence that produces conviction" *Neeling v Commonwealth*, 98 Pa. 322, 328 Proof is that quantity of appropriate evidence which produces assurance and certainty Evidence therefore differs from proof as cause from effect' *Wills Cir Li* 2, 3, *Greenl Et* § 1

#### 4 Whenever it is provided by this Act that the Court

May presume," may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it

Whenever it is directed by this Act that the Court shall  
'Shall presume.' presume a fact, it shall regard such fact as proved unless and until it is disproved

When one fact is declared by this Act to be conclusive proof  
Conclusive proof" of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it

S 4

**Presumption, meaning of** The word "presumption" in its legal significance is used in English Law to describe either an inference or a rule of law. Where the word is used synonymously with "inference" it deserves no special consideration except to guard against any misconception which may arise from the use of the word in so many other senses. Where the word does not mean an inference it is used to describe some "rule of law." This is the shortest way of saying that it may mean a great many different things, for the rules of law are many and various. As a matter of fact, it sometimes designates a rule of substantive law and sometimes a rule of procedure, or other branch of adjective law. *McKelleys Evidence* p 79. So in English Law, following the Civil Law, presumptions are divided into three kinds: (1) presumptions of fact (*presumptiones facti vel naturae*), (2) rebuttable presumptions of law (*presumptiones juris*), and (3) conclusive presumptions of law (*presumptiones juris et de jure*). There is another class recognized in English text books, viz mixed presumptions, or presumptions of mixed law and fact. *Noti Et* 97. The effect of this section is to do away with the distinction known to the English Law between presumptions of fact and presumptions of law, all the presumptions are made to fall under one or other of the three classes mentioned in the present section. *Cum Et* 84.

**Origin of Rules** These rules, it is likely, all had their beginnings in logic, inference however independent of it they may have become in their final shape. Now, the basis of inference is experience. The Judge and the jury go into Court with the experience of ordinary human beings, and, in the process of drawing inferences, constantly call upon such experience. Coupled with the facts introduced as evidence at the trial, it forms the basis of the inferences necessary to arrive at a determination of the facts in issue. It happens that, in the almost innumerable cases that are tried, certain facts or groups of facts have been repeatedly presented to Courts as foundations for inference, and the inferences being reasonable ones, judged by the experience of the Court and jury have been repeatedly drawn until a rule has crystallized. It is not difficult to see why these rules developed so early, and were so readily adopted by the Courts. Judges have always been suspicious of juries and have seized every opportunity to establish rule for their guidance and to control their conclusions from the evidence introduced. The mind of the Judge was supposedly free from if not logical while the untrained minds of the jury were open to the influence of prejudice, sympathy and a thousand other things. Logical inference was therefore made the basis of a vast number of such rules which the Judge established and which they called presumptions,—rules relating to the manner of proving cases and in this sense having to do with the law of evidence, but for example, when sufficient evidence was introduced or when a party introduced further evidence if he would win his case. *McKelleys Et* 80. As the effect of a presumption *Prof Thayer* says "They have the same effect (if no other) which they have in all the other reasons of legal reasoning." Their effect results necessarily from their characteristic quality—the quality viz which imports to certain fact or groups of fact, a *prima facie* significance or operation. In the conduct, then, of an argument, or of evidence they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further adduced they settle the question involved in them in a certain way. He therefore who would not have it settled so, must show cause." *Thayer Cas Fi*.  
*Id* p 11

**Presumption of facts** Presumption of facts according to English Jurists consists of those inferences which have never hardened into rules of law, but as to which therefore the Judge is not entitled to direct the jury that they are bound as a matter of law to draw them. In other words they are common probabilities of fact which the jury may draw or not as in their judgment circumstances of the case may appear to warrant. *Hills Fi 2nd Ed* 43. A presumption of fact is nothing more than an argument more or less cogent that an inference of one fact drawn from other facts. It is for the jury to draw that inference or not as they think fit. They are not bound as a matter of law to draw it. It is the duty of the Judge when there is no evidence from which a reasonable man would honestly draw the inference, to withdraw that ques-

from the jury, but if there is any evidence upon the matter, he must leave it to the decision of the jury. If they do draw the inference their verdict will not be disturbed, but equally it will not be disturbed if they decline to draw it. *Pouell Et* 386. So there are no special rules which govern the subject of logical inferences, and pre-suppositions which are merely inferences relate to all classes of things and cases. *McLachly Et* § 37. The cases which are so often cited as illustrating the proposition that there is a pre-supposition against the party who suppresses or destroys evidence or fails to call a witness within his control are all cases where what is talked of is inference. *Carpenter v Penn, Ry Co*, 13 App Div 328=43 N Y Supp 203. 'The first clause' says *Mr Norton* "appears to point at pre-suppositions of fact, or natural pre-suppositions, or as the civilians termed them *hominis tantum*" *Nort* 1 v 96. Inferences or pre-suppositions are always necessarily drawn whenever the testimony is circumstantial, but pre-suppositions, specially so-called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum*, which warrants a presumption from the one to the other, wherever the two are brought into contiguity. Pre-suppositions are drawn from the course of nature, for instance, that night will follow day, the seasons follow each other, death ensue from a mortal wound and the like, or from the course of human affairs from a familiarity with the ordinary springs of human action, from the usage of society, domestic relationship and transactions in business. (*vide section 111 illustrations and notes*) *Nort* Ex 97. Such inferences are formed not by virtue of law but by spontaneous operation of the reasoning faculty, all that the law does for them is to recognize the propriety of their being so drawn if the Judge think fit. The Court may presume them, i.e. may either draw the inference which the fact suggests at once, and call on the opposite party to disprove it, or may refuse to draw the inference and call for proof independently of the facts by which the inference was suggested. Thus, in the case of a man found in possession of stolen goods shortly after the theft and unable to account for his possession, the Court may either presume the guilt of the accused and throw upon him the onus of proving his innocence or it may refuse to presume his guilt and may throw upon the prosecution the burden of proving it. Besides these natural presumptions there are several instances of pre-suppositions as to documents dealt with in sections 86-88, and 90, in which the Court, in like manner, empowered to throw the burden of proof on which party it pleases to presume a fact or to call for proof of it, as it thinks best. *Cun Et* 85. "A presumption of any fact" says *Abbott C J* in *R v Burdett* 4 B & Ad 161 "is properly an inferring of that fact from other facts that are known, it is an act of reasoning."

**Presumptions of law** Pre-suppositions of law are of two kinds. First conclusive or imperative pre-suppositions that is, legal rules not to be overcome by any evidence that the fact is otherwise. Thus by the Statute of Limitation a simple contract debt, not kept up in certain specified manners is extinguished after a lapse of certain number of years, nor can it be recovered by proving that the sum due has never been paid. Again, a sane man is presumed to contemplate the probable consequences of his own acts, and this pre-supposition is conclusive, nor may he rebut it by showing that in fact he did not foresee them. "It is an universal principle" said *Lord Ellenborough* "that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act" *Hex v Dixon* 3 M & S 15. So that by this rule a man is made responsible for the consequences of his acts, whether his conduct is marked by heedless negligence or obstinate rashness. Of the same nature are all rules respecting the limitation of actions and title by prescription, which *Mr Sturte* calls artificial pre-suppositions. *Sturte* Pt Vol 3, 1235. In some cases of conclusive legal pre-supposition a party is said to be estopped and to have created an estoppel against himself. An estoppel is when a man has done some act which affords a conclusive pre-supposition against himself in respect of the matter at issue. Formerly in England, all children born in lawful wedlock, if the husband was not impotent, or beyond the four seas during a period exceeding that of gestation were legitimate, nor could evidence to the contrary be received in a court of law. *Co Litt* 244 C. The presumption



**S 4** of law was then imperative whatever might have been the real facts of paternity and however clearly they might be proved, still the husband was considered the father of his wife's children. Since that time however the rule has been changed in England, and probable evidence that the husband was not the father of the child, is admissible. *Bonbury Peerage Case*, *Gardner Peerage* by Le Marchant, 42. The presumption therefore in this case now belongs to the second or more comprehensive kind, which is termed disputable or rebuttable presumptions of law—*Presumptions of Law and Presumptive Evidence*, 6 Law Magazine, 413. 'Conclusive proof' in this section is equivalent to irrebuttable presumption, or the *presumptiones juris et de jure* of the civilians. Their number is comparatively few, sound reason seems to favour an inclination to reduce their number still further, and to allow as many legal presumptions as possible to stand only *dum probetur in contrarium* (until the contrary be proved) the effect of a presumption is to shift the burthen of proof, and to throw the *onus probandi* on him who has to displace a presumption when once it has arisen. *Nort Es 91*. A well known instance of an irrebuttable presumption of law can be found in section 82 of the Indian Penal Code where it is laid down that nothing is an offence which is done by a child under seven years of age.

**Rebuttable presumption of law** The second or the more comprehensive kind of presumption of law is known by the term "rebuttable presumption of law" or the *Presumptiones juris tantum* of the civilians. This kind of presumption arises when presumptions of law are certain assumptions or legal rules defining the amount of evidence requisite to support a particular allegation, which fact being proved may be either explained away or rebutted by evidence to the contrary but are conclusive in the absence of such evidence. The distinction between the two kind of legal presumptions is thus clearly stated by Lord Mansfield in *Darwin v Upton*, 2 Saund 175 b note "The enjoyment of lights with the defendant's acquiescence for twenty years, is such a presumption of a right by grant or otherwise, that unless contradicted or explained the jury ought to believe it but it is impossible that length of time can be said to be an absolute bar, like a Statute of limitation, it is certainly a presumptive bar which ought to go to a jury." Legal presumptions of this latter kind (which may be termed disputable or rebuttable presumptions) are defined by the quantity of evidence or the state of facts sufficient to make out a *prima facie* case in other words of the circumstances under which the burden of proof lies on the opposite party. Of this very extensive class of presumptions a few examples will suffice. Thus, a man is presumed innocent until he is proved guilty that is if a man is charged with a crime, he is not bound to prove that he did not but his accuser is bound to prove that he did commit it. So also if a child is born in wedlock, one who questions his legitimacy must disprove it if a child is born during a divorce at *mensa et thoro* one who maintains his legitimacy must prove it. Again the presumption of law is that a man is alive unless nothing has been heard of him for seven years when the presumption is that he is dead that is to say, if it is averred that a man is dead the party must prove his assertion but if nothing has been heard of him for seven years the opposite party must prove that he is alive. Waste lands which belong to a lord are presumed to belong to the owner of the adjoining land and a land whose title is therefore valid unless some one can show a paramount claim. The circumstances which will raise such a legal presumption or in other words will impose on the other party the necessity of proving that the fact is not so sometimes differ with regard to the same fact in different cases. Thus evidence which in one case is sufficient to establish a certain fact in another is not sufficient. Thus in settlement cases proof of a long cohabitation of two persons who passed as man and wife is sufficient to raise a presumption of marriage or to compel the other party to prove that there was none. But in trial for bigamy and actions for criminal conversation proof of a fact which is required in the first case is not required in the second.

**Mixed presumptions.** Mixed presumptions of law and fact are called *presumptiones juris et facti*. In such law of real property. The Indian presumption of

give them much study, nor is it necessary to pursue the subject further here. The Code provides only that a few of the ordinary presumptions recognised by law may or shall be drawn' *Nort El* 97

**May presume** This is a presumption of fact of the English jurists. Presumption of fact has a totally different meaning from presumption of law, and refers not to propositions, but to arguments—not to assuming, but inferring. When evidence is offered which can only be brought to bear on the matter at issue by a process of reasoning, the inference is termed a presumption of fact. In *Rex v. Burdett* 4 B & A 161, Lord Tenterden said "A presumption of any fact is properly an inferring of that fact from other facts that are known, it is an act of reasoning, and much human knowledge on all subjects is derived from this source. A fact must not be inferred without premises to warrant the inference, but if no fact could thus be ascertained by inference in a Court of law, very few offenders could be brought to punishment." The statement on which this inference is founded is termed presumptive evidence. Our experience of the world, for instance, leads us to infer that a man who is in possession of stolen goods shortly after the theft and can give no account of them, is either the thief or has received the goods knowing them to be stolen. Our knowledge of human nature leads us to infer that a man, who does answer a question, could not but answer it in a manner favourable to himself. Such inferences are formed, not by virtue of any law, but by the spontaneous operation of the reasoning faculty. All that the law does for them is to recognize the propriety of their being so drawn. If the Judge think fit. The Court may presume them, i.e. may either draw the inference, which the facts suggest, at once, and call on the opposite party to disprove it, or may refuse to draw the inference and for proof of it, independently of the facts by which the inference was suggested. Besides these natural presumptions there are several instances of presumptions as to documents dealt with in sections 86-88, and 90, in which the Court is, in like manner, empowered to throw the burden of proof on which party it pleases, to presume a fact or to call for proof of it, as it thinks best. *Cun El* 85, see also *Shafiquinissa v. Shabhan Ali* 26 A 581 (586)=31 I A 21=7 O C 290=6 Bom L R 750. A Court, where it "may presume" a fact has the discretion to presume it as proved or to call for confirmatory evidence of it, as the circumstances require. *Raghu Nath v. Hothi Lal* 1 A L J 121 (123). The presumption mentioned in this clause is not a hard and fast presumption incapable of rebuttal a *presumptio juris et de jure*. *Emperor v. Srinivas*, 7 Bom L R 969 (974)=3 Cr L J 32. The word 'may presume' in s 90 ought generally to be construed in more rigorous of the sense allowed by section 4. *Meher v. Nur Muhammad*, 110 P L R 1902 see also *Safiquinissa v. Shabhan Ali*, 7 O C 290, *Ramien v. Verappa*, 11 M L T 69.

**Shall presume** In cases in which a Court shall presume a fact the presumption is not conclusive, but rebuttable. A W N (1906) 316 (317). Of course there is no option left to the Court but it is bound to take fact as proved until evidence is given to disprove it, and the party interested in disproving it must produce such evidence if he can. Presumption of this sort arises chiefly as follows: (1) Where from the nature of the case the truth of the thing presumed is in a high degree probable as, for instance, the genuineness of a document purporting to be the Gazette of India, or of a duly signed record of evidence, or (2) when it is as, for instance, that a document, called for and not produced was duly stamped, attested and executed (section 89) or that circumstances bringing an offence within the exceptions to the Indian Penal Code do not exist. Section 107, sections 79-85 make mention of such presumptions. *Cun El* 85. The definition of the word "shall presume" given in the section cannot be extended to other Statutes except by express legislation to that effect. *Per Anwar J in Dunga Prasad v. Haari Singh* 33 A. 799 (803) P B. In the Indian Evidence Act the word "shall presume" indicates that the presumption mentioned therein is a rebuttable presumption. *Ibid*, see also *Wares Ali v. Pursotam Narain* 12 A 127 (1 B). Presumptions of law are rules of law whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence it is a rule of law to be applied inflexibly as a presumption that is indisputable. In other words, a presumption of law that is disputable, when not changed by

S 4. evidence, becomes to the Court a rule indisputable for the case and the Court is bound to apply it. *Per Thornton J in Huddell v Stevens*, 60 C 114 (4m) at 114P. Under section 90 of the Evidence Act read with section 4 of the same, the Court has discretion to call for proof of a document although it be more than 30 years old and purports to come from proper custody. *Safiqunnissa v Shabbah* 47 O C 290, see *Ramien v Perappa* 11 M L T 69 = (1912), 1 M W N 11. The words 'shall presume' in section 201 of the Agency Act have no higher force than similar words contained in the Evidence Act. *Dillwan v Lda Lal* 29 A 148.

**Conclusive proof** The third class is of those cases in which one fact is conclusive proof of another. An artificial prohibitive effect is given by the law to certain facts and no evidence is allowed to be produced with a view to the combating of that effect. These cases generally occur where it is against the policy of Government or the interest of society, that a matter should be further open to dispute. Thus judgments of certain Courts are conclusive proof of the matters stated therein (section 41) and a notification in the Gazette of India of a cession of British Territory is conclusive proof of a valid cession having taken place (section 113). So also formerly all children born in wedlock, if the husband was not impotent, or beyond the four years during a period exceeding that of gestation were legitimate nor could evidence to the contrary be received in a Court of law. *Co Litt*, 214 A. see also section 112 of the Evidence Act. But that presumption strictly speaking is no longer considered as conclusive presumption in England. "I apprehend" said Lord Redcliffe in the *Binbury Peenage Case* Gardner Peenage by Le Merchant 432 "the law takes that the birth of a child during wedlock raises a presumption (of law) that such child is legitimate, that this presumption may be rebutted both by direct and presumptive evidence, that under the first head may be classed impotency and a necessity that it is impossibility of access, and under the second all those circumstances which can have the effect of raising a presumption that the child is not the issue of the husband." As regards conclusive proof, vide *Manuel Chand v Corporation of Calcutta*, 66 Ind Cis 600 = 48 C 496. The definition of "conclusive proof" given in this section though refers only to the Evidence Act, yet it may properly be applied to the expression 'conclusive proof' in the Oath Act (Act of 1871) *Vithu Gobinda v Ramji*, 1 M L T 63 = 8 Bom L J 19 (22).

**Presumptions as rules of law—Process of Development** Rules of law of this sort were undoubtedly developments. They were not always rules. The first stage was that of a mere inference permissible to Judge or jury, the second a mere disposition on the part of the Judge to advise the jury as to the desirability of such an inference, the third an instruction that such an inference ought to be drawn, and the fourth a rule that the inference was a necessary one which the jury were bound to draw. Take the case of the seven years' absence rule. The fact that a person is not heard from for a space of seven years by those who would be likely to hear from him if alive, is a fact from which the inference may be reasonably drawn that he is dead. An absence of six years under the same circumstances would not be quite so strong but an absence of eight years would be stronger. The space of seven years however became fixed in the law as the limit period from which death might be inferred. Having once fixed the period from which the inference was permissible the Judges were not long in instructing the jury that the inference ought to be drawn and finally taking it out of the jury's hand entirely and establishing the rule that it must be drawn. Such a rule has nothing to do with the logical inference; it matters not whether such inference exists. The rule has become one of equivalent, i.e. that seven years' absence under the circumstances mentioned is equivalent to death. In such a case it is only a rule of *prima facie* presumption since evidence may be introduced to show that the inference which the rule requires is not in accordance with the facts. It fixes the presumption which a *prima facie* case establishes and hence directly affects the burden of proof. *M Kellogg v Fessenden*. The conclusive presumption was the result of further development of the same rule of equivalent. In the process of development further and further cases went on to further and further rule that fact no 1

be equivalent to fact No 2, at all events, and no evidence would be permitted to show that it was not *Ibid* p 81 S 4

**Relation of Presumption to the Law of Evidence** 'What is the relation of presumptions to what we call the law of evidence. They are ordinarily regarded as belonging peculiarly to that part of law. This appears to be an error; they belong rather to a much larger topic, already briefly considered that of legal reasoning in its application to particular subjects. Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given enquiry. They may be grounded on the general experience or probability of any kind, or nearly on policy and convenience. On whatever basis they rest they operate in a place of argument or evidence or irrespective of it by taking something for granted, by assuming its existence. When the aim is legitimately implied it designates a rule or a proposition which still leaves open to further enquiry the matter thus assumed. The exact scope and operation of these *prima facie* assumptions are to rest upon the party against whom they operate, the duty of going forward in argument or evidence on the particular point to which they relate. They are thus closely related to the subject of judicial notice, for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine. Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both.

Presumption assumption, taking for granted are simply so in many names for in fact or process which aids or shortens inquiry and argument. These terms relate to the whole field of argument whenever and by whomsoever conducted, and also to the whole field of the law in so far as it has been shaped or is being shaped by the process of reasoning. That is to say, the subject now in hand is one of universal application in the law, both as regards the subjects to which it relates and the persons who apply it. *Thayer Prel Lect* p p 314, 315. "A presumption, as already noticed, is in its characteristic feature a rule of law laid down by the Judge and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. It is based in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact, but the presumption is not the fact itself nor the inference itself, but the legal consequence attached to it. But, the legal consequence being removed the inference as a matter of reasoning may still remain, and a 'presumption of fact' in the loose sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact regarded as not having this necessary legal consequences.

They have no significance so far as affects the duty of one or the other party to produce evidence because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best,—just as it may to other evidence. So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts; however great their probative significance. The employment here of the term 'presumption' is due simply to historical usage by which 'presumption' has originally a term equivalent in one sense to inference, and the distinction between presumption of fact and of law was a mere borrowing of an applied continental term. There is in truth but one kind of presumption, and the term 'presumption of fact' should be disregarded as useless and confusing. Nevertheless it must be kept in mind that the peculiar effect of a presumption of law (that is the real presumption) is merely to involve a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence) the presumption disappears as a rule of law and the case is in the jury's hands free from any rule. It is therefore a fallacy to attribute (as do some Judges) an artificial probative force to a presumption increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary. For example if death be the issue and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that



The modern system of Evidence says *Prof Wigmore* 'rests upon two axioms. These underlie its whole structure. Implicitly, but nevertheless actually and positively recognised in the practice of the Courts and in the utterances of the Judges, they were first distinctly formulated by the great master and expounder of the history of our law of Evidence. The first is this. None but facts having rational probative value are admissible. This principle is indeed axiomatic, for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of information implied—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated according to the prevailing standards of reasoning to effect rational persuasion. The second axiom on which our law of Evidence rests is this. All facts having rational probative value are admissible unless some specific rule forbids. *Wigmore* §§ 9 10

'There is another precept' says *Professor James Bradley Thayer* 'which it is convenient to lay down as a preliminary one in stating the law of evidence viz that unless excluded by some rule or principle of law all that is logically probative is admissible. This general admissibility of what is logically probative is not like the former precept a necessary presupposition in a rational system of evidence, but yet it is important to notice this also is being a fundamental proposition. In a historical sense it has not been the fundamental rule to which the various exclusions were exceptions. (But) the main propositions which I have stated should in the order of thought be first laid down and always kept in mind. *Thayer Prel Treat Ev* pp 265 268. This principle then does not mean that anything that has probative value is admissible, this would be an entire misconception. In *Wright v Tatham*, 5 Cl J F 670 *Lord Coleridge* said "The fullest that whatever is morally convincing and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury." The true meaning is that every thing having a probative value is *ipso facto* entitled to be assumed to be admissible and that therefore any rule of policy which may be valid to exclude it is a superadded and abnormal rule. Some of these rules may be extensive in scope—the hearsay rule for example or their applicability may in a particular case be so plumb on the face of the offer of evidence that the objector has no burden of proving that this rule of exclusion is applicable. Nevertheless, when the rules of Evidence are taken in view as a system these rules of policy appear as merely so many reserved spaces in the vast territory of logically probative material." *Wigmore* § 10

The following observations of *Mr Justice Edward Livingston*, in his Introductory Report to the Code of Evidence, Vol I, 421 (1872 Ed) are worth studying in this connection. "Ultimately, the whole machinery of jurisprudence in all its branches is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigated proposition. This is to be done by hearing and examining evidence that is to say hearing and examining everything that will contribute to bring the mind to the determination required. If we refuse to hear what will in any degree, produce this effect we must determine on imperfect evidence and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination. But as in morals we are forbidden to do evil that good may come of it so in legislation we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence may be more than counterbalanced in some instances by the evil attending it sometimes, in the shape of inconvenience and expense inseparable from its procurement sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties and in those cases where they are most likely to preponderate, but in no others to exclude the evidence." So "the law (of evidence) with a few exceptions on the ground of public policy now is that all which can throw light on the disputed transactions is admitted,—not of course matters of mere prejudice nor anything open to reprimand or sensible objection."

S 5 all things which fairly throw light on the case' Per Coleridge C J in *Blake v Assurance Co*, L R 1 C P D 91

**Distinction between Relevancy and Admissibility** Strictly speaking admissibility is a quality standing between relevancy, or probative value on the one hand and proof or weight of evidence on the other hand. Admissibility signifies that the particular fact is logically relevant and something more,—that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved but merely that it is received by the tribunal for the purpose of being weighed with other evidence. *Wigmore* § 12. But in the Indian Evidence Act the word relevancy is sometimes used in the sense of logical relevancy and sometimes in the sense of admissibility. (I see *Stephen's Introduction* p 65 *Whitely Stiles* Vol II p 849, *Lala Lallu v Sayed Haider*, 3 C W N (clxxvii). From sections 5—55 of the Indian Evidence Act the word 'relevancy' is used in the sense of admissibility.

5 Evidence may be given in any suit or proceeding of the

Evidence may be existence or non-existence of every fact in  
given of facts in issue issue and of such other facts as are hereinafter  
and relevant facts declared to be relevant, and of no others

**Explanation**—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure

#### Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue —

A's beating B with the club

A's causing B's death by such beating

A's intention to cause B's death

(b) A suitor does not bring with him and have in readiness for production at the trial hearing of the case a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent trial of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

**Principle** "Of all rules of evidence the most universal and the most obvious is this—that evidence adduced should be alike directed and confined to matters which are in dispute or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof and anything which is neither directly or indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal and as tending to distract its attention and to waste its time. *Frusta probatur quod probatum non relevat*. (It is useless to prove that which when proved is not relevant)' Best § 251. The principle underlying this section is associated with another maxim. *Interest ree publicae ut sit finis litium* (For the interest of the public there should be an end of every litigation)

**Scope of the Section** Evidence may be given of two sets of facts. (1) of facts in issue (2) of facts relevant to the issue. Evidence of (1) is generally known as direct evidence that of (2) as circumstantial evidence. *Coffle Cas* 16. What are facts in issue are ascertained by the substantive law and the law of procedure. What facts are relevant or admissible in evidence is answered by the law of evidence. This chapter contains the law of relevancy. There is still a further restriction. Evidence the production of which is barred by some provision of

Civil Procedure Code is not admitted in evidence even if it be relevant. This restriction is put by the explanation at the end of the section. S 5

**Evidence may be given.** Evidence may be given of any fact which is relevant under this Act. But there are certain limitations to this rule. This section should be read subject to Parts II and III of this Act and subject to the hearsay, character and opinion rules of evidence. *See Step Dig 1c Intro p 12*. This section does not also make evidence admissible which is not admissible under some special or local law, such as Stamp Act, Registration Act Criminal Procedure Code, etc. The general and broad requirement of relevancy is that the alleged conclusion from the offered fact must be probable or more probable hypothesis with reference to the possibility of other hypothesis. *See more § 38*. "It is sufficient if the circumstances be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received and left to the consideration of the jury to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue." *Gibson v Hunter*, 2 H Bl 998.

**Facts in issue.** The facts in issue are those which are alleged by one party and denied by the other on the pleadings, in a civil case, or alleged in the indictment and denied by the plea of 'not guilty' in a criminal case so far as they are in either case material. There is, therefore little difficulty in ascertaining what are facts in issue. *Cooley Cas 56*. Facts in issue are facts about which there is a question in issue between the parties and although all relevant facts are not necessarily facts in issue, the facts that are in issue cannot be other than relevant to the determination of the suit. Facts must be either relevant or irrelevant and there is no separate third class of facts in issue. *Raghubbhushana v Itharamallu* 34 Ind Cr 875. Evidence can be given of a fact in issue or a fact which by that Act is declared to be relevant. *Ibinash v Puresh*, 9 C W N 402 (406).

**Facts declared to be relevant.** The relevant facts are all those facts which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable, or roughly, throw light upon them. *Relevancy* may indeed be considered as synonymous with connection, a word which frequently appears in discussions on the subject. Of course both words must be taken in their legal meaning which is generally restricted. Common sense or logical relevancy is a rule wider than legal relevancy. A Judge might in ordinary transactions, take one fact as evidence of another and act upon it himself when, in Court he would rule that it was legally irrelevant. And he may exclude facts although relevant if they appear to him too remote to be really material to the issue. *Cooley Cas 56*. One great principle in the law of Evidence is that all facts which are relevant to the issue may be proved. *Wright v Tatham*, 7 A & T 313 351. "The Courts so far as they can are disposed to receive in evidence whatever can throw any light on the matter in issue and advance the search after truth." *Per Pollock C B in Milne v Forster* 7 H & N 796. So in describing the nature of relevancy under the English law of Evidence, *Coleridge C J in Blake v Assurance Co L R 1 C P D at p 94* said. "The law of Evidence with a few exceptions on the ground of public policy now is that all which can throw light on the disputed transaction is admitted, — not of course matters of mere prejudice nor any thing open to real moral or sensible objection but all things which fairly throw light on the case." *Sir James Stephen, in the Introduction to his Digest of Evidence* said. "The great bulk of the law of Evidence consists of negative rules declaring what, as the expression runs is not evidence. The doctrine that all facts in issue and relevant to the issue, and no others, may be proved is the unexpressed principle which forms the centre of and gives unity to all these express negative rules."

But the framers of the Indian Evidence Act have departed from the above mode of treatment of the law of relevancy. Facts which are relevant are "fully defined in ss 6—11 of the Indian Evidence Act. These sections enumerate specifically the different instances of the connection between cause and effect."



# III INDIAN EVIDENCE ACT

S 5

which occur most frequently in judicial proceedings. They are deemed to be relevant in such a way as to overlap each other. The conduct influenced by it (s 8) is part of its cause (s 7). Subsequent conduct influenced by it (s 5) is part of its effect (s 7). Facts relevant of drawing up the Act in this manner was the general ground on which fact relevant might be stated in its relevancy may be easily ascertained. The object of the most important is they are the most original part of the Evidence Act is this affirm positively what facts may be proved whereas the English law is times this to be known and merely declares negatively that certain facts should not be proved. *Steph Introduction* L p 75. That the sections are designed to be proved very widely will be apparent if we go through the sections. As regards section 11 itself I observed Section 11 of the Evidence Act is no doubt expressed in terms so extensive that any fact which can by a chain of reasoning be brought into connection with another so as to have a bearing upon a point in issue may possibly be held to be relevant within its meaning. But the connection of human affairs are so infinitely various and so far reaching that thus to take the action in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of parties. One of the objects of the law of Evidence is to restrict the investigation made by Courts within the bounds prescribed by general convenience and this object would be completely frustrated by the admission on all occasions of every circumstance on either side having some remote and conjecturable probative force the precise amount of which might itself be uncertain only by a long trial and determination of fresh collateral issues growing up in endless succession as the inquiry proceeded. That such an extension meaning was not in the mind of the Legislature seems to be shown by several instances in the Act itself. The illustrations to s 11 do not go beyond familiar cases of English Law of Evidence. *Reg v Pabbu Day*, 11 b H C R 90.

In deciding what facts are relevant under ss 6-11 of the Act which are very widely worded the following extracts from the *Introductory Report to the Code of Evidence by Mr Justice Lushington* already quoted at p 67 must be borne in mind. Ultimately the whole machinery of jurisprudence in all its branches is tried for the purpose of enabling the judging power to determine the truth or falsehood of every litigated proposition. This is to be done by hearing and examining evidence to him, the mind to the determination required. If we refuse to hear what will in any degree produce this effect we must determine on imperfect evidence and in proportion to the importance of the matter thus refused to be heard must evidently be the chance of making an incorrect rather than a just determination. But as in morals we are forbidden to do evil so that good may come of it, so in legislation we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence may be more than counterbalanced by some instances by the evil attending it sometimes in the shape of inconvenience and expense inseparable from its procurement sometimes from the danger of error arising from the deceptive nature of the evidence itself. The great rule to which the difficulties and in these cases where they are not likely to preponderate but in no others to prove a material part of the issue is admitted whatever has a tendency to exclude the evidence. "So generally speaking" *People v Arnold* 15 C 181. "People were formerly frightened out of their wit" said Chief Justice Cockburn in *R v Birmingham* 1 B & S 763. "The admission of evidence let juries should go wrong. In modern times we admit it evidence and discuss its weight."

In *Johnson v State* 11 Gr 61 and in *Haynes v State* 17 Gr 484 *Lushington* thus widely laid down the rule "The Judges both in England and in this country are struggling constantly to keep open the door wide as possible against it off the hinges to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion."

Truth, common sense, &c.

enlightened reason alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict. This Court stands pledged by its past history, for the abolition to the extent of its powers, of all exclusionary rules which shut out from the jury facts which may serve, directly or remotely, to reflect light upon the transaction upon which they are called upon to pass.

**And of no others** This section excludes everything which is not covered by the purview of some other section which follows in the Statute. *The Collector of Goralpur v Palal dhari*, 12 A (F B) 1 at p 43, see also *Hearsay v Eta*, 12 A L J 285=24 Ind Cts 16; But in *Queen Empress v Abdulla* 7 A 385 (F B), *Mahmood J* at p 401, observed. In conclusion I feel that, although what I may call the principle of exclusion adopted by the Evidence Act,—i.e., the principle that all evidence should be excluded which the Act does not expressly authorize, is the safest guide in regard to the admissibility of evidence, yet it should not be so applied, as to exclude matters which may be essential for the ascertainment of truth. Adopting an expression once used by *Mr Justice Story* I think that the law of Evidence would not be worthy of its name if it made possible any such result. So one who wants to give evidence on a particular fact must show that it is admissible under some one or other of the following sections. *Abinash Chandra v Paresk Nath* 9 C W N 402 (406), *Lalray v Mohpal*, 7 I A 70. The words 'and of no others' impliedly impose a duty on the Court to exclude evidence of irrelevant facts irrespective of objection by the parties. *Whitley Stocks* Vol II p 874; see also ss 60-64 and the first clause of the second proviso to section 165.

As regards admissibility, ordinarily the Court is bound to adhere to the rules laid down in the subsequent section. *Vide People v Farrel* 31 Cal (Am) 584. But where a Judge is in doubt as to admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non admissibility. *Per Straight J* in *The Collector of Goralpur v Palal dhari* 12 A 1 (F B) at p 26, see also *Kali Kishore v Bhusan*, 18 C 201 P C p 203, *Madhav Rao v Deonol*, 21 B 695, but see *R v Parbhudas* 11 B H C R 90 (97). Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems, might operate to exclude are, under the Act to be taken into consideration only in judging of the value to be allowed to evidence when admitted. *R v Monapuna* 16 B 661 (669). Even when there is a moral conviction of guilt the rules of evidence can not be departed from. *Bhundra v R* 37 C 91, *R v Brojo*, 25 W R Cr 13. *R v Soib Roy* 5 W R Cr 28, *R v Oddy* 5 Con C C 210 (213).

**Classification of the Rules of Admissibility** Relevancy Auxiliary probative Policy, and Extrinsic Policy. The rules of admissibility may be classified under three heads: the first dealing with the probative value of specific facts; the second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it; and the third covering all those rules which rest on extrinsic policies irrespective of probative value.

The first group of rules attempts to define for legal purposes the probative value which suffices to entitle a fact to be regarded as evidential. Here the law is concerned with the rules of logic and inference as applied in practical experience with relevancy. Circumstantial testimony and real evidence are the three great classes, and each has its special problems.

The second group of rules, lays down auxiliary test and safeguards usually for particular kinds of facts, over and above the required minimum probative value. The hearsay rule, the rules of quantity, the rule of the oath and a dozen others, belong here. These two groups together are rules of Probative Policy.

The third group of rules involves for the exclusion of certain kinds of facts extrinsic policies which override the policy of ascertaining the truth by all available means. These rules concede that the evidence in question has all the probative value that can be required and yet exclude it because its admission would injure some other aim more than it would help the cause of truth, and because



as to its admissibility until the final judgment in the case. No doubt that course had advantage and is a proper enough course to follow in certain cases, but having regard to the observations of the Appeal Court in the case of *Jadu Ray v Bhabatarun Nundy*, 17 C 173, I do not think that course is open to me in the present instance", but see *Ramanuj v Dalhousie*, 30 C W N 279 (262). The principle of the Evidence Act differs from the English Law in that it defines the evidence which may be given, so that in order to produce any particular evidence it must be shown to be admissible under some particular section of this Act, whereas the principle of the English Law is to assume that everything is admissible subject to certain exceptions. *Field Esq* 6 Ed p 69. But where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non admissibility. *The Collector of Gwalior v Palalhari*, 12 A 1, *Madhab v Denal*, 21 B 698, *Mosarty v Lodnon C & D Ry Co* L R 5 Q B 314. In the last mentioned case *Lush J* said at p 323 "I also think on further consideration in the evidence was receivable. I had formed no definite opinion on the subject at the trial. It was a new point and I adopted what I considered to be the usual and the safer course where evidence is pressed by one party, and objected by the other, receiving the evidence at the peril of the party presenting it. Under the Evidence Act admissibility is the rule and exclusion the exception." *R v Monapum* 16 B 661 668, see also *R v Uttam Chand* 11 B H C R 121, *Gopee Nath v Anund moore*, 8 W R 169, *Mason v Gohin* 15 W R 490, but see *R v Poribhudas* 11 B H C R 93, *R v Ram Chandra Gound*, 19 B 755, *Gajju Lal v Futeh Lal*, 6 C at p 193, *Hareesh v Charu Mayhe*, 22 W R 355, 356 357.

**Objection.** In England the initiative in excluding evidence is left entirely to the opponent—so far at least as concerns his right to appeal on that ground to another tribunal. The Judge may, of his own motion deal with offered evidence, but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence which is not invoked is waived. *Diaz v U S* 223 U S 450, *Sanger v French*, 235 S W 126. But in India it has already been stated that the Court is bound to exclude evidence of irrelevant facts irrespective of objections by the parties. *Whately Stiles* vol II p 851, see also *Ambai Ali v Lutfi Ali*, 21 C W N 996, *Narahari v Ambabai* 44 B 192, *Sumitra v Ramnagar*, 57 Ind Cis 561, *Damodar v Jodunath*, 91 Ind Cis 149, *Lacharam v Radhachoran* 31 C I J 107. "It is perfectly true" said *Mr Justice Moolerjee*, in *Ambai Ali v Lutfi Ali*, 21 C W N 996 at p 1001, "as pointed out by *Sir Richard Couch*, in *Miller v Madho Das*, L R 23 I A 106 that in erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible." See also *Huak v Bishnu*, 8 C W N 101. The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. *P v Pulambur*, 7 W R Cr 25, see also *R v Chander Kumar* 24 W R Cr 77, *Lukhee v Shunlwee*, 2 W R 252, *R v Kallychurn* 7 W R Cr 2, *R v Kedar Nath* 18 W R Cr 16, *R v Ramgopal*, 10 W R Cr 75, *Petumbar v Rutton* W R (1864) 213.

**Time of objection.** The general principle governing the time of the objection is that it must be made as soon as the applicability of it is known to the opponent. *Wigmore* § 18, *Kissen Kamru v Ram Chaudhri*, 12 W R 13, *Sheetal Pershad v Jummroy* 12 W R 241. For evidence contained in a specific question the objection must ordinarily be made as soon as the question is stated and before the answer is given unless the admissibility is that, not to the subject of the question but to some feature of the answer. *Wigmore* § 18. In *Bullch v Buller* 2 B & C 131 137 *Hoboyl J* said "If the objection was known a priori, it should have been made before the evidence was given. When an irrelevant document is tendered, an objection should be made at that time. Objection as to the mode of proof of a particular document should be taken when it is tendered in evidence. *Abdul Samad v Guncundia* 82 Ind Cis 974 (976) see also *Sundari v Gaganendra* 9 C W N 111. So when such objection is not taken in time it is considered to be

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waved *Kalilnanda v Shivanand*, 63 Ind Cis 625. So when rent receipt were admitted in evidence without objection in the Court of first instance, no objection could be taken in the Appellate Court that they were not properly proved *Rajeswar v Pulin Behary* 25 C W N 581=62 Ind Cis 647, see also *Gunnabha v Rajendra*, 1 C W N 530, *Prianath v Durgataram* 14 C L J 578. "In fact this proposition rests upon a well known principle with regard to the rule of evidence and that is this. Where an objection has got to be taken as to the mode of proof of a particular document, such objection must be taken at the time when the document is tendered for admission, for any lacunae in the mode of proof may then be at once supplied by the party who produces the document and wants to have it proved." *Per Moolerjee J in Abdul Samad v Gunendra*, 82 Ind Cis 971 at p 976, see also *Choom v Nilmadhub*, 41 C L J 374, *Manmatha v Probodh*, 43 C L J 274=99 Ind Cis 279. But irrelevant document does not become relevant for want of objection. *Sumitra v Ramkrishna* 57 Ind Cis 571=5 Pat L J 410.

**Grounds of objection.** In *Bain v Whitehead & F R Co*, 3 H L C 1, 16 Lord Brougham, said "Now it is necessary that when a party excepts to the reception of evidence, to the rejection of evidence, or to the direction of the Judge given to the jury, whatever is the subject matter of this exception, he must state the ground of his exception otherwise he cannot except. If he objects to the reception of A's evidence, he must show why it should not be received as by stating that A is an incompetent witness. If, on the other hand, he objects to the rejection of A's evidence, he must show why it should not be rejected as for instance, that A is a competent witness and that his evidence is admissible and that the rejection of his evidence is contrary to law. In all these cases the ground of objection must be clearly stated and beyond the ground of objection thus stated, the court is not at all bound to look."

**Waiver of objection.** An objection may of course be expressly waived. Of implied waivers, the usual instance is that of failure to make objection at the proper time. The question whether a party is bound by his consent that the examination of witnesses before a Judge should be dispensed with and another method substituted for the Judge's taking cognizance of oral testimony is regulated partly by the Evidence Act and partly by the law and practice relating to the Civil and Criminal Procedure and in the absence of any such law by the discretion of the Court. What is regarded by such procedure is not the law relating to the relevancy of evidence but the law under which the evidence will be taken as contained in O XVIII r 1 of the Civil Procedure Code. The parties have a right to waive such rules of procedure as are intended to protect a personal interest and are not based on public policy. So where the lower Court admitted in evidence on the consent of parties evidence as to the death of a person which could not be admitted in evidence under s 33, it is not binding upon the parties. *Krishna Reddy v Sundara Reddy* (1911) M W N 931.

When the opponent fails to object to the admission of the document, the Court of course, on general principles, a waiver as to the need of any evidence without stating its genuineness, and this waiver is commonly held to extend to the fact of authority of an agent purporting to sign the document for a principal, but not as to the legal sufficiency of the instrument for any purpose. *Hymn v* § 2132. It is a familiar principle that if testimony is offered which is relevant but repugnant to some rule of evidence it must be objected to at once, otherwise the objection will be considered waived. *Barton Coal Co v Cor* 39 M L J 11 M L J 189 (n). But an erroneous omission to object to the admission of testimony which is not relevant does not make it available as a ground of judgment. *B Miller v Mudho Das* 19 A 76=23 I A 106. *Sunder v Shri* 1923 Lab 60. The objections as to the admissibility of evidence will not as a general rule be entertained for the first time in a second appeal. *Lal Shri Ram v Krishnak* 20 M L J 198=101 Ind Cis 518. It is open to parties to consent, or waive objection to the mode in which statements which are admissible in evidence under the Evidence Act should be admitted to the record. When they have so consented they cannot afterwards object. *Gonnabathula v G Chennu*

22 L W 756. The question of the mode of proof is a question of procedure and is capable of being waived by a party. *Mt Bibi Kaniz Zainab v Syed Mobarak* 72 Ind C 18 718.

Where the genuineness of a document relied on by a party was not disputed by the opposite party, and the only question was as to its binding character the opposite party must be deemed to have tacitly waived its proof by consenting to its admission in the first Court and could not be permitted to question its admissibility for the first time in appellate Court. *Inayahara v Ramaswami*, 10 M L J 242. So also where no objection was taken in the Court of first instance to the admission of the copy of a document, it is not competent to the appellate Court to raise and entertain the objection to its admissibility. *Itchunt v Kallani* 5 M L J 81. In *Sayyiduddin v Samiruddin* 72 Ind C 18 985—(1913) A. I R (Cal) 378, *Mt Justice Mulherjee* said, 'We may here point out that although as ruled by the Judicial Committee in *Millet Official Assignee v Babu Madho Das*, 23 I A 106=19 A 76, an erroneous omission in the trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, still, as explained in *Gurindia Chandra v Rajendra Nath* 1 C W N 530, an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when if the objection had been taken in the trial Court it might have been met and the proceeding regularised'. See also *Mamatha v Prabodh* 43 C L J 274. When a document was produced and marked in the presence of the opposite party who took no objection there but an objection was taken in appeal. *Held* that under those circumstances the Court may take it until the contrary is shown that the formal proof of the document was waived by consent of parties. *Collector of Gunjam v Bhumappa*, 24 L W 677.

When documents are admitted in evidence with or without formal proof in the first Court it is not open to the appellate Court to reject the documents as not having been properly proved. *Arjun v Dayanidhi*, 93 Ind C 18, 301=51 M L J 632, *Alfoo v Laburali Ma*, 97 Ind C 18 411, *Abdul Samad v Gwendra* 82 Ind C 18 974=A I R 1925 Cal 452, *Mt Bibi v Syed Mobarak*, 72 Ind C 18 718, *Sudhanya v Gow*, 35 C L J 473=27 C W N 134=62 Ind C 18 86=(1922) Cal 60, *Ali Mohammed v Maharaj Bepari*, 36 C L J 186=64 Ind C 18 266, *Gopce v Narayana Chetty* 43 M L T 448=10 L W 122=1922 M W N 464=31 M L J 125 (H C)=69 Ind C 18 15. If a certain piece of evidence is not admissible the fact that no objection was raised does not make it admissible. *Damodar v Jadunath* 91 Ind C 18, 449, *Arjun v Dayanidhi* 93 Ind C 18 301=51 M L J 637.

## 6 Facts which, though not in issue, are so connected with a

Relevancy of facts forming part of same transaction  
fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places

### Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and groins are broken open. The occurrence of these facts is relevant as forming part of the general transaction though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose and forming part of the correspondence in which it is contained, are relevant facts though they do not contain the libel itself.

(d) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

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**Scope of Sections 6 to 55** The Evidence Act lays down in 6 to 55 certain rules of logic which are directions to the Court as to the cases in which the Court is to consider as a matter of logic that one fact has any relevance or logical bearing on another. The rules of logic are to be distinguished from rules laying down how the materials on which the Court is empowered to base its conclusions—that is how the *legal media concludendi* are to be brought to the cognizance of the Court is the method of proving relevant facts. These rules have reference to the mode in which the Court has to collect the materials for the hypothesis, while the first class of rules refers to the use to be made of the materials, that is the inference to be drawn from the hypothesis. To prove relevant facts parties have unrestricted power to make admissions. But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted the parties have no power to alter the directions given to the Court by the legislature or to empower the Courts to act in a manner declared by the legislature to be illogical. *Krishna Reddy v Sundra Reddy*, (1914) M W N 9

**Scope of the section** Acts, declarations, and circumstances which constitute or accompany and explain the fact or transaction in issue, are admissible for or against either party as forming parts of *res gestae*. *Phip Ps* 46, 13 *Halsbury* § 585. All facts which are parts of the same transaction are relevant to each other so that when one of such facts is in issue, the others are admissible. Such facts which are thus parts of the transaction in issue are generally known as *res gestae*. *H v Ellis* 6 B & C 145, *Carmorthen and Cardigan Rail Co v Manchester and Milford Rail Co* (1873) L R 8 C P 685. But in admitting facts as part of *res gestae* care should be taken that facts which are *res inter alios actae* are not proved. *Hyde v Palmer* 32 L J Q B 126, *Wright v Tatham* 5 Cl & Fin 670 H L, *Agassiz v London Tramway Co* 21 W R 179 (Fos). Relevant facts are usually those which are either the cause or the effect of a relevant fact or a fact in issue (*vide* s 7). But where the inference is wider it may also be drawn from facts which either accompany or explain the transaction in issue. *Rough v Great Western Rail Co*, (1811) 1 Q B 51.

Ordinarily, the acts of strangers to a transaction—*res inter alios actae*—they are called that is things transacted by others are excluded from admission. Thus what others did or said about a particular matter would, *prima facie* be mere hearsay and not be received accordingly. But where thus interwoven with the matter so as to form as it were portion of the transaction itself part as it is technically termed of the *res gestae* it would be admitted as an incident of whole and explanatory of it. This is in truth only the exposition of the main fact itself by the aid of the circumstances which surround it and, is a general principle whatever surrounding circumstances may be necessary to explain the nature of the prominent or principal fact in a case are received as original evidence. *Goodale Ps* 127. These facts when the nature and quality of the act are in question are either to be regarded as part of the act itself or as the best and most approximate evidence of the nature and quality of the act. Their connection with the act either sanctions them as direct evidence or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated. *Stallie on Evidence* p 87.

**Res gestae—meaning of the term**—‘This phrase in one or another form—*res gesta*, *res acta*, *res gestae*—was familiar in classical Latin literature, and may be seen by any dictionary. It is found also in the *Corpus juris*. The meaning of the term seems to have been quite untechnical, it imported simply ‘a fact’, a transaction, ‘an event’. The plural sometimes indicated not so much the plural of the English equivalent—facts, transactions—as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by the singular form—an occurrence, a transaction. ‘Prof Bradley Thayer—’ 15 *American Law Review* 5 81. The term was used for the first time in 1667 in *Ship Money Case* 3 How St Trial 988 where Mr Holborne arguing refers to the truth of an indictment for *res gestae* as this’ *Wigmore* 1767. It was again used in *Horne vols Trial* 25 *Houell’s State Trials* 440 (1794). A letter from a certain society had been sent to in association with which Poole was connected declining

a previous proposal from the latter and Mr Garrow alluded to its admission probably upon the ground that 'it is fit to be received as a part of the *res gesta*' upon the subject'. The phrase is found again in *Hoare v Allen*, 3 Esp 276 (1801) where in an action for seduction of the plaintiff's wife, her statement of her reason for leaving the husband (plaintiff) was admitted by Lord Kenyon as part of *res gesta*. Similarly in *Robson v Kemp* 4 Esp 233 (1802), Lord Ellenborough observed "Where the declaration of the bankrupt is part of the *res gesta* it may be evidence". See also *Hieson v Kinnaird* 6 East 158 (1805). So far as text books are concerned the phrase occurs for the first time in *Dean's Appendix to Pothier on Obligation* where in Vol II at page 217, the author says "In question of fraud or *bonafides* an adequate judgment can, in general only be formed by having a perfect view of the whole transaction which of course including the conversation which forms part of it, and according to the phrase usually applied to his subject the language which is used on any occasion forms a part of the *res gesta*". *Vide American Law Review* Vol XV, pp 351 per Prof James Bradley Thayer.

**Phrase inexact and indefinite** 'This phrase is conceded on all hands is inexact and indefinite in its scope and is ambiguous in its suggestion of reasons for the doctrine. If it were possible to say that it is properly applicable in etymology or in usage to any particular doctrine it would be simple enough to attach this doctrine and to urge the restriction of the phrase to the one meaning. Or if the phrase genuinely indicated some independent principle of Evidence existing in its own right and not otherwise named or numberable nor attributable to any other place in our system of Evidence it would be allowable to preserve the name for that principle. But neither of these things is true. The phrase has nothing to entitle itself on either ground to preservation. It has had various uses. But it is ambiguous and unmanageable in all of them. The doctrines to which it has been applied possess all of them a right to existence under well recognized pre-existing principles and can be explained without a resort to this phrase. No more can be said for it than that it has been much used in the course of the development of some important aspects of two of the doctrines. *Wigmore Et* § 1767. In the first edition of *Phillips' Evidence*, the phrase occurs but in his fourth edition he substituted for it the English word *transaction*.

**Transaction, meaning of** The word 'transaction' is not defined in this Act. But a definition of the word is given in *Stephen's Digest of Evidence*. There the author says "A transaction is a group of facts connected together to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of enquiry which may be in issue. Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay. Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single Judges have given different decisions." *Steph Dig Ev* Art 3. This definition has received judicial recognition in *Cham Mahto v Emperor* 11 C W N 266 (270), *Janala Sahai v Emperor* 31 P R 1914 Cr - 27 Ind C 664 = 16 Cr L J 184. But this definition in spite of judicial recognition is a curious definition. *Stol's Anglo Indian Code* Vol II 851. The word transaction occurs also in Criminal Procedure Code, ss 235 and 279. In connection with s 235 of Cr Pro Code the Joint Committee of 1922 said "We think it would be dangerous if not impossible to attempt any definition of the phrase 'in the course of the same transaction'. An exhaustive definition is not feasible and if the phraseology is altered the Courts would be deprived of the guidance which they now have from a long series of rulings on the point. We do not find that there has been any pronounced conflict of opinion the reason being that the Courts instead of attempting to lay down general principles as a rule discuss each case on its merits. A part of the Select Committee (1922). In this connection it may also be stated that before accepting any definition not given in the Act the Court should remember the following warning given in the *Solicitor's Journal* (Vol 20, 869) and quoted with



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approved by such a great jurist as *Prof James Hadley Thayer* in his Preliminary Treatise of Evidence at p. 190. "A definition is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. And where it is unnecessary to define it is also dangerous because one incorrect definition will confound the correct use, etc." The word transaction is used in a limited sense in illustration (a) of this section and in more general sense in the remaining illustrations of the section. *Queen Empress v Fakirappa* 15 B 491 (196).

**Transaction meaning of the word in ss 235 and 239 of Criminal Procedure Code.** "What does or does not form part of the same transaction may be considered to be question of fact in each particular case. Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there is between these acts proximity of time, community of intention and continuity of action." Per *Cunningham J in Rume Khan v Rajubai* 31 C W N 327, see also *Banga Chandra v Anand* 35 C L J 327. *Amrita Lal v King Emperor* 41 C 957. *Emperor v Madhab Larman* 13 B 117 = 20 Bom L R 607, *Khu lai Mallu v Emperor* 50 C 1001. *Crown v Ghulam*, 1 S I R 73. *Emperor v Lulman* 21 S L R 107. So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction. *Amrita Lal v King Emperor* 12 C 957. In *Reg v Sherwafth* 27 B 135 at p 138 *Chandrasekhar Iyer* observed "Here again the occasions when the two offences were committed were different, but there was a continuity and community of purpose. The real and substantial test then for determining whether general offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not itself necessarily import want of continuity though the length of the interval may be an important element in determining the question of connection between the two. For instance in *Queen Empress v Vajvan* (16 B 414) proximity of time, combined with the close as to intention and similarity of action and result was held to bring several offences as to several fraudulent transfers of property within the meaning of the words 'same transaction' in section 235 of the Code of Criminal Procedure. The word transaction suggests not necessarily proximity of time so much as continuity of action and purpose that is to say it is not necessary that the act should have been committed, all on the same occasion but it is sufficient that though separated by a distinct interval of time they are closely connected by continuity of purpose or progressive action towards a single object. *Emperor v Hari Bhot* 2 N L R 117 = 4 Cr L J 420. The words "the same transaction" in s 239 of the Code of Criminal Procedure Code cannot embrace the examination of all the witnesses throughout a trial but could apply only to the examination of each witness as such separately. *King Emperor v Shue So* 3 L B R 231 = 4 Cr L J 480. Ordinarily theft and the disposal of the proceeds would be parts of the same transaction and as proximity of time between two acts does not necessarily constitute them parts of the same transaction an appreciable interval of time between two acts otherwise connected, does not prevent them from continuing to be parts of the same series of connected events and hence it is not necessary to show that the theft and disposal occurred within a few hours or even a few days of each other. *Nga Nyo v King Emperor* U B R (1907) Cr Pro Code 5 = 6 Cr L J 28. So if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose and such subsidiary acts as would make the accused effect as to constitute in the opinion of the Court one transaction then the accused may be charged with and tried of one trial for every offence committed in such series of act. *Crown v Ghulam* 1 S I R 73, see also *Woodcock v Imp* 18 S L R 199 = 27 Cr L J 357. *Husani Bibi v Emperor* 20 S L I 71 = 27 Cr L J 456. *Emperor v Nga Lu*, 19 Cr L J 34 (Bur), *Sanuman v*

*Emp* 19 A L J 392=22 Cr L J 641, *Krishna Anjan v Emperor*, 8 L W 225=1918 M W N 525 *Gunnant v Emperor*, 13 N L R 35 *In re Chona gudi Venkatadri*, 33 M 502, *Virupana v Emperor*, 28 M L J 397, *Rau Subhag v King Emperor*, 19 C W N 972, *In re Iochley* 13 M 411, *Emperor v Datto Hannant*, 30 B 19, *Tipanidhi v King Emperor*, 5 P L J 11, *Son Dril v Crown* 1 L B R 361 *Mga Tha v Emperor*, 5 Bur L T 101=13 Cr L J 485, *Kushai v Emperor* 50 C 1001, *Paddai v Emperor* 1 Lah 562=21 C L J 626, *Gunnant v Emperor* 13 N L R 35 *In re Gam Malhi* 49 M 71=48 M L J 308=26 Cr L J 1513 *Patil Paban v Emperor*, 26 Cr L J 369 "According to its etymological and dictionary meaning the word transaction means 'carrying through' and suggests we think, not necessarily proximity in time—so much as continuity of action or purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is in the course of transaction" *Emperor v Datto* 30 B 19, see also *Emperor v Ganesh Navani* 14 Bom L R 922=13 Cr L J 533 Acts done in pursuance of a conspiracy must be deemed to be parts of the same transaction *King Emperor v Maung Aung* 1 Rung 604=2 Bur L J 224 The transaction of milking a series of false entries so as to attribute another cause for the death was in continuation of and pursuance to the same transaction of voluntarily causing grievous hurt with the view of extorting confession *Emperor v Balwant* 14 Bom L R 41=13 Ind Cr 825=13 Cr L J 137 Theft of a cart from one house and theft of two bullocks from another house in order to remove the cart were parts of the same transaction *Emperor v Huri Raot*, 2 N L R 117 Criminal breach of trust and falsification of account for the concealment of the same are parts of the same transaction *Emperor v Jogilham* 19 C L J 987 So also causing hurts to two different persons in the course of a riot can be considered as parts of the same transaction *Katuon v Emperor* 39 A 623=15 A L J 544=18 Cr L J 788 Criminal breach of trust and giving false evidence to conceal the same are also parts of the same transaction *Nga Pol v Emperor*, U B R (1897=1901) 31 see also *Emperor v Jiban Krishna* 40 C 318 (criminal misappropriation and falsification of accounts in order to screen the misappropriation), *Bilas v Emperor*, 27 C W N 626 *Emperor v Balwant* 14 Bom L R 41 *Emperor v Srinawan* 11 C W N 715, *Emperor v Jiam* 40 B 97=17 Bom L R 881=16 Cr L J 761

**Transaction**—what facts form parts of A transaction consists both of the physical acts and the words accompanying such physical acts whether spoken by the person doing such acts, the person to whom they were done or any other person or persons. Such words are admissible in evidence as parts of transaction *Thompson v Ticeanton*, Skinner 402 *Coffle* Crs 65, *Illustration (a)* In *treson v Kinnana* 6 East 193 counsel contended "Declarations by the wife upon her elopement from her husband accusing him of misconduct could not be given in evidence against him in an action against the adulterer. In answer *Ellenborough L C J* said "It is not so clear that her declarations made at the time would not be evidence under any circumstance. If she declared at the time that she fled from immediate terror of personal violence from the husband I should admit the evidence though not if it were a collateral declaration of some matter that happened at another time. A transaction may be a continuous one extending over a length of time *Hanson v Haugh* 9 Moore 217 vide also *illustrations (b) (c) and (d)* The case of *R v Fowler*, Stephen 1 shows how the statement of a third party may be relevant in part of the transaction if he is actually present at the time. In that case the question was whether a man had absented himself from the realm "with the intent to hinder his creditors and so brought him self within the Bankruptcy Act. Letters written during his absence indicating such an intention were held admissible in proof thereof. In delivering his judgment *Best C J* said "When these letters are coupled with the fact of his running away in a hurry would not the jury be warranted in finding that he went to avoid his creditors? If so there has been a clear act of bankruptcy. But it has been urged that the second and third letters having been written subsequently to the act of departing the realm were not admissible in evidence. I am clear that they were admissible. *The going abroad was of*

- 6 itself an equivocal act, and where an act is equivocal, we must get at the motive with which it was committed. In ninety nine cases out of a hundred the case can only be got at by the declarations of the party himself. The declarations, in order to be admissible must be made, or the letters written, at the time of the act in question but it is sufficient if they are written at any time during the continuance of the act, the departing the realm is a continuing act, and the letters were written during its continuance. In the same case *Parl J* observed "I am satisfied that declarations made during departure and absence are admissible in evidence to show the motive of the departure. It is impossible to tie down at time the rule as to the declarations, we must judge from all the circumstances of the case we need not go the length of saying that a declaration made a month after the act would of itself be admissible, but if, as in the present case, there are connecting circumstances it may even at that time, form part of the *res gestae*." The declaration however must be connected with the state of the party's mind at the time and in the present instance I think the connection is clearly clear from the admission of the letters. So where the questions were whether a person who had remained abroad for some years had acquired a domicile in the country of his residence letters written by him during such residence showing his intention to remain there permanently, or otherwise would doubtless be admissible as parts of the transaction. *Donceel v Geoghegan* 9 Ch D 155. Acts declarations and circumstances which constitute, or accompany and explain the fact or transaction in issue are admissible for or against either parties as forming parts of *res gestae*. *Phup Pi* 16. But declaration and statements are admitted in evidence as parts of *res gestae* or transaction under two distinct principles. One of these principles establishes a real exception to the Hearsay Rule and sets certain limitations to the kinds of statement admissible under this Exception. The other principle does not establish an exception to the Hearsay rule, but defines those cases to which the rule is in its nature not applicable. *Lide Wigmore* § 1745. One depends for its admission on the principle of spontaneous declaration and the other is part of the *res gestae* on the principle of verbal act doctrine. But acts are not parts of the same transaction unless they were done substantially at the same time although they are similar in other respects. *R v Bridge*, 4 C & P 386. In that case the prisoner was charged with stealing pickled pork, a bowl, some knives and a loaf of bread. He went to the prosecutor's shop, took the pork and ran away with it. In about two minutes he returned, replaced the pork in a bowl which contained the knives and tool lot away. About half an hour later he returned and took the loaf. In delivering the judgment *Littledale* observed "The taking away of the loaf cannot be given in evidence upon the indictment. I think that the prisoner's taking the pork, and returning in two minutes and then running off with the bowl, must be taken as one continuous transaction but I think that half an hour is too long a period to admit of the construction. The taking away of that loaf, therefore is a distinct offence." In *R v Ellis* 6 B & C 145 Collier 63 the prisoner was charged with stealing six shillings milled money, from a till evidence was allowed of the taking not only of the amount but also of other money taken at the same time. *Layde*. In delivering the judgment observed "I think that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all parts of one entire transaction. Generally speaking it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together, and form part of the transaction then the one is evidence to show the character of the other." See also *R v Lealand* 4 F & F 76 *R v Parth*, L R 1 C C R *Rouppell v Hou*, 3 F & F 1. *R v Long* 6 C & P 179 *R v Cobden* 3 F & F 832 *R v Prabalda* 1 B H Cr 90. When the offence under trial is filing a false complaint, which happened at the subsequent police investigation of the complaint forms part of the *res gestae*. *G Venkata Subbiah v Emperor* 48 M 610 = 21 J W 190 = 1925 M W N 68 = 86 Ind Crs 209 = 26 Cr I J 721 = A I P 192. Maf 779 = 48 M I J 195. In an abduction case where the abduction took place at night the search conducted on the next day cannot be treated as a part of

the same transaction *Extrullany Emperor* 91 Ind C 133=26 Cr L J 1553=12 C L J 111, see also *Khu'sullany Emperor* 17 C L J 704, *Pilher Smyth Emperor* 7 Ld L J 133=26 P L R 674=A I R 1925 Lab 778

**Scope and limit of facts forming the res gestae** The act or transaction may be completed in a moment of time or it may be a continuing circum stance it may extend through a period of day or weeks or even months. Sometimes the main transaction can only be established by proving a series of similar facts which may happen either because the nature of the case itself demands cumulative evidence in time or because the similar facts have occurred in which connection in point of time or place or other particulars as virtually to form but one continuous transaction *Thy* 17 88 al *L Griffin* Fines Dec 15 1800 C A cited in *Hil* *Sp'hoarces* 17 Cox 888 *Earl Burnaby* 1901 2 K B 188 *Clark v L* 11 Q B D 92 cited in *Phip* 17 17 If in one of the public trusts there is an unexpected collision between two men entire strangers to each other then the *res gestae* of the collision is confined within the few moments it occupies. When again there is a social feud in which two religious factions as in the case of the *Earl George Gordon* disturbances or of the *Plataleph* riots of 1841 are arrayed against each other for weeks and are so much absorbed in the collision as to be conscious of little else then all that such parties do or say under such circumstances is as much part of the *res gestae* as the blows given in homicides for which particular prosecutions may be brought. *Whart* 17 § 278, *Lake here v Herrick* 49 Ohio St 25, *Lund v Vorhauer*, 101 Mo App 468 (two years) *Smully Williams* 87 Ga 681

In *Rosson v Hugh* 2 Bingham 104 Lord Wensleydale, said "It is impossible to tie down to time the rule as to the declarations." It must be always borne in mind, however that it is the connection with or illustration of the main fact which constitutes the admissibility of this species of evidence. The point is also well illustrated by *Mr Starkie* when he says "If for the sake of illustration, the question for what purpose a sum of money was paid by A to B were material to the issue what A said to B on paying the money would be most important, it may be conclusive evidence. But if A and B were strangers to the cause and the fact of payment were not material to the issue then although A at the time of payment made a declaration as to the truth of a fact material to the issue as that he had lost a wager betted on that fact, the declaration would neither be evidence in itself nor as explanatory of the act of A, which as being the act of a stranger was also inadmissible. In *Wright v Tatham*, 7 A & L 313 Mr Justice Colman observed "Where an act is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue and when the declaration *per se* is inadmissible in which it has been held that the union of the two has rendered them admissible."

The expression *res gestae* as applied to a crime means the complete criminal transaction from its beginning or starting point in the act of the accused until the end is reached. What in any case constitutes the *res gestae* under which it is said that all facts which are part of the *res gestae* of a crime depends wholly on the character of the crime and the circumstances of the case. *State v Foley* 113 La 52=101 Am St 493. It frequently happens that, as evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offence charged the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of that chain consists of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged there is no reason why the Court should exclude those circumstances. They are so intimately connected and blended with main facts adduced in evidence that there is no reason why the criminality of such intimate and connected circumstance should exclude them more than other facts apparently innocent. Thus if a man be indicted for murder and there be proof that the instrument of death was a pistol, proof that that instrument belonged to another man, that it was taken from the house the night preceding

the murder, that the prisoner was there on that night and that the pistol was seen in his possession on the day of the murder, just before the fatal act, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction and whether they are perfectly innocent in themselves, or involve guilt, make no difference as to their bearing on the main question which they are adduced to prove." *Waller's Case*, 1 Leigh (1st) 557, *Sprinkle v United States* 141 Fed. 811. And it is a general rule that evidence of connected, precedent, or surrounding circumstances is proper to show the probability that the principal fact has happened in all cases where it may naturally be assumed that a connection exists between the main fact and the subordinate fact. *Powers v People*, 42 Ill. App. 427 (431), *State v Ryder*, 80 Vt. 422.

**Written declarations as part of res gestae.** In *Testin v Arnold*, 84 L. R. B. 2214 where the question was whether written admission of negligence by the driver after collision can be part of a *res gestae*, *Bailhache J* said: "There is some difficulty in deciding in a particular case whether a given statement is part of *res gestae*. This difficulty arises from the fact that the nature of *res gestae* varies greatly. Sometimes the *res gestae* are acts only, sometimes acts and words combined, sometimes words only, and sometimes a whole transaction which may include letters and memoranda. In this case the *res gestae* was a single act—namely, the collision with the motor car. In such a case words, even spoken words, do not become part of the *res gestae*, unless they were made at the time and are the natural consequence of the collision—words which spring out of the fact of collision, so to speak—inevitable and almost without the exercise of the will of the speaker, and are at any rate spontaneous. The words must of course be strictly germane to the collision. Spoken words are not relied on here, but if I have correctly described the characteristics which words must have in order to form part of the *res gestae* of the collision it follows that a written statement can never do so. It lacks all the characteristics except two—namely, that it was made at the time and germane to the collision. This would be true even if this particular memorandum had been written by the driver of the traction engine, it is *a fortiori* so when, as in this case, the driver of the motor car wrote the memorandum of admission of liability of the driver of the traction engine to sign, and the driver of the traction engine put his cross to it, and the driver's mate signed the driver's name. I hold that this memorandum so signed was no part of the *res gestae* of the collision."

**Basis of the theory.** The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others, and each during its existence has its inseparable attribute and its kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature. *1 Greenl. Ev. § 108*. *Wharton* defines *res gestae* as "those circumstances which are the undesigned incidents of particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or by standers. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act, necessary in this sense, that they are part of the immediate preparations for or emanations of such act and are not produced by a calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary warnings seeking to manufacture evidence for itself. Incidents that are immediately and unconsciously associated with an act, whether such incidents are doings or declarations become in this way evidence of the character of the act. See also *State v Rome* (N.J.) 72 Atl. 39. So long as these circumstances do not consist of declarations and statements that are introduced as a matter of course proved by either side without question, unless indeed they get too far away from the main fact, when under rules having no relation to the subject of hearsay they are excluded. It is when they comprise statements, exclamations, answers to questions, and other verbs

utterances by the participants in the act or event, that they occupy the attention of the Court. If it had been possible to treat verbal utterances made under such conditions *purely as acts, and not in any sense as evidence of the things stated (vide infra)* the subject of *res gestae* would not have belonged under the head of exceptions to the Hearsay rule. But declarations of this sort were urged upon the Courts most strongly when they were wanted and needed as evidence of facts to which they referred, and the Courts received them as evidence, and thus created another exception to the rule against Hearsay. *Insurance Co v Mosley* 8 Wall U S 397, *Waldele v New York*, 17 Am Rep 41. The ground of reliability upon which such declarations are received is their spontaneity. They are the extempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false and misleading statements, they exhibit the mind's impression of immediate events, and are not narratives of past happenings, they are uttered while the mind is under the influence of the activity of the surroundings. *McKelvey's Evidence* pp 344, 345

Facts forming part of the same transaction—classification of Acts, declarations, and circumstances which constitute, or accompany and explain, the fact or transaction in issue, are admissible for or against either party as forming parts of the *res gestae* *Phip Et 3rd Ed 46*

**Constituent facts** To prove the stealing of gas from the prosecutor's main on a certain day, by means of a pipe inserted in the main—the abstraction of gas intermittently for several years by the same method is admissible, as forming one continuous taking *R v Firth* 38 L J M C 54. So, as to the continuous taking of coal from a mine for several years (*R v Bleasdale* 2 C & K. 765), or a continuous false representation *R v Welman*, 22 L J M C 118, *Phip Ev 54*. See also illustrations (c) and (d). Where the charge is that the accused is a common cheat, the facts that they falsely represented themselves to be persons of property to several persons on different occasions are admissible *R v Roberts*, 1 Cmp 399.

**Accompanying facts** Facts, although not facts in issue, may be part of it, in the sense that they accompany, and tend to explain the main fact. *Phip Ev 47*. In a criminal case this class includes other criminal acts which are an inseparable part of the whole deed. In a case of stealing bank notes from a letter, the stealing of others from another letter, and replacing them by the ones in issue, is admissible as a part of the transaction *R v Salisbury*, 5 C & P 155. In the case of a burglary, evidence of three other burglaries by the defendants on the same night was admitted, partly because "so intermixed that it is impossible to separate them" and partly to explain the disposal of the property taken *R v Cobden* 2 F & F 833, *Wiley*, 2 Lcr 985. In the latter case Lord Ellenborough said "If several and distinct offences blend themselves with one another, the detail of the party's whole conduct must be pursued." See also *R v Ellis*, 6 B & C 148. In *R v Hunt*, 3 B & Ald 566, the question was whether a certain meeting was seditious. The following facts were held admissible as parts of the transaction: the fact that bodies of men, organised in the same manner, had drilled at different places several days before the meeting and afterwards came from different quarters to attend the meeting on their way acting riotously and using threatening language. Upon questions of bankruptcy, where the intentions of the alleged bankrupt are often material to be enquired into it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature equivocal. Thus it has been held, that a declaration accompanying a purchase of goods is admissible evidence to show whether a person sought is living by buying and selling *Gale v Halfing* 3 Stark C 58. "In a case in which murder and robbery have been shown to form parts of one transaction it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on a charge of robbery would similarly be evidence against him on a charge of murder." *Queen Empress v Suami*, 13 M 426 (432).

**Declarations accompanying acts** Declarations which accompany a fact in issue or relevant facts become admissible under this section, if they form part

6 of the same transaction *Wright v Tatham* 5 C & F 670, *R v Bliss* 5 C & F 550 *Hyde v Palmer*, 32 L J Q B 126, *Gresham v Manning* 1 R 1 Cl 125 "Where an act done is evidence *per se* a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act." *Collman J* in *Wright v Tatham* 5 C & F 607 = 7 A & A 361 In the same case at page 693 of 5 C & F *Coleridge J* observed "The act itself being admissible whatever accompanies it and serves to explain its character is relevant and admissible also So when the act of a party may be given in evidence, his declarations made at the time and calculated to elucidate and explain the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence Such a declaration derives credit and importance as forming part of the transaction itself *Lund v Tynemouth* 9 Cus 12 Statements made by members of an unlawful assembly of their determination to force their way through a police cordon is evidence of *res gestæ* and is admissible to prove their intention *Maung Tal v Emperor* 3 Rung 372 = 90 Ind Cas 918 = A I R 1925 Rang 354

**Conduct to be characterized by the words must be independently material in the case** "Where an act done is evidence *per se*, a declaration accompanying the act may well be evidence, if it reflects light upon or qualifies the act But I am not aware of any case where the act done is in its own nature irrelevant to the issue and where the declaration *per se* is inadmissible in which it has been held that the union of the two has rendered them admissible" *Per Collman J* in *Wright v Tatham* 7 A & L 361 see also *Patten v Ferguson* 18 N H 58 *Wright v Tatham* 5 C & F 689 *Pinney v Jones*, 64 Coun 545, *R v Bliss*, 5 C & F 550, *Hyde v Palmer*, 32 L J Q B 126

**Conduct must be equivocal** The utterances are admitted merely to assist in completing or giving legal significance to the conduct Hence the conduct must be equivocal or incomplete as a legal act, before the utterances can be admissible *Wigmore* § 1774 *R v Bliss* 5 C & F 550, *R v Hamwright* 13 Cox 171 "Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best determined by the expression accompanying them. Wherever therefore, the demeanour of a person at a given time becomes the object of inquiry his expressions as constituting a part of that demeanour, and as indicating his present intent and disposition cannot properly be rejected in evidence as irrelevant The proposition that a declaration accompanied by an act is admissible is only correct where the expressions are demonstrative of the nature of the act itself *Evan's Notes on Pothier*, II, 242, *Cooper v Salt*, 63 Ala 80 *Shuel v Vanderenter* 4 Ia. 264 In *Corn v Chance* 174 Mass 243 *Holmes C J* said "It is not the law that any and all conversation which happened to be going on at the time of an act can be proved if the act can be proved" "If this limitation is not attended to the utterances come in with the practical effect of a hearsay assertion, and the present principle becomes merely a pretext for using hearsay" *Wigmore* § 1774 So also in *Rauson v Haigh*, 2 Bing 99, where the question was whether a man had absented himself from the realm with the intent to hinder his creditors letters written by him during his absence were put in evidence *Best C J* in admitting the letters observed "The going abroad was itself an equivocal act, and where an act is equivocal we must get at the motive with which it was committed" But in England declarations accompanying acts are admissible even where the act in question is not equivocal but only to explain the act in question *Wright v Tatham* 7 A & E 361, *Lend v Tynsborough* 9 Cus 42

**Words must merely aid in completing the conduct** It follows also, as a necessary deduction that the utterances must be such as serve the aforesaid purpose namely, give more definite significance to the equivocal or indefinite conduct, by adding a missing part They must be such as do merely this, and not more *Wigmore* § 1775 "The common phraseology," said the learned author however is here so loose and inclusive that utterances may be held admissible which do not merely complete and define the very act by serving

**S 6** or something said while something was being done, but something said after some thing done. It was not as if, while being in the room, and while the act was being done she had said something which was heard. When the witness was called. She was first asked as to the circumstances, and stated that the deceased came out of the house bleeding, very much at the throat, and seeming very much frightened and then said something and died in ten minutes. It was then proposed to prove what she said, but *Coelburn C J* said it was not admissible. Anything he said uttered by the deceased at the time the act was being done would be admissible, as for instance if she had been heard to say something as "Don't hurry." But here it was something stated by her after it was all over whatever it was, and after the act was completed. The propriety of his decision was the subject of two pamphlets, one, by W. Pitt Taylor, who demed the other by the Lord Chief Justice who maintained it. *Steph Dig Fe p 5*. This decision is thus explained by *Prof Wigmore*—Of this ruling it may be said (1) From the Verbal act point of view, the declarations did not accompany the fact, did, was not contemporaneous and therefore was rightly excluded, from the same point of view, moreover, a declaration by one person about the deed of another could not possibly be received, (2, as involving a question under the exceptions for Spontaneous Exclamations (*vide infra*), the ruling in *Beddingfield's Case* is plainly erroneous and would almost certainly not be followed in this country, the facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. The arguments on the ensuing controversy between Chief Justice Coelburn and Mr Taylor dealt indiscriminately with the Verbal Act precedents as well as with others more germane but without attempting to examine the merits of these arguments, it is sufficient to say that the general practice in England up to that time—the practice which did not lead to rulings published in law reports—seems to have been very liberal. In the *Palmer poisoning trial* (1856. Notable British Trials Ser.) some of the most damaging evidence, admitted without question by any one, is supportable only on the liberal principle of Spontaneous Declarations, for example, when the deceased was asked after recovering from one of his attacks of convulsion "What do you think was the cause of that, Mr Cool?" he replied, "the pill that Palmer gave me at half past ten o'clock." In England *R v Beddingfield*, is not considered a precedent. Such evidence is clearly admissible in India under Section 6 illustration (a) (*Vide Sarat Dhobai 10 C 302 Chann Mahto v Emperor, 11 C W N 266*) and under section 32, clause (a) as well as under clause (3) of section 21.

**Application of Verbal Act doctrine in cases of sale.** "The declarations of a party when they tend to explain the fact and are necessary for that purpose, might be given in evidence. As in the case of tender, the declaration of the party of the purpose for which the money is offered is a part of the *res gestae* and must be proved otherwise the transaction cannot be understood." *Swiff's Ex 130*. So a declaration accompanying a delivery of money becomes admissible where it shows the nature of the transaction because it helps 'to ascertain with what motive an act was done' *Cleuser v Samuel 15 N Br 58, Strange v Donohue, 4 Ind 328*.

**Possessor's declaration in cases of adverse possession.** The declaration of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is as part of the *res gestae*. Possession unexplained, is *prima facie* evidence of ownership in the possessor. But such possession is entirely consistent with ownership in another and therefore the conduct and declarations of the possessor may be material to show the nature of his possession whether as owner part owner or agent. *Butt Jones § 301*. So also in cases of adverse possession by a person, all declarations by the occupant importing a claim of title in himself, are admissible as verbal parts of his act of occupation serving to give it an adverse colour. *Wigmore § 1775*. In *Mc Bride v Thompson 8 Ala 650 653 Collier C J* said "It is not to be understood that such declarations are admissible to every conceivable extent. True the affirmation of the party in possession that he held it in his own right or



under another is proper evidence is part of *res gestae*, which *res gestae* is his continuous possession. But his declarations beyond this are no part of the subject matter, or thing done and cannot be received as such. While it is allowable to prove statements of one in possession is explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title,—as, that it was acquired by him *'bona fide'* and for a valuable consideration, was paid for by the money of a third person or his own etc. This, we have seen in-tend of being a part of the *res gestae*, would be something beyond and independent of it. But declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof. *Webb v Richardson* 42 Vt 165 (172). It is the intent to possess, with which the acts are done that gives them their character. So declarations which are made at the time of the act done and which are calculated to unfold its nature and quality are admissible in evidence. *Stephen v Mcclay* 36 I A 661. "The limitation of this doctrine must, however, be observed. It assumes that adverse possession is in some way material under the issues of the case (forcible entry, pre-emptive title, or otherwise) and that the declarations were made when in possession, and that they were not offered except as colouring the occupation. Subject to these limitations, the use of such declarations for this purpose is never disputed." *Higmore* § 1778. Where the occupier is the lessee of the person claiming adversely, his declarations to the effect that he holds the land as a tenant of the person who holds the land in adverse possession are also admissible. *Holladay v Rakes*, cited in 2 T R 55. The reason for such admission is that the 'possession of the tenant was connected with that of land lord, which was adverse'. *Doe v Williams*, Cowp 21, see also *Davies v Pierce*, 2 T R 53, *Peaceable v Watson*, 4 Tunt 16, *Doe v Green*, Gow 228, *Carne v Nicoll*, 1 Bing N C 430.

**Declarations affecting revocation of will** "All acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances in which it occurred, and the declarations of the testator with which it may have been accompanied, for unless it be done *animo revocandi* it is no revocation." *Per Wilde J in Pouell v Pouell* L R 1 P & D 212. So declarations of the testator in such cases are evidence where they show the *quo animo*. *Dan v Brown*, 4 Cow 490.

**Declaration of a testator** Statements made by the testator at the registration of the will and in judicial proceedings relating to the properties comprised in the bequest are receivable in evidence under this section as parts of *res gestae*. *Muthu Krishna v Ram Chandra*, 47 Ind Cas 611 (611)—37 M L J 489.

**Declarations of a bankrupt** On this principle the declarations of bankrupts on going from and returning home have been received for the purpose of showing the motive and cause of absence although a considerable time had elapsed. *Bateman v Bailey* 5 Term Rep 512. In *Rauson v Haigh*, 2 Bing 99, the question was whether a man had absented himself from the realm "with the intent to hinder his creditors, and so brought himself within the Bankruptcy Act". Letters written during his absence, indicating such an intention, were held admissible in proof thereof. *Best C J* in delivering the judgment observed "When these letters are coupled with the fact of his running away in a hurry would not the jury be warranted in finding that he went to avoid his creditors? If so there has been a clear act of bankruptcy. But it has been urged, that the second and third letters, having been written subsequently to the act of departing from the realm were not admissible in evidence. I am clearly of opinion that they were admissible. The going abroad was itself an equivocal act and where an act is equivocal, we must get at the motive with which it was committed. In ninety-nine cases out of a hundred, this can only be got at by the declarations of the party himself. The declarations in order to be admissible must be made or letters written at the time of the act in question, but it is sufficient if they are written at any time during the continuance of the act, the departing the

**S 6** real is a continuing act and these letters were written during its continuance.' Twenty two years before this case *Lord Ellenborough L C J* in *Robt v Kemp* 1 Esp 233 laid down the rule as follows "Where the declaration of the bankrupt is part of the *res gesta* though it may show the intention of the act and thereby constitute an act of bankruptcy it may be evidence." Similarly in *Pilling v Gyle* 9 Bing 349 *Lindal C J* observed, "When a bankrupt has done an equivocal act his declarations accompanying that act are admissible to explain his intentions as where he has left his dwelling house, which he may have done either in furtherance of his business or to avoid payment of a debt." In *Peru & R Co 1 Q B 51* *Denman L C J* observed "The act and the intention were both necessary to be proved. The substantive act proved *alunde* is the departure from home that is equivocal the declarations made during the continuance of that act shows the intention with which it was done." See also *Carters v Gregory* 8 Pick 168. Where the question is whether security in bankrupt must be admitted not so much is declarations but as part of his conduct from which inference is to be drawn that the security was given without prudence. *Per Bosanquet J* in *Ridley v Gyle* 9 Bing 349.

**Declarations as to Domicile** If the questions were, whether a person who had remained abroad for some years had acquired a domicile in the country of his residence letters written by him during such residence, showing his intention to remain there permanently or otherwise would doubtless be admissible as part of the transaction. *Doucet v Geoghegan*, 9 Ch D 157, *Cockle Cas* 19. "That such declarations says *Prof Wigmore* in the ordinary case that is, when made not prior to removal, but during removal or settling cannot conceivably be governed by the Verbal Act doctrine, is more than ought to be asserted. But having regard to the element of intent as treated in the law of domicile it may better be regarded as a separate and independent element material for its own sake and not merely as appurtenant to an act, and therefore may be shown by declarations admissible under the exception for statement of a mental condition." *Wigmore* § 1784.

**Knowledge, belief good faith etc.** A person's knowledge of a given fact may be shown either by his own declarations, or those of others conveying notice or information to him provided that the existence of the fact be first proved *alunde*. *Thomas v Connell* 4 M & W 267, *Ischer v Cocks* M & M 373, *Phip Ev* 53 see also *Fabrigas v Mostyn*, 20 How St. Tr 137. Such statements need not of course be made contemporaneously with the happening of the fact, nor even at the precise time when the existence of the knowledge is in issue, since previous knowledge may be evidence of subsequent knowledge though not *vice versa*. *R v Gunnell*, 16 Cox 154, *R v Kaye*, 16 Cox 922, 293 N. *Phip Ev* 53.

Where the question is whether a party has acted prudently, wisely or in good faith the information on which he acted whether true or false is original and material evidence and not hearsay. *Friend v Hamill*, 34 Md 298.

**Statements as regards state of health and bodily feelings** In *Attor v Annard*, 6 East 188 the action was upon a policy of insurance on the life of the wife of the plaintiff. The only question to be decided in that case was whether the statement of the insured's good health given at the time of effecting the policy was false. The Court in that case admitted evidence of a friend to whom the deceased stated that she was in a bad state of health. *Lord Ellenborough* in delivering the judgment observed "The question being what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain her own account of the cause of her being found in bed at an unreasonable hour with the appearance of being ill. She was questioned as to her bodily infirmity. She said it was of some duration several days. What were the complaints what the symptoms what the conduct of the parties themselves at the time are always received in evidence upon such inquiries and must be resorted to from the very nature of the thing. The substance of the whole conversation was that the wife had been ill at least from the 9th of the 9th of

November when she was examined by the surgeon and certified to be in good health, down to the day when the conversation took place, and those appearances were exhibited to the witness, and in that view I think the evidence was unexceptionable" See also *R v Nicholas*, 2 C & K 246 *R v Gloster*, 16 Cox 46

**Declaration by accused found with stolen goods** On a charge of larceny, when the accused is found in possession of the stolen goods and this circumstance is offered against him the accused's use of his own declaration in exoneration may be treated from the point of view of several principles. *Higmore* § 1781. In *R v Abraham* 3 Cox Cr 430 which was a case of burglary the defendant had said, before suspicion existed that he found them in a field. *Alderson B* said that if he had given such an account of his possession of the stolen property to his neighbours, before suspicion existed or search made he had not the slightest doubt of its admissibility. See also *R v Crouhuist* 1 C & K 370, *R v Smith* 2 C & K 207 *R v Evans* 2 Cox Cr 270, *R v Wilson* 2 F & F 183, *R v Exall*, 4 F & F 922 (929)

## ILLUSTRATIVE CASES

### Admissible

(a) In the matter of the *Petition of Sarat Dhobni* 10 C 302, the only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement by the person injured to a third person immediately after the commission of the offence. The prisoner did not when the statement was made, deny that she had done the act complained of. The only question was whether the evidence was relevant under s 6. In delivering the judgment, *Judge J* said "What therefore we have really to consider is whether the evidence is admissible under the Indian Evidence Act and having given to the matter my most careful consideration I have come to the conclusion that it is admissible. It is clear from the additional evidence now submitted by the Sessions Judge that the statement made by the girl was made in the presence of the prisoner and almost immediately after the infliction of the injuries by the tongue. I think, therefore that it falls within the purview of s 6 [see illustration (a)] of the Evidence Act.

In *Rex v Foster*, 6 C & P 325 before three learned Judges—*Parke* and *Patterson JJ* and *Gurney B*—the prisoner was charged with murder in a killing of a certain person by driving a cabriolet over him. A witness was called as a witness and he said that he was driving his wagon and that he saw the cabriolet driven by it a very rapid rate but did not see the accident and then he went on to say that immediately after, on hearing the deceased groan, he went up to him and asked

### Inadmissible

(a) In *Cham Mahto and ors v The Emperor* 11 C W N 266 a chowkidar deposed that one Gopal ran up to him and stated that he had seen the accused persons murder his mistress whom he had met by assignment and that he had run away from the place of occurrence to save his life. What interval of time passed between the murder and the alleged statement did not appear. In declining this evidence as inadmissible *Hobinwood and Miller, JJ* said "We are also of opinion that the statements of Gopal are not admissible against the accused. They are hearsay and proved only by those who heard them. They are not made in the presence of the accused. Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act. Other exceptions could not and should not be added. The learned Sessions Judge has relied on section 6 of the Evidence Act and illustration (i) to it and also *Sarat Dhobni's Case* 10 C 302. The facts of the case of *Sarat Dhobni* are very clearly distinguishable. There the person who made the statement was dead and she was the victim. The statement in that case was closely bound up with the occurrence and on the facts proved the learned Judge held that it was also admissible under s 6. In order to make the statement of a bystander admissible and Gopal must be supposed to be a bystander, it must have been made as contemplated by section 6 and illustration (a) to it, at the time the transaction was taking place.

## S 6

## Admissible

him what was the matter. It was objected that what the deceased said in the absence of the prisoner is to what had caused the accident was not receivable in evidence, but the three learned Judges agreed that under the circumstances it ought to be received. See also *Mason v Kinnand*, 6 East 193.

In *Thompson v Traction*, Slender 402, tried before Chief Justice Holt, sitting at Nisi prius it was held that what a woman said immediately on a hurt being received by her and before she had time to contrive anything for her own advantage might be given in evidence. This rule is there stated to rest on the absence of time or opportunity for concoction.

In *Reg v Lanny* 6 Cox C C 177, at a trial for murder, a girl heard a cry and then found the deceased weak and injured and he made a statement immediately on her coming up to him. Chief Justice Mohan admitted it as a part of the *res gestae*.

In *Hutchins v Railroad Co*, 128 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure to let down the step. As she fell she exclaimed "yes let down the step after I fall." The declaration was admitted as part of *res gestae*.

In *R v Northcott* (1916) 1 K B 347, which was a case for indecent assault a statement made in answer to an imperative question was admitted.

## Inadmissible

or so shortly before or after it as to form part of the transaction. If the transaction has terminated and the statement is made, the statement is irrelevant. The admissibility is dependent on continuity. The statement to be relevant must be made when the transaction is in progress. When the transaction is concluded, the statement of a bystander is clearly inadmissible under the section. In fact it would be dangerous to accept the statement of a bystander made after the conclusion of the transaction, when an interval has elapsed disconnecting the thread of the transaction. In the present case Gopal, if he made any statement, made it after the transaction was over. We do not exactly know what the interval between the murder of Lily and Gopal's statement to the Chowkidar was. Gopal was not then in such condition of mind as to exclude the supposition of his fabricating evidence or his being tutored. The evidence does not make out his state of mind to be such as the Sessions Judge describes it to have been. He was perfectly in his senses at the Chowkidar's and Maniram. He talked quite sensibly and Maniram did not find any peculiarity in his mental or physical condition. We can not therefore hold that his statements are admissible." See also *Joshi Sahai v Crown*, 34 P R 1914 Cr = 27 Ind Cas 664 = 226 P L R 1915.

Where one of the prosecution witnesses, stated that one of the accused went to him after the murder and admitted that he had killed the deceased and was prepared to confess, and the witness further stated that he went to the shop at once and there heard of the by standers talking that 4 persons had committed the murder, and this portion of the evidence was admitted by the Sessions Judge under s 6 illustration (a). On appeal the High Court held this evidence not to be admissible. *Polhor Singh v Emperor*, 7 Lah L J 436 = 26 Punj L R 674 = A I R 1915 Lah 578.

The statement of a person not examined as a witness through the mouth of a witness cannot be evidence as part of the *Res gestae* if the statement though made at the time of the occurrence was not in respect of the occurrence itself but with regard to an event which took place a year ago which was altogether a different action.

Admissible.

Inadmissible

S 6

*Ahmaduddin v Emperor* 12 C L J 701 = A I R 1926 C 139 = 73 C 372 = 92 Ind C 112 = 27 Cr L J 266

In the case of *Director of Public Prosecution v Christie* (1914) A C 518 = 3 L J K B 1097 the respondent was charged with an indecent assault on a child of tender years. At the trial the child was called as a witness and gave evidence not on oath under the provisions of the English Children Act 1908 s 30. The mother of the child and a police constable were called to give evidence of statements made by the child very shortly after the commission of the offence identifying the prisoner as the person who had committed the assault and giving particulars of it. To this the accused replied, "I am innocent." In delivering the judgment *Lord Atkin* said: "The boy's statement was so separated by time and circumstances that it was not, I think, admissible as part of the *res gestae*." see also *R v Thomson* (1912) 3 K B 19, *R v Osborne*, 1905, 1 K B 551.

On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut and was speechless and that she said something immediately after coming out of the room, and a few minutes before she died—the question being whether it was murder or suicide. *Held* that the statement was not admissible as part of the *res gestae* the transaction being considered over. *R v Bedingfield*, 14 Cox 341 per *Cockburn C J* after consulting *Mumby* and *Field JJ*. See also *R v Goddard* 15 Cox 7. Where *Haulins J* rejected a somewhat similar statement made ten minutes after the injury and *Gilbey v Great Western Ry* 102 U T 202.

A is charged with wounding B with a stone. Testimony of B that immediately after he was struck a lady going past pointing to the prisoner's door, said though not in prisoner's hearing, "the person who threw the stone went in there" held inadmissible as hearsay. *R v Gibson*, 18 Q B D 537, see also *Reg v Hainwright*, 13 Cox C C 171, *Reg v Pool*, 13 Cox C C 172n.

S 6

## Admissible

(b) Statements made by members of an unlawful assembly of their determination to force their way through a police cordon is evidence of *res gestae* and is admissible to prove their intention *Maung Fol v Emperor* 3 Rang 352=90 Ind Cas 918=A I R 1925 Rang 54

## Inadmissible

(b) On a charge of treasonable conspiracy, declarations made out of Court by the prisoner that "when he planned a certain convention, he had not intended to destroy the king and the government" are inadmissible *R v Hardy* 21 How St Trial 1094 The reason for rejection is thus stated by *Eyre C J* "Since, if it were otherwise, every man if he were in difficulty, or in view of one, might make declarations to suit his own case *Philp Ev 3rd Ed 61*

(c) Where a person was charged with having received illegal gratification under s 161 of the Penal Code on three specific occasions in a certain year, from a firm, held, evidence of similar but unconnected instances of receiving illegal gratification from the same firm in subsequent years is inadmissible under ss 5-13 of the Evidence Act *Empress v Jagannath*, 6 C 655=8 C L R 197

**Declarations under this section, whether an exception to the Hearsay Rule** The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the speaker becomes the basis of our inference and therefore the assertion can be received only when made upon the stand, subject to the test of cross examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted but without reference to the truth of the matter asserted the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case, but if it is not received this is in no way due to the Hearsay rule. For example in a prosecution against a defaulting embezzler *Doc*, it is desired to show that after leaving his employment he concealed himself and passed under a false name, here his statement 'My name is Roe' is not offered to evidence that his name was in truth Roe, on the contrary it will be shown that his name was Doc and the statement is not used as hearsay. Or on an issue of insanity it is offered to show that the party said "I am the Emperor of Africa" here the utterance is not offered as evidence that he was in truth the Emperor but on the contrary as circumstantially indicating his mental aberration. Again in an action upon a warranty of a horse it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old he has not offered the defendant's statement with any view to using as evidence of its truth, but with just the contrary purpose. So also in an issue of mitigation of damages in an action for battery the defendant offers to prove that the plaintiff just before the assault, provoked the defendant by a remark that he was a liar here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted he would be much disappointed if they should accept it in that a part, his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it. The prohibition of the Hearsay rule then does not apply to all words or utterances merely as such. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose namely as a statement to evidence the truth of the matter asserted *Wignmore* § 176b *Rule 41* of the Evidence Act

When a declaration accompanies an act or conduct it is admissible under this section if it explains the act or conduct *Hyle v Palmer* 20 L J Q B

126, *Graham Hotel v. Manning* I R 1 C L 125, *Agassiz v. London Tram Co.*, 21 W R 199, *Phup Fv 3rd El* 48. Such declarations attach to the act or conduct so as to have legal effect. The conduct or act standing alone has no definite significance or at best is equivocal, and its whole legal purport or tenor is to be ascertained precisely by considering the words accompanying it. These declarations are not assertions to evidence the truth of the matters asserted. So they do not fall within the rule of Hearsay evidence. These utterances are admitted in evidence not in violation of section 60 of the Evidence Act but as verbal part of the Act, or in the common phrase as a verbal act. *Inde Wigmore* § 1772. "Declarations of a party said *Clifford J* in *Insurance Co v. Morley* 8 Wall 411, 'to a transaction, though he was not under oath if they were made at the time any act was done which is material as evidence in any issue before the Court, and if they were made to explain the act or to unfold its nature and quality and were of a character to have that effect, are treated in the law of evidence, as verbal acts and as such are not hearsay, but may be introduced, with the principal act which they accompany and to which they relate, as original evidence because they are regarded as a part of the principal act and their introduction in evidence is deemed necessary to define that act and unfold its nature and quality.'

**Verbal Act doctrine—Strict interpretation of—much valuable evidence is left out.** From the illustrative cases given above it is clear that much valuable evidence cannot be admitted if the Verbal act doctrine be too strictly followed as in *R v. Bellingfield*, 14 Cox 341. This case was the subject matter of much controversy between *Cockburn C J* who decided the case and *Justice John Pitt Saylor*, the well known author of *Taylor on Evidence*. The rule on this point is now obtained in England and is thus stated by *Phupson* in his *Law of Evidence* "Acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue are admissible for or against either party as forming parts of *res gestae* the main conditions being that the matters tendered should form the natural incidents of the act substantially contemporaneous with it and qualify, explain or complete it in some material respect." *Phup El* 44—46. *Roscoe Cr Ev* 26.

But in admitting such evidence, both in England and in India confusion is made between declarations which are verbal acts and declarations which fall within the Hearsay rule and as such can not be admitted in evidence unless it is admissible under some other section. In India this confusion is mainly due to illustration (a) to this section. The illustration runs as thus "A is accused of the murder of B by beating him. Whatever was said or done by A or B or by the by standers at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact." In *Chain Mahto v. Emperor* 11 C W N 266 at p 270 the Court said "We are also of opinion that the statements of *Gopal* are not admissible against the accused. They are hearsay and proved only by those who heard them. They were not made in the presence of the accused. Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act. Other exceptions cannot and should not be added." Then it adds at p 271 "In order to make the statement of a by stander admissible and *Gopal* must be supposed to be a by stander it must have been made as contemplated by section 6 and illustration (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made the statement is irrelevant. It is submitted that the first part of their Lordships' judgment contradicts the latter part of the same judgment. In the first part it is distinctly stated that *Gopal's* statement violates the Rule against Hearsay and as such it should not be accepted. But in the latter part it is hinted that had the statement been made during the continuance of the transaction the statement would have been admissible under this section. So illustration (a) must be so interpreted as to admit declarations which do not violate the Hearsay rule. Therefore it is clear that under this section such declarations are admissible if they are not in violation of the Hearsay rule as laid down in s 60. Under this section, declarations which are verbal acts and which explain or elucidate the conduct of a party the conduct being independently material to issue and equivocal, are admissible in evidence if they accompany the conduct. *Wigmore* § 1772.

**S 6** Declarations falling under Verbal Act doctrine must not be confused with Spontaneous Exclamations. Certain kinds of statements are admissible, by universal concession but which do not fall within the Verbal Act doctrine. The typical case presented is statement or exclamation, by a participant, immediately after an injury declaring the circumstances of the injury, or by a person present at an affray a road collision, or other exciting occasion, asserting the circumstances as observed by him. Now this kind of statement cannot ordinarily be accounted for as one to which the prohibition of the Hearsay rule is not applicable. The Hearsay rule as already noted forbids the use of an assertion, made out of Court, as testimony to the truth of the fact asserted. Whenever, therefore, an utterance is used as testimony that the fact asserted in it did occur as asserted, not on the credit of the speaker as a credible person it is being used testimonially, and is within the prohibition of the Hearsay rule. Now this testimonial use is precisely the use that is made of the present class of statements which are called 'Spontaneous Exclamations in America' in default of a better name. *Lanier v People* 104 Ill 256, *Michum v State*, 11 Ga 621 *Dismukes v State*, 83 Ala 259. These exclamations differ from declarations falling under the Verbal Act doctrine as part of the same transaction in the latter class there is by hypothesis a material equivocal act which needs to be coloured and completed in legal significance by the word of the actor accompanying it—for example, the occupation of land the handing over of money the tearing of a will. That fundamental requirement is lacking in this class of cases. Moreover they clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,—for example when the injured person declares who assaulted him or whether the locomotive bell was rung, or whether the bystander at an affray exclaims that the defendant shot first. *Wigmore § 1746*. Some of these declarations are admitted under the English law and under the Indian Evidence Act as falling within the term *res gestae*. *Vide, Thompson v Trevelyan Skinner* 402, *see also Kinnaird* 6 East 193. In the *Petition of Sarat Dhobani*, 10 C 302 *Chauhan v Mahto v Emperor*, 11 C W N 266. In the last mentioned case the facts of which are stated at p 89, the Court observed "In the present case Gopal, if he had made any statement made it after the transaction was over. We do not exactly know what the interval between the murder of Lily and Gopal's statement to the Chowkidar was. Gopal was not then in such condition of mind as to exclude the supposition of his fabricating evidence or his being tutored. The evidence does not make out his state of mind to be such as the Sessions Judge decries it to have been. He was perfectly in his senses at the Chowkidar's and Moniruddin did not find any peculiarity in his mental or physical condition. We cannot therefore hold that his statements are admissible." From the above observations it is clear that the statement of Gopal which were testimonial assertions and as such falling under the Hearsay rule would have been admitted in evidence had the other requirements been fulfilled. But those requirements are only necessary to prove the truthfulness of the assertions made. These are hearsay evidence and according to section 60 of the Evidence Act they are inadmissible. Such declarations cannot be admitted as being part of the same transaction under section 6. Sections 6—11 of the Evidence Act only take what facts are logically relevant as cause and effect and when that relation has been established it is subject to Hearsay rule and other rules contained in the Act. So a very important class of evidence named as Spontaneous Exclamations by the American Jurists are to be left out of consideration if we strictly construe the Indian Evidence Act. In the next few pages we shall show how important this class of evidence is and provision should be made in the Act for the inclusion of this class as an exception to the Hearsay rule. But so long as that is not done in our opinion this class of evidence is clearly inadmissible under the *strictly construed* or as being made in the same transaction. Similarly it has been held that section 11 is controlled by section 32 of the Act. *Bela Janni v Mohabir* 31 A 111-9 A L J 331-4 11 Ind C 116, see also *J. D. Sethna v Vir a Mubarak* 31 A 19 Bom L R 1017 decided elaborately under section 11.

Spontaneous Exclamations are genuine exceptions to the Hearsay Rule. Spontaneous Exclamations are admitted as direct exceptions to the Hearsay Rule.



rule The general principle for admitting these statements is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness) and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received as testimony to those facts. *Higmore* § 1717 *State v McLaglin*, 138 La 958. In *Thompson v Tielamon*, Skinner 402 which was an action for assault and battery upon the wife of the plaintiff *Lord Holt J* "allowed that what the wife said immediately upon the hurt received and before she had time to devise or contrive anything for her own advantage might be given in evidence. In *Mason v Ammand*, 6 East 193, counsel for the plaintiff contended that "declarations by the wife upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer." *Lord Ellenborough LC* said "It is not so clear that her declarations made at the time would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from the husband I should admit the evidence, though not if it were a collateral declaration of some matter which happened at another time. In *R v Foster* 6 C & P 32, the statement made by the deceased as to the cause of his death was admitted. In that case *Paisie J* observed "It was the best possible testimony that under the circumstances can be adduced to show what it was that had knocked the deceased down." See also *Chan Mahto v Emperor*, 11 C W N 266.

The reason for its admission is thus stated by *Nisbet J* in *Melum v State* 11 Ga. 621 "They derive their credibility not from their veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact, evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact is itself and would derive no enhancement of their credibility from the oath of the declarant. (In this case) his coming to where the witness was seems to have been voluntary and the exclamation spontaneous. The short period of time that had intervened, and the agitated manner of the prisoner, forbid the idea of deliberate design. His distressed and agitated appearance when he reached the witness exhibits a state of mind incompatible with such a belief." So these statements should be believed as they were made without premeditation or artifice, and without a view to consequence. *Hart v Powell* 18 Gr. 639, see also *Melum v State*, 11 Gr. 621. When it is rightly guarded in its practical application there is no principle in the law of evidence more safe in its results. In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned." *Insurance Co v Mosley* 8 Wall 397. *Brownell v R Co*, 47 Mo 246, *Harriman v Stoe* 57 Mo 93.

The reason for their reception is thus forcefully stated by *Brown J* in *State v Wagner*, 61 Me 195. We think that the precise ground upon which their admission (evidence of outcries naming an assailant) should be placed in a case like this is substantially the same as that upon which dying declarations are admissible. No one doubts that the exclamations of these two women embodied the truth as it appeared to each and that the cries of alarm and supplication uttered by any and all human beings under similar circumstances would express their perceptions of existing facts as truly as if backed by the action of all the oaths known in Christendom. See also *Disimiles v State*, 83 Ala 259. *Littlelock v Leverett* 18 Ark 313, *McLeod v Gunther* 80 Ky 105. But before giving any weight to such statements made by a declarant, the Court must be satisfied that it was made at a time when it was forced out as the

**S 6** utterances of a truth forced out against his will or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say. *U S v King*, 31 Fed 314, *Travelers' Ins v Sheppard* 80 Cr 751

**Reason for accepting such statements** In order to admit evidence of such statements, death absence etc need not be shown. This kind of statement is not admitted as an exception to the Hearsay rule, on the ground of inconvenience of requiring the person's attendance upon the witness box. But it is admitted for its superior trustworthiness. Hence it is desirable that such unbiassed testimony should be admitted. "This extra-judicial assertion being better than is likely to be obtained from the same person upon the stand & necessity or expediency are for resorting to it. *Wigmore* § 1718. To preclude this proof would be to shut out the party's only defence." *Lamplugh in Hart v Pouell*, 18 Gr 674. Because it is impossible for a witness to convey such scenes to the mind and their effect and influence upon it" so this kind of evidence is more convincing than the testimony of the persons themselves sometime after the occurrence. *Mobile & M R Co v Ashcraft*, 48 Ala 31. "We merely say that, whatever force is given to dying declarations is the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth is it appears to them must needs be recorded also to the exclamations of mental terror caused by a deadly assault. To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an uplifted weapon when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darkened and dimmed by the mists and shadows of approaching dissolution would be, we think, but a bad sample of the perfection of human reason." *Per Barrow J in State v Wagner*, 61 Me 195.

**Requisites for admitting such evidence** (1) *Nature of the occasion*—There must be some shock startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. Such a limitation does not appear to be in terms expressly required in the judicial definitions, but it is a necessary implication from their language. Moreover in practically all of the instances—involving statements after corporal injury by violence—such condition are in fact present, and this requirement is fulfilled. *Wigmore* § 1750, see also *Thompson v Tietanion*, Skin 402.

(2) *Time of the utterance* The utterance must have been before there has been time to contrive and misrepresent i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. It is to be observed that the statement need not be strictly contemporaneous with the exciting cause, they may be subsequent to it provided there has not been time for the exciting influence to lose its sway and to be dissipated. *Wigmore* § 1750. In *Mitchum v State*, 11 Ga 626 *Nisbet J* said "Where the books say, when the Court has said that the declarations must be contemporaneous with the act, [it is a question] which must depend upon the application of the principle upon which the rule is founded. If the declarations appear to spring out of the transaction if they elucidate it if they are voluntary and spontaneous, and if they are made at a time so near to it as is reasonably to produce the idea of deliberate design then they are to be regarded as contemporaneous." "What the law altogether directs to is not after speech but after thought. That the declarations shall be or appear to be spontaneous is indispensable and it is for this reason alone that they are required to be speedy. *Bleakley C J in Travelers' Ins Co v Sheppard*, 80 Cr 751. So there is no imaginary line somewhere between a few hours and a few days or a few weeks on one side of which declarations in favour of a party are admissible in evidence while on the other they are inadmissible. Unless such complaints form a part of the *res gestae* they are inadmissible, and if they are so far detached from the occurrence as to admit of the deliberate design and be the product of calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestae*. *Kennedy v R Co* 130 N Y 636. While it is said that the declarations must be contemporaneous with the main fact

no rule can be formulated by which to determine how near, in point of time they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the *res gestae* would extend over a day, or a week, or a month. *Jacl v Mutual R F Life Assn* 51 C C A 36. 'Were the statements' said *Baker J* in *Solice v State*, 21 Ariz 392, 'a part of the *res gestae*? We have examined a large number of authorities upon the abstract propositions involved in the rules on which testimony is received or not received as part of the *res gestae*. These authorities satisfy us that the close connection in time between the statement or declaration and the act of which it is said to be a part is an element for consideration, that being close in point of time is not, however, all the basis for receiving such evidence and that the ultimate test is spontaneity or instructiveness and logical relation to the main event, that the tendency of the modern cases is to be liberal in the reception of such testimony. In a collision case, evidence was admitted that, as the defendant steamer was backing clear of the plaintiff brig, the pilot of the steamer, who was on the bridge, stamped his foot and said 'The damned helm is still a-starboard.' *The Schualbe*, Sw 1b 521. In *R v Lundy*, 6 Cox Cr 477, the deceased's statements on the arrival of help were admitted. In an abortion case the abortion took place on the 21st March. The woman's statement on March 28, that she had done it herself was excluded. *Thompson's Case*, (1912) 7 Cr App 276. The question was, whether A cut B's throat, or whether B cut it herself. A statement made by B when running out of the room in which her throat was cut immediately after it had been, was not allowed to be proved by *Coelburn L O J* in *R v Beddingfield*, 14 Cox Cr 341.

In *Hutchins v Railroad Co*, 128 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure to let down a folding step. As she fell she exclaimed, "Yes, let down the step after I fall." The declaration was a typical instance of *res gestae*. It was clearly admissible, both as a part of the transaction and having been received, as evidence also that step was not let down until after the plaintiff fell. In this case the statement was spontaneous and coincident with the event. But declarations admissible under this exception are not always so near in point of time to the fact which is the subject of proof. In *Rothroel v City Cedar Rapids* 128 Iowa, 252 the declarations which referred to the manner and place in which plaintiff had sustained injuries, but were made on the arrival home, within half an hour after the occurrence, were held admissible, it appearing that she was still suffering from the injuries and had the marks upon her. But where declarations were made over a mile from the place of accident, and an hour afterwards and were not spontaneous, but elicited by questions it was held that they are not admissible. *White v City of Monquett*, 140 Mich 310. In America it has been said that the modern tendency is to extend rather than to narrow this exception to the Hearsay rule and to consider the grounds which formerly excluded such declarations as affecting their weight. *Jacl v Life Association*, 113 Fed 49.

"Since the application of the principle thus depends entirely on the circumstances of each case it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of time to derive or contrive is to trifle with principle and cumber the records with unnecessary and unprofitable quibbles. *Higmore* § 1750. The Court must consider the circumstances of each case (*Vicksburg R Co v O'Brien* 119 U S 99) and in determining this it considers whether the statements are spontaneous whether there was an opportunity for fabrication or a likelihood of it, the lapse of time between the act and the declaration relating to it, the attendant excitement, the mental and physical condition of the declarant, and other circumstances important in determining whether the truthworthiness of the unsworn statements is such that they may safely go to the jury. *Per Dabell J* in *Houch v Great Northern Railway Co*, 133 Minn.

(3) *subject of the utterance* — The utterance must relate to the circumstances of the occurrence preceding it. This is perhaps a cautionary rather than a

**S 6** logically necessary restriction. If, for example, after an assault, the injured person exclaims that in the previous week the attacking party had tried to hood him, there is perhaps no less reason for trusting that part of his utterances than any other part. Nevertheless it is possible to argue that such utterances imply to some extent a process of reflection or deliberate reasoning, and practically there is not the same necessity for employing them. It seems clear on precedent, that utterances thus relating to some distinct prior circumstance would not be received. *Wigmore* § 1750, see *Ahlyruddin v Imperor*, 92 Ind Cas 417 = 13 C 372

**Knowledge, Infancy, Infamy, etc** This evidence strictly speaking is a kind of testimonial evidence. So before admitting such evidence it should be shown that the declarant had an opportunity of personally observing the matter of which he speaks. Any one possessing such qualifications would be a competent speaker. In particular, a bystander's declarations would be admissible. By the general principle applicable to the Exceptions to Hearsay Rule, the declarant must at least not lack the usual qualifications that would be required of him if testifying on the stand. *Wigmore* § 1751. But infancy is not such a disqualification (*Soto v Ferr*, 12 Ariz 36, *Beal Doyle v Carr*, 85 Ark 479), neither infamy by conviction of crime. *Neely v State*, 56 S W 625. The disqualification of insanity should probably be treated for the present purpose like that of infancy. *Wilson State* 19 Tex Cr 50, *Wigmore* § 1751.

**Certain Spurious Limitations borrowed from the Verbal Act doctrine** Under certain conditions only verbal parts of acts are admissible in evidence. They are as follows: (1) There must be a main or principal act, relevant under the issue, the significance of which needs to be made definite, (2) The words must genuinely elucidate or give character to this act, (3) The words must be by the actor himself not, by another person, and (4) the words must be precisely contemporaneous with the act. Now all four of these limitations, though entirely peculiar to the Verbal Act doctrine, have been misapplied in some cases to the present exception for spontaneous exception. That it is a case of misapplication is clear for here the concern is with a hearsay or testimonial use of words, while there no such function is attributed to them. *Wigmore* § 1752. So in *Gresham v Manning*, Ir R 1 C L 125 *O'Brien J*, said "The act which they (declarations) accompany should be one that would be evidence in the cause without any such declarations. But see *R v Edwards*, 12 Cox Cr 230. This form of expression is frequent enough. But such a limitation has no place in this Exception. What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and spontaneous utterance." *Wigmore* § 1753.

As regards the second limitation—ordinarily declarations which do not in some way or other elucidate or explain the occurrence are not given in evidence. So from this aspect the limitation becomes a real one. In *Mason v Annand*, 6 East 193 in which declarations of wife upon elopement, charging the husband with misconduct causing it were admitted. Lord Ellenborough observed "I should not admit it, if it were a collateral declaration of some matter which happened at another time." So also in *Iyassu v Framuay Co* 21 W R 199 where after an accident the conductor mentioned that the driver "has been off the line five or six times to day," *Kelley C B* observed "The conductor's remark had no relation to the accident in question, but referred to the conduct of the driver at another time or times."

As regards the third limitation of Verbal Act doctrine that the declaration must be that of the Actor himself it should be remembered that that limitation has no application in the present exception. A is accused of the murder of B by beating him. Whatever was said or done by A or B or by the bystanders at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact. *Vide illustration (1)*. So also in *Milne v Leisler*, 7 H N 786 796 *Pollock C B* said "Courts so far as they can, are disposed to receive in evidence whatever can throw light on the matter in and advance the search after truth. No doubt for that reason, in the examination by any one in a crowd, when an accident occurs and the peculiar person is in

question it may be asked whether some one did not call out 'Shame!', for it is part of the *res gestae*. But in *R v Gibson* L R 18 Q B D 537 541, which was a case for assault, immediately after the stone was thrown, a lady going past, pointing to the prisoner's door and, 'the person who threw the stone went in there.' This evidence was excluded.

Under the general Verbal Act doctrine it is necessary that the actor's utterance accompany the act, and thus be precisely contemporaneous with it, otherwise it does not make a part of the act itself, but is merely an ordinary testimonial assertion of a past act. But under the present exception in utterances, by hypothesis, offered as an assertion to evidence the fact asserted and the only condition is that it shall have been made spontaneously, i.e. is the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible, even though subsequent to the occurrence provided it is near enough in time to allow the assumption that the exciting influence continued. It is therefore an error to apply to the present Exception the Verbal Act rule that the utterance must be precisely contemporaneous with the act or occurrence. *Wigmore* § 1756. The case of *R v Bedingfield*, 14 Cox C 341 fully reported at p 85 is an example of this. As an exception to Spontaneous Exclamation the evidence is clearly admissible and the ruling of *Cockburn C J* is plainly erroneous. The facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. Of course from the Verbal Act point of view, as the declaration did not accompany the fatal deed, was not contemporaneous, and therefore was rightly excluded. *Vide Wigmore* § 1756.

**Statement made to the police by one accused.** One P came to a police station and handed in a written report in which there were allegations that certain persons had committed the offence of riot, one of them being a Zemindar named M. The report was read out to P and as soon as he heard it, he informed the police that M was not present at the riot and that he had made no charge against him. He stated that the report was written by one J subsequently M prosecuted J and P for an offence under section 211 of the Penal Code. *Held* that the statement made by P to the police was not admissible against J either as part of a confession or as part of the transaction under investigation under section 6. *Jalpa v Emperor* 50 Ind C 487 = 17 A. L. J 760.

**7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.**

#### Illustrations

- (a) The question is, whether A robbed B.  
The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.
- (b) The question is, whether A murdered B.  
Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.
- (c) The question is, whether A poisoned B.  
The state of B's health before the symptoms ascribed to poison and habits of B, known to A, which afforded an opportunity for the administration of poison are relevant facts.

**Scope of the section.** Every fact is connected with numberless other facts by ties more or less close. It may often be difficult for a Judge to say whether a fact can or cannot be properly said to "form part of a transaction" within the meaning of section 6. Section 7 meets this difficulty by embracing a larger area of facts. Leaving the transaction itself, it provides for the admission of several classes of facts, which though not possibly forming part of the tran-

**S 7** section are yet connected with it in particular modes, and so are relevant when the transaction itself is under enquiry. These modes of connection are (1) as being the occasion or cause of a fact, (2), as being its effect, (3) as giving opportunity for its occurrence, (4) as constituting the state of things under which it happened. They are in truth different aspects of causation, and the reason for the admission of facts of this nature is that, if you want to decide whether a thing occurred or not, almost the first natural step is to see whether there were facts at hand calculated to produce or afford opportunity for its occurrence or facts which its occurrence was calculated to produce. In order moreover properly to appreciate a fact it is necessary to know the state of things in which it occurred. For all these points the present section provides. *Cunningham, p 91*

**Limit of the rule** The rule therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof. *Stephen's Introduction p 70*

**Principle** The principle contained in this section has a logical foundation (*Vide Wigmore § 30-33*). So 'evidence relating to collateral facts is only admissible when such facts will, if established, establish a reasonable presumption as to the matter in dispute.' *Per Lord Watson in Metropolitan Asylum v Hill, 47 L J 29*. But the competency of a collateral fact to be used as basis of legitimate argument is not to be determined by the conclusiveness of the inferences, it may afford in reference to the litigated fact. It is enough if the evidence may tend, even in a slight degree to elucidate the enquiry or to assist, though remotely to a determination probably founded on truth. *Holmes v Goldsmith, 147 U S 150, 160*

**Occasion, Cause and Effect** An event may be evidenced circumstantially by a cause or by an effect. This mode of inference is available in three forms, namely, prospectively, retrospectively, and concomitantly. For example, the sinking of a ship is evidenced prospectively by the presence of a storm in the vicinity, the occurrence of a fire is evidenced retrospectively by the blackened ruins left as its traces, the revolution of car wheels is evidenced concomitantly, by the motion of the car, to the person riding in it. *Wigmore § 436*

**Prior cause, as the basis of inference** That a corporal injury will cause a permanent disability to work that noxious fumes will cause the destruction of herbage—these are examples of this sort of inference. The evidential offer may be put in this way. The fact of injury is offered as evidence that at a future time there will ensue an inability to work, the fact of noxious fumes is offered as evidence that at a future time there will ensue no herbage. Such evidential offers would unquestionably be recognized as proper. *Wigmore § 436*

**Subsequent Effect, as the basis of inference** That the falling barometer indicates the existence of an atmospheric disturbance that the derelict car indicates the prior occurrence of a collision or other destructive event,—these are instances of inferences from effect back to the existence of a cause. Such inferences, however rarely raise evidential questions in practice. Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question as indicating the same destructive influence of atmosphere, soil, or the like, but in the further process of fixing on the fumes in question as the precise cause, either we proceed to offer that specific inference through an expert witness who asserts as a matter of professional experience that the appearance of the herbage indicates specific fumes as the cause (in which case no question of circumstantial relevancy arises) or in attempting, otherwise to fix upon the fumes as one of the probable destructive influences, it must first be shown that they have this tendency to destroy herbage, so that in evidencing this tendency, the argument sets up new auxiliary inferences and has travelled into the scope of a new category of fact. Thus in general, the inference from effect to the existence or operation

of a cause is usually so proper as to be unquestionable, or else leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference—*Wigmore* § 436

**Concomitant Events, as the basis of inference** An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy but of cause and effect. An example of the latter sort is the inference of fire from smoke, *i.e.*, it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car, *i.e.*, there is really no inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause. In some instances, however for practical purposes, this latter analysis may be neglected and the inference treated as a single one—*Wigmore* § 436

**Real meaning of cause or effect** It must be noted from the remarks stated above that, that which is the main or first apparent inference offered is upon analysis to be resolved into an inference of the present sort, *i.e.* in which the proposition to be evidenced is a tendency, capacity, or the like. In general the inference is from specific instances of observed effects—exhibitions or illustrations—to the supposed tendency, capacity or quality producing them. This inference from effects to capacity or tendency to produce those effects furnishes the general form to which all such processes are reducible. For example, the question at issue may be whether the vibrations of factory machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter, but, in searching among the probable causes the argument is obviously confined to those things which have a tendency or capacity to produce such effects. Thus, while one of the ultimate issues for the Court still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short when it is desired to show broadly the occurrence of an event, or the cause of it, the process of thought usually resolves itself into two inferences,—first that the capacity or tendency of something to cause the event is evidence that the event did so result therefrom, and, secondly, that something else is evidence of such a capacity or tendency and it is the second of these inferences which in practice raises evidential questions—*Wigmore* § 441

**Principle of probative value—General Rule** There is presented as the *factum probandum*, a capacity or tendency in X to produce the specific effect B. This means that in the presence of a certain complex of circumstances the introduction of X will result in the occurrence of B, *i.e.* this alleged tendency or capacity in X is not an abstract and absolute one but a limited and specific one namely, a capacity, under the circumstances in which B occurred, to be followed by B. What X's capacity or tendency under other circumstances might be is immaterial, the single question is whether there was such a capacity or tendency under the circumstances in hand. In looking elsewhere, therefore to evidence this specific capacity or tendency by observing the same effect elsewhere the requirement is that the circumstances elsewhere are the same as in the case in hand. Thus, if elsewhere we found similar results, B', and B'', accompanying X, it cannot be inferred that they are the result of the alleged tendency of X, unless the other circumstances in those cases were similar to that in issue, because otherwise it cannot be known that some other circumstance, Y or Z was not the cause of B', or B''. In other words—unless the circumstances are the same the door is open for other hypotheses that might account for the effects B', and B'', as well as for B. Thus if the proposition is that X factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B', and B'' might not evidence such a tendency if B' were in old house and B'' were a wooden house while B was a new brick house, the case B' would at most indicate a tendency in X to injure an old house, not a new house B, and the case B'' would at most indicate a tendency in X to injure a wooden house, not a brick

**S 7** house B The general logical requirement is then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value—they are relevant—to show such a tendency or capacity only if the conditions or circumstances in the other instances are similar to those in the case in hand. But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. *Wigmore § 41* So in evidencing a quality, tendency, capacity etc., by instances of its effects or exhibitions or operations on other occasions, the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances. *Greenl Et § 14 (v)*

### ILLUSTRATIVE CASES

#### Admissible

In *Hunt v Louell Gaslight Co*, 8 All 169, 171, the question was whether the illness of the plaintiffs was caused by gas leaking from the defendant's pipes. In that case "the plaintiffs were permitted to offer evidence that A. H. and his family had been in perfect health upto the time when the gas began to escape into their house, and that, immediately or soon after every member of the family became seriously ill. The sickness of the persons

is admissible merely for the purpose of showing the nature of the gas which came into the house, to the influence of which all the inmates were subjected alike. Evidence that inmates of another house were made sick in consequence of inhaling the gas has been held to be inadmissible. The evidence should be limited to the effect of the gas upon those who have in common and under similar circumstances inhaled it." *Per Chapman J*

In *Baxter v Doe*, 112 Miss 558, 566 to show that the plaintiff's illness on board the defendant's vessel was due to the defendant's failure to supply anti-scorbutic food and medicine the fact was offered of a similar sickness of others of the crew, on board the ship about the same time. In admitting the evidence *Gardner J* said "It is difficult to find a case where all the conditions and circumstances affecting all the crew were similar. As suggested by the plaintiffs in their argument, the crew lived together in the same quarters, on the same vessel, for the same length of time, worked in the same employment, were subjected to the same climatic influences, hard labour, deprivation and manner of life partook of the same

#### Inadmissible

In *Emerson v Louell Gaslight Co* 3 All 410, 417, the question was whether the illness of the plaintiffs was caused by gas leaking from the defendant's pipes. Evidence was offered by the plaintiff that whenever the gas which escaped from the fracture in the defendant's pipe entered any dwelling house in the neighbourhood of the plaintiff's sickness followed. *Meredith J* observed "The evidence is properly excluded. The attending circumstances may be so different that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another."



*Admissible**Inadmissible*

S

food at substantially the same time, and of the crew of twelve, eight were affected at about the same time with about the same symptoms of diseases. This evidence tended directly to prove that the provisions served to the crew were unsuitable and insufficient, and the sickness was occasioned by want of anti-scorbutics."

**Distinction between possibility, capacity, tendency, and cause, as the object of Evidence, evidencing a possibility** The notion of causation is by no means easy to analyse correctly, but it is enough to point out here that certain superficially different terms represent essentially the same evidential process. When it is asked, for example, whether certain factory vapours were the cause of a destruction of herbage, the notion of 'cause' simple as it seems, becomes upon analysis somewhat complex and at the same time indefinite. Stated in its broadest form, the notion of cause and effect is merely that of invariable sequence. It is only rarely, however, if at all that such an abstract assertion can be made in universal terms that will stand examination. Thus, that a bullet shot from a pistol into the heart "causes"—i.e. will invariably be followed by—death, is a seemingly impregnable assertion, and yet not only may it not be true of bullets of every size, but it may not be true, even with ordinarily large bullets, in instances recorded here and there, and, in the future, surgical skill may show that the instances of non sequence of death might be made even more numerous. The assertion may then be amended by adding limiting conditions, so as to say that, provided this and that and the other be so, a bullet through the heart causes death. In short, instead of an absolute certainty or invariability of sequence, the assertion will be only of a very high probability of sequence. In most instances no one thinks of making an assertion in absolute form, and it is easy to see that in assertion of causation means usually only an assertion of high probability or strong tendency. Thus, the planting of seed in good soil at the right time of the year will probably result in a harvest in due season, but the result is not invariably certain, because no rain may fall or the land may be built upon or other influences may intervene. Though we should feel justified in speaking of the seed as the cause of the harvest, yet it would not be intended to assert anything more than that the seed has a tendency to produce the harvest. Coming now to an example of still weaker probability, suppose it to be asserted that gun powder may spontaneously i.e. without human meddling—explode, this is not saying that it will probably so explode but, merely that under a rare combination of circumstances it will do so i.e. it has a capacity to do so. Capacity, then, is a quality representing the same process of thought as tendency, i.e. it represents the possibility of a result as compared with the probability of a result, and above them both is a notion of a still higher degree, rarely realised in experience,—that of absolute certainty of result. All these are in the same category, the difference is that in the highest degree we think of the sequence as occurring under any and every combination of other circumstances, but in the middle degrees under the ordinary combinations only, and in the lowest degrees under rare combinations only. The notion of causation is perhaps most commonly associated with the middle and highest degrees only, i.e. one would naturally enough say, 'A bullet through the heart will cause death' and 'Sowing seed will cause a harvest', while in the lowest degree one would either not speak at all of cause or would qualify the statement, for example, by saying 'Gun powder may cause spontaneous explosion'. The essential thing to note is that all these terms express only varying degrees of certainty or probability or possibility, and that they all belong to the same logical category of thought. *Wigmore § 416, see also Salguier on Fallacies* 81, 285, *Field's Evidence Notes under Section 7*

**When relevant facts are excluded.** Facts forming part of the same transaction are admissible under section 6. Now the question is what facts, not part of the same transaction are admissible in evidence. Such facts are either

**S 7** similar or dissimilar. When the facts are dissimilar they are clearly inadmissible. *R v Whitehead*, 3 C & K 202. But similar facts also are not always admissible in evidence. The fact may be generally relevant, yet in a particular instance obnoxious to some rule of "Auxiliary Policy" as *Prof Wigmore* termed it. In such a case such facts may be used on such occasion, where the latter rule does not apply. But where the fact is itself irrelevant, but not obnoxious to the rule of Auxiliary Policy it cannot be used at all. For the present purpose two such rules are to be considered, namely, (1) the reason of unfair surprise and (2) the reason of confusion of issues. *Wigmore* § 413, *Greenleaf* E 141, *Phipps* E 126, 14 *Am Law Rev* 350, 358. So facts of this class though often not destitute of moral weight are rejected as legal evidence on grounds of convenience since they tend to embarrass the enquiry with collateral issues, prejudice the parties with the jury, and encourage attack without notice. *Phipps* E 126. The difficulty for the opponent of anticipating the particular instances that may be alleged, the length of time that may be spent on these minor evidential matters, and the possible confusion of issues in the mind of the jury, may overwhelm the slight probative value of the evidence. *Greenleaf* E § 141. In *Metropolitan Asylum District v Hill* 1 L T R N S 29, speaking for the rejection of evidence of the effects of other hospitals in spreading contagion offered to show the noxious quality of the one in question *Lord O'Hagan* said "Without proof as to the state and management of other hospitals, so as to establish a substantial similarity, any inference drawn from a comparison of their operation with that of the Hospital might have been quite fallacious and deceptive. But, even without regard to this, it would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them, and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limit, and secure promptitude, precision, and satisfaction in the demonstration of justice, it seems to me that the Court should be very jealous of the admission of such proof." The production of various instances to evidence a tendency, capacity, or quality may also cause unfair surprise to the opposite party who may be unprepared to meet such evidence. In such cases the Court in its discretion may reject such evidence. In *Insurance Co. v Tobin*, 32 Oh St 90, *Ashburner J* in excluding such evidence observed "This class of testimony was incompetent because calculated to surprise and take undue advantage of defendant at the trial. Ordinarily he could not be prepared to meet and contest the merits of each particular case of loss from unknown cause introduced. To deprive him of this privilege would be the denial of the legal right and to admit them would overwhelm the case with collateral issues of fact distract judicial investigation, leading to no valuable legal result. The most rational and practical solution of the difficulty would be to leave it largely to the trial Court to draw the line of exclusion whenever the above objections in fact present themselves." *Darling v Westmoreland* 52 H N 401 408, *Greenleaf* E § 141, *Wigmore* § 444.

**Classification of such facts.** The arrangement of the various precedents is a matter of much difficulty but having regard to the kind of fact offered in evidence and the helpfulness of the analogies it may be best to consider them according as the evidential fact is (1) a material effect, (e.g. marks on a board from a pistol-shot, injuries to a house by smoke, fire set by a locomotive firework done by machinery etc), (2) corporal effects (e.g. wounds produced by gun-shots, illness produced by a poisonous substance, injury caused by a defect in a highway etc), and (3) psychological or moral effects, i.e. effects on human conduct (e.g. efforts to escape danger, time required for work, cautions taken out of a dangerous place, etc). *Greenleaf* E § 141, *Wigmore* § 450.

**Material effects.** Under this head may be noted the use of similar instances as evidence of the character of a place, building, factory, etc., alleged to be a nuisance in particular a railroad, of the injurious effects of water by flowing etc, of the injurious qualities of gases on trees, paint, etc., of the tendency of the machine to operate defectively or otherwise as shown by the other instances of the action of the same machine or of a similar machine, and of sundry other things. *Greenleaf* E § 141.

## ILLUSTRATIVE CASES

## Admissible

In *Tenant v Hamilton*, 5 Cl & F 122, the question was whether A's land was injured by noxious discharge from B works. Lord Cottenham admitted evidence on both sides as to the condition of land similarly circumstanced to those of the party complaining "for ascertaining what the effect was of the smoke and vapour emitted by this manufactory." See also *R v Neville*, 1 P. & N P C 91, *R v Fairrie*, 8 L & B 180 486 488.

In *Border v Saillard*, 2 Ch D 692, which was in action to restrain a nuisance, Jessel M R admitted "a practical experiment performed by Mr Pinon who actually only put in the stable a piece of wood with a horse's shoe attached, and when that was struck upon the ground he heard it on the second floor front (of the next house), showing that it is distinctly heard."

In *Metropolitan Asylum District v Hill*, 47 L T R N S 29 H L, the question was whether a small pox hospital managed by a certain corporation, had communicated disease to residents in the neighbourhood. Lord Selborne L C admitted evidence of "any similar or other facts from which the effect, or absence of effect, of other hospitals, and particularly of those at H and S, on the surrounding neighbourhoods, could either positively, or approximately be ascertained," accord. Lord Watson, contra Lord O'Hagan. In the above case Lord Selborne observed "Evidence relating to collateral fact is only admissible, when such facts will, if established, establish reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive."

In *Hoodley v Seaward & S Co*, 71 Conn 640=42 Atl 997 the question was whether a factory caused nuisance. In that case effect of defendant's business upon other persons situated substantially in the same position as the plaintiff was admitted.

In *Cooper v Randall*, 59 Ill. 320 a nuisance case, Walker J admitting evidence that the defendant's mill threw dust, smutt, etc., on other houses observed "It tended to show that the mill was capable of inflicting the injury complained of by the appellant. If the deposit was general in the immediate

## Inadmissible

The question being whether an obstruction to a harbour was caused by the erection of a sea wall in its vicinity, evidence that similar obstructions occurred at some other harbours on the same coast which were in the vicinity of the sea wall was held inadmissible, as an attempt *item lite resolvere*. *Phipps v L 133* But in *Follis v Chadd*, 3 Doug 157, Lord Mansfield, C J admitted evidence of the state of other harbours along the same coast where no embankment existed, to show that no such change had occurred as at the harbour in question, where an embankment existed.

In *Attorney General v Nottingham Corporation*, (1904) 1 Ch 675, where the question also was whether small pox hospital was a nuisance, experience of other similar hospitals as to the risk of infection, was admitted by consent following *Hill v Metropolitan Asylum (Supra)*. But Farwell J, in writing the opinion observed "As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking to accept evidence in chief of what had happened with other hospitals, and I acceded to the request in deference to the opinion expressed in *Hill v Metropolitan Asylum District*, and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to small pox hospitals. The result is that the case has taken a week to try and I venture to suggest that the admission of such evidence in chief is wrong in principle, is raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties e.g. how can I rely on the case without injustice to them?"

In *Hughes v General Electric L & P Co*, 107 Ky 485 which was also a case of nuisance of smoke etc., effects of smoke in other dwellings were excluded.

In *Lucolse v Mfg Co*, 9 All. Mass 181, which was a case of destroying meadow crops by poisoning of a stream by copper acids, the evidence of similar effects produced upon other

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*Admissible*

neighbourhood and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of appellant's house." See also *Bradley v R Co*, 111 Ia 562=82 N W 996

In *Doybe v R Co*, 128 N Y 488, the question was whether damage was caused to plaintiff's building by the operation of an elevated railroad. Evidence of the effect upon premises similarly situated and not too distant was received. The Court in receiving the evidence observed "The Court may undoubtedly in such cases, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity giving a reasonable range

The tendency or quality of tools, weapons, vehicles and, and other materials, can be proved by their effects upon similar substances under similar conditions. *R Heseltine*, 12 Cox Cr C 404.

The question being whether A's premises were ignited by sparks escaping from a railway engine,—proof (1) that the same engine, and other engines of similar construction, belonging to the same company, have previously caused fires along the same line is admissible. *Aldridge v G H Ry*, 3 M & Gr 522, *Piggot v E C Ry*, 3 C B 229, *Philp Et* 133. In *Piggot v E C Ry, Co* 3 C B 229 *Maule J* in admitting the evidence observed

The evidence objected to was that other engines used on the defendant's line of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine and involved in that issue, was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could and for that purpose it was clearly material and admissible.

*Inadmissible*

meadows along the river, was excluded for reasons of confusion of issues and of the slight probative value. So also where the question was whether the removal of certain stones from a river had caused the latter to wash away the plaintiff's land, evidence that the removal of stones from another part of the river had the same effect was rejected as tending to mislead the jury, no satisfactory proof being given that the conditions of the two occurrences were the same. *Haules v Charlemond*, 110 Mass 110 *Comm v Piper*, 120 Ma 115 cited in *Philp Et* 133

In *Clair v Water Power Company*, 52 Me 75, which is an action for damage caused to plaintiff's mill, for diverting a stream by the defendant company, evidence of injuries to other mill owners was rejected on the facts, because "there were no elements of comparison offered which could afford any safe or reliable data for the judgment of the jury."

**Instances of corporeal effects as evidence** Under this head may be noted the use of other instances (often those obtained by experiment) of the tendency of a gun shot or pistol shot with reference to the kind of wound made, of the nature of a drug, gas, food, or other substance with reference to its corporeal effects and symptoms, and, in particular, of the intoxicating nature of liquor. The use that has come most into controversy is that of other injuries at a highway track, or machine, as evidence of its dangerous character. There seems here to be no impropriety in the nature of an inference, just as the character of a white powder with reference to producing illness may be evidenced by its effects on those taking it, so the tendency of a machine or a place in the high way, with reference to producing injury to those who use it or pass over it may be judged of by its effects in given instances, provided only the conditions are substantially similar to those in the case at issue. Nevertheless, the doctrines of unfair surprise and confusion of issues as explained above have been thought to have an especial bearing here. The other instances of the injuries thus offered in evidence may concern defects in high way or defects in railroad tracks, machines, premises, and the like. *Green v* § 141

# ILLUSTRATIVE CASES

## Admissible

In *Spencer Couper's Trial*, 13 How St Tr 1162, which was a case for murder, the body of the deceased was found in the river, the question was whether she had committed suicide or had been killed and thrown into the water. The prosecution advanced the proposition that the absence of water in the stomach showed that the person was dead before entering the water. The defence was allowed to prove by experiments, made by doctors upon dogs to show that a drowning person does not necessarily take water into the stomach.

In *R v Webb*, 1 Moo & Rob, 405, 412, which was a case of man slaughter by administering noxious pills, to disprove the noxious quality, the fact was admitted of the cure of various diseases by them. See also *R v Salmon* before Patteson J. *Pellam's Chronicles of Crime* Ed 1891, Vol II, 417 cited in *Wigmore* § 457 foot note.

In *Holes v Keer*, (1908) 2 K B 601 which was an action against a barber for negligent use of razor, etc by which he had cut the plaintiff and caused the plaintiff to have barber's itch about October 1907. It was proved that the plaintiff never went to any other barber's shop. The fact that two other persons had acquired the itch at the defendant's shop, was held admissible as showing the unclean condition of the razors, etc.

In *Croft v R Co* L R 1 C P 300 which was an action for injury on a defective staircase evidence from defendant was admitted without question that about 43,000 persons had

## Inadmissible

In *State v Fletcher* 24 Or 295 298, experiments as to the force of a bullet, with cartridges and pistol found on defendant, were excluded because conditions were not shown similar.

In *Schlaff v R Co* 100 Ala 377, 378, former injuries of other persons at a bridge, were excluded.

In *Birmingham v Starr*, 112 Ala, 98, the evidence of similar falls at the same place about the same time e g a month before or after, was admitted but evidence of falls at other times or at times unspecified was excluded.

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## Admissible

passed over it without injury during the previous year, in which alone it had been used

In *District of Columbia v Ames*, 107 U S 519, 524, which was an action for damage caused by a fall on a defective side walk, evidence was admitted to show that other persons had fallen at the same place

**Effects on Human conduct—Instances of mental and moral effects, as evidence** The tendency or nature of a material object may often be ascertainable by its psychological or moral effects, and it seems proper to place here a number of sorts of evidence in which it is perhaps not usual to perceive such a process of inference. Nevertheless, this inquiry seems at once to embrace the various kinds and also to supply the reasons upon which their admission depends. It may be thought that the Hearsay rule is violated by using as evidence the conduct of persons not before the Court, but that rule excludes only the assertions of such persons taken as evidence of the truth of the fact asserted and though the line between conduct and assertions is not always easy to draw, the distinction is a real one and leaves the Hearsay rule not applicable to the former. The simplest instance is the use of other instances of fright by horses at a particular object—a whistle a pile of stone a flag, a railroad car, etc.—as evidence of its tendency to cause fright in horses. Closely analogous to this is the use, on an issue whether a person's fright and jumping from a train, etc., was natural, of the alarmed conduct of other persons in the same situation. On the same general principle—the use of mental impressions as indicating the nature of a material object—the impressions of other persons (usually obtained by experiment) as to whether a thing could be seen, heard, or identified under given circumstances of time place and other surroundings have usually been received. It seems to be upon the same principle that, upon an issue of care, reasonableness, necessity, or the like, the conduct of other persons as involved in their practice or custom under the same condition, is to be received as evidential. This sort of evidence is constantly resorted to in every day life and it is of usefulness and propriety in litigation. The chief limitation is that we should treat the conduct of others merely as some evidence, and should not erect it into an absolute legal standard or test of liability or excuse. *Green v 141*

## Admissible

In *Brown v R Co* 22 Q B D 391, the question was whether a heap of refuse and earth in a highway, has the dangerous tendency to frighten horses. To prove its tendency to frighten horses, the fact was received of the shying of various other horses than the plaintiff's in passing the heap.

The question being whether A's dog killed certain sheep belonging to B, the fact that the same dog had been seen to kill one of B's sheep on a mountain on a Saturday morning and that other sheep of B's were found dead on the same mountain in the evening was held admissible. *Leuis v Jones* 49 J P 198=1 T L R 153. *Whart I* § 1293, *Phipson Ev* p 132

## Inadmissible

## Inadmissible

In *Whillie v Chehalis Co*, L & T Co 50 Wash 324, one instance of another horse being frightened at frightment, was excluded.

In *Bloor v Town of Delafield* 6 Wis 223, the evidence that numerous other horses had been driven past without fright was excluded.

The question being whether A's dog had a propensity to bite strangers,—evidence that (1) it barked at strangers (*Sanders v Waugh* C A Times, April 10 1897), or (2) had a propensity to bite animals (*Osborne v Chocquet*, 1896, 2 Q B 109), is irrelevant, *Phip Ev* 3rd 132

**State of things under which they happened.** Often the physical conditions under which the main fact happened or any other matter intimately connected therewith must be placed before the jury in order to make the incident intelligible to them. Under such circumstances such facts may be relevant. *Vide R v Bond* (1906) 2 K B 309, *Phip Ev* 6th Ed 57

**Opportunity** Proof of opportunity possessed by the accused to commit the crime may rise in inference that he is the criminal *Lauson Pre Et* p 587 When an act is done, and a particular person is charged with having done it, it is obvious that his physical presence within a proper range of time and place, forms one step on the way to the belief that he did it. It is true that another person may have done it, and thus is fit to become a subject for further investigation. It might be asked whether mere possibility involved in opportunity is not too slender, whether something more than mere opportunity—for example, exclusive opportunity—should not first be shown. The answer to this is that, by the very showing of an opportunity, countless hypotheses are negatived and the person charged, who might otherwise have been one of the innumerable other persons at the time, is shown to have been one of the limited number who are in a position to do this particular act. In short, opportunity alone and not exclusive opportunity, is a sufficient showing for admissibility *Wigmore* § 131 A is indicted for poisoning B. The fact that A lives in the same house with B, and had opportunities for tampering with his food and drink is relevant. *Burr Jones Et* 306 T is indicted for entering U's room in the night and stealing his money. The fact that T is a lodger in the same house is relevant is showing an opportunity *Ibid* 337

In *Reg v Graham*, Curle Summer Assizes, 1845 cited in *Will Cr Lo* p 356 Baron Rolfe said "Had the prisoner the opportunity of administering the poison?—that is one thing. Had he any motive to do so?—that is another. There is also another question which is most important, it is whether the person who had the opportunity of administering poison, had poison to administer. If he had not the poison, the having the opportunity becomes unimportant." So without opportunity of committing the imputed act, neither existence of motives, nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight. *Will Cr Ev* p 82 The opportunity is in fact the "state of things" under which an occurrence took place. Without an opportunity no deed can be perpetuated. Hence opportunity must be established beyond a reasonable doubt. *Donough Cr Ev* 10

**Explaining away, equal opportunity for others** If a person is shown to have been in a building, at the time when a murder was committed he immediately becomes a person suspected of committing the crime, he may have done the deed. He may diminish the probative significance of this fact by showing that there was at that time at least ten other persons in the same building. In doing so he has pointed out the possibility of ten other hypotheses, equally possible with that charged against him. Such is the principle of explaining away opportunity. *Wigmore* § 132 When it is proved that another person had a better opportunity than even the accused, the presumption is further weakened. *Lauson's Pre Et* 587

**Exclusive opportunity** Since the showing of opportunity leaves open all the hypotheses of other persons' equal opportunity, it is proper for the proponent of the evidence to strengthen it by cutting off, so far as possible, these hypotheses, by showing that the person charged was one of the few only, or the sole person, having the opportunity. In other words while the proponent need not, he may always show exclusive opportunity. *Wigmore* § 131 Exclusive opportunity proves conclusively that the deed was committed by the person having such an opportunity. *People v Van Horn*, 119 Cal 323=51 Pac 338, *Miller v People*, 39 Ill 166 But it is not always safe to convict a person solely relying on exclusive opportunity of committing the crime in question. The statement will be fully illustrated by the following two cases. (1) A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secured as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house, but it afterwards appeared, by the confession of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house to an

**S 7** upper window of that in which the deceased lived, and that having committed the murder, they retreated the same way, leaving no traces behind them. *Starke Et 4th Fy 865 cited in Best § 153*

(2) One Sunday morning when the whole of a household except T, a female servant, was absent at Church, the house was robbed and a small cabinet containing jewels and gold coin to a very large amount taken and carried away. T maintained that no one had entered or gone out of the house during the time of the family's absence. T was convicted of the robbery. Many years after as T, having served out her sentence, was going through the market, a butcher tapped her on the shoulder and said in a half whisper and ironical tone of voice "Ah! What a creature is a naked woman!" T, remembering that she had made that remark to herself on the morning of the robbery, the butcher was arrested. He confessed that his master served the house with meat, and having forgotten to take some minced veal home on Saturday evening, as he should have done, he carried it in a large basket on Sunday morning. The family had gone to Church, T was upstairs and setting the meat in the usual place he pretended to go directly out and to shut the door after him, instead of which he shut himself in and putting off his shoes crept softly up to the garret waiting for T to come up to her room. T presently came up to change her clothes, and unconscious that any human being was near her, being entirely undressed and contemplating her naked figure uttered the exclamation above, which being plainly overheard by the butcher he immediately went through the house and took what he wanted, escaping by the back door before T was through her toilet. *Taunton's Case Phil, Cur Et, XXVIII cited in Lawson's Pre Fy, p 588*

**Alibi** The theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged, and therefore with personal participation in the act. *Wigmore § 136*

**Illustrations** Illustration (a) is an instance of facts relevant as giving occasion or opportunity (b) of facts constituting an effect, (c) of facts constituting the state of things under which an alleged fact happened. *Cunningham Ev*

**8** Any fact is relevant which shows or constitutes a

Motive preparation motive or preparation for any fact in issue and previous or subsequent conduct or relevant fact

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

**Explanation 1**—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of the Act

**Explanation 2**—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant

#### Illustrations

(a) A is tried for the murder of B

The facts that A murdered C, that B knew that A had murdered C and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.



(b) A sues B upon a bond for the payment of money B denies the making of the bond S 8

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant

(c) A is tried for the murder of B by poison

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant

(d) The question is whether a certain document is the will of A

The facts, that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted valuers in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant

(e) A is accused of a crime

The facts that, either before or at the time of, or after the alleged crime A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant

(g) The question is whether A owes B rupees 10,000

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts

(h) The question is, whether A committed a crime

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant

(i) A is accused of a crime

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property required by the crime or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is whether A was ravished

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant—

as a dying declaration under section 32, clause (1),

or

as corroborative evidence under section 157

**Motive**—meaning of Motive is that which moves a man to do a particular act. Ganga v. Rex, 62 Ind. C.S. 515. When we infer an act from a motive, there are two distinct evidential steps. We may argue, first, that since a particular emotion or passion is likely to lead to the doing of the appropriate act—for example, desire for money to theft or robbery, or angry hostility to an act of violence—the presence of such emotion in the person in question is likely to lead to the deed in question. In this step of the argument we assume the emotion as a fact, proved some how or other. Just as a specific sort of disposition of habit, or plan, is likely to lead to the appropriate act, so a specific sort of emotion or passion has a similar evidential bearing. The basis of this

**S 8** inference is the living, impelling, active emotion, seeking for an outlet in action. But motive in the sense of motion requires to be proved. It is generally proved by two sorts of circumstantial evidence namely (1) conduct of the person, and (2) by events about that person which would excite that emotion. Conduct is the effect and expression of the inward emotion. The outward fact which happens about him, shows probability of the existence of such emotion. This outward fact is sometimes termed as motive. But strictly speaking that which has value to show the doing or not doing of the act is the inward emotion, passion, feeling, of the appropriate sort. *Vide Wigmore § 117*. So motive is that which is in a man's mind and which moves him to act and whether the belief which produces that state of mind is true or false the motive remains the same and the truth or the falsity of the belief is not really in question. *Ganga v Emperor*, 67 Ind Crs 545=22 Cl L J 529.

In *Mrs Maybruel's Case*, (Notable Trial Series) where she was charged with causing death of her husband *Stephen J* in this charge, is reported to have expressed the view that her "adulterous intrigue with another man" would supply the strongest motive for getting rid of her husband. If we analyse the statement it comes to this. Her adulterous intrigue excited in her a living, impelling or an active murderous impulse or emotion which sought for an outlet by getting rid of her husband. So the intrigue is not the direct cause of the homicide, but it gave move to that impulse or emotion which impelled her to cause the murder. So the existence of motive in the ordinary sense, to commit a crime does not always end in crime. They may be" says Wills "outweighed by other and conflicting motives or by the moral sense. We can estimate, by a knowledge of the existence and operation of motives in the average man, what is probable in the mental economy of an average man, but such a course of induction is a rough and ready process and liable to error in its application. Men are not all of average hue or constitution and it does not follow that because there is something shown which would lead to crime in one man, or in many men, that it would necessarily lead to crime in the case under consideration. Many a murder has been committed for the sake of a very few pounds, and yet there are hosts of people to whom millions would not offer the slightest inducement to anything of the kind, and we must be careful not to forget that when we have found a motive which might lead to crime it by no means follows that we have found one which did lead to as well as towards the crime." *Wills Cr Ev* pp 56, 58.

**Motive is relevant.** In *Palmer's Case* 1856, Wills 394, *Lord Campbell C J* said "It is of great importance to see whether there was a motive for committing such a crime, or whether there was not," *Lord Threlstone C J* also took the same view in *Bennett's Case* reported in *Times* (1901) Feb 20, Wills 467. In *Kennedy v People* 39 N Y 245, 254 *Woodruff J* said "It is always a just argument on behalf of the accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborate evidence of guilt." If it is clear and certain that a crime has been committed, it is not an essential part of the Public Prosecutor's case to prove that there was a motive for the crime. If he can prove the case without any motive, he is entitled to a verdict. But when the evidence is circumstantial only, and the guilt of the prisoner is only inferential and is not proved as a matter of fact by the evidence of witnesses who saw the crime then the question of motive becomes of vital importance to the prosecution. If motive is displaced, or even made reasonably doubtful it is enormously in favour of the prisoner. *Reg v Monson*, (Not Trial) cited in *Donough Cr Ev* 17. Similarly in *People v Green* 1 Park C C 2, the jury was told "Where a murder is charged and the evidence is wholly circumstantial then it is peculiarly proper to look at the motive. And in all cases you will naturally seek for the motive. And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes most important to examine into the motive. If, however, the evidence of murder be direct and positive, then the guilt is established without looking further. And in all these cases a question as to the adequacy of motive does not always arise. It is claimed generally that the motive was inadequate, that it

is not sufficient to induce the commission of murder. But all this must depend on the peculiar circumstances of the case, and the peculiar character of the accused. There is no motive which, to the mind of an honest man, can be adequate to the commission of a crime, and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. Hence, there can be no one rule for all cases, as regards adequacy of motive, it must depend on the moral character of the person accused in each case. The worse it is the less the motive which will tempt to the commission of crime."

**Whether motive is essential** "It is sometimes popularly supposed" says *Prof Wigmore* "that in order to establish a charge of crime the prosecution must show a possible motive. But this notion is without foundation. *Wigmore* § 118. So "a motive for the killing is sometimes an important, if not an essential point on a trial, for murder. Where the killing is undisputed, the question of motive becomes less important. For the moving cause is often not very apparent, in very many cases of homicide there is no motive discernible except what arises at or near the time of the act." *Laley v People* 1 Park C C 530. In *Powder v U S*, 151 U S 396, 413, *Harlan J* observed, "The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it cannot be fathomed, and so it does not require impossibilities, it does not require the jury to find it. Yet if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary in best,—that is it is only an item of evidence going to shew whether a particular party may have committed an act, and sometimes going to show the characteristics of that act. It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favour of the accused to be given such weight as the jury deems proper, but proof of motive is never indispensable to conviction." See also *State v Rathbun*, 74 Conn 524. As regards absence of proof of adequate motive *Lord Justice Clerk* made the following observations in *Pritchard's Case* (Not Tr), Donough Cir Ev 19. "The existence of any adequate motive for the perpetration of a great crime is a thing impossible, there is no adequate or sufficient motive for a great crime. Still, there may be what is called an intelligible motive—the existence of some evil passion, or some immediate and strong excitement, which in a moment of half frenzy drives a man to the commission of murder. There are very evident and intelligible incentives to crime. But when we find that in the opinion of the prisoner's counsel there is no motive for the perpetration of this crime, it means no more than that the motive has not been discovered. If the crime has been committed there must have been a motive or incentive, and yet we may never discover what it was. The motives of human action, as we know from history and experience, are often inscrutable."

**Absence of proof of motive, when material.** "Motive to commit crime if shown, may in many cases be sufficient alone, almost to induce a belief of guilt. Upon the other hand where no motive for the commission of a crime can be shown it is almost impossible to convince the mind of the guilt. Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance to a just crime and the fear of punishment which usually follows detection. This view of this question is so universally recognized as being true that it has become incorporated into the law, and in almost all cases where the guilt of a defendant depends upon the facts and circumstances in proof in the case the Court instructs the jury to consider the motive or lack of motive which the proof shows may or may not exist in the mind of a defendant on trial charged with a crime." *Per Dale C J* in *Son v Terr*, 5 Okl 526. So in cases depending upon circumstantial evidence, motive is sometimes of vital importance. *People v Robinson* 1 Park C C 649. Absence of proof of motive becomes almost essential where the positive evidence fails to prove the prisoner's guilt. *Queen v Soroh*, 5 W R Cr 28 (31). See also *Queen v Empire* 5 W R Cr 563. *Queen v Babar Ali*, 15 W R Cr 46 (47), *Queen v Sheikh Mustaffa*, 1 W R Cr 19, *Fatema v Emperor*,

**S 8.** 25 Ind Cis 525, *Jawan v Emperor*, 25 Ind Cas 631 *Moyla v Emperor*, 1913 M W N 115 *Durgan v Reg* 31 C 686 In *People v Kelsner*, 3 Wheel. Cr Cas 10, where *Kelsner* was charged with poisoning his wife, the Court said "The motive which induces the commission of the highest offences, and especially of the crime of murder, is always required to be a certained." In *People v Hendrickson*, 1 Parl C C 115, where the accused was similarly charged the Court observed "The defendant was charged with the murder of his wife. The marital relation existing between them furnished a strong presumption in favour of his innocence. In the absence of proof to the contrary, it was to be presumed that he loved her and would protect her. It was important, therefore, for the prosecution, if it could, to repel this presumption by proof that the defendant had disregarded the claims of conjugal duty. For this purpose evidence tending, however slightly, to show in alienation of affection—anything from which a jury might infer a desire to be free from the burden of one who was no longer the object of regard, was competent. So any conduct or declaration evincing unkindness or disrespect, though less decisive in their character as evidence, were admissible as tending to show the state of the defendant's feelings towards his wife."

When there is clear evidence that a person has committed an offence, it is unnecessary to prove motive. *Mohana v Emperor* 86 Ind Cas 406 <sup>see also</sup> *Hasrat v Emperor*, 32 C W N 345. Proof of motive or previous ill will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death. *Queen v Jaishand*, 7 W R Cr 60. The mere circumstance of an act being apparently motiveless is not a ground from which the existence of a powerful and irresistible influence of homicidal tendency can be safely inferred. *Sobha v Emperor*, 40 P R 1900 Cr-145 P L R 1905=2 Cr L J 714. It is not always possible or necessary for the prosecution to prove the motive of the accused in committing the crime and the absence of any proof of motive is not in itself sufficient to justify the rejection of evidence which, otherwise is reliable. *Crown v Baloch Khan*, 4 S L R 38=7 Ind Cis 38=11 Cr L J 498 <sup>see also</sup> *Crown v Mahomed Khan*, 91 P R 1866 Cr, *Abdul Hossain v Emperor*, 9 N L R 184=22 Ind Cis 177=15 Cr L J 83 *Emperor v Balaramdas*, 49 C 358. So where no motive for the commission of a crime is shown, the presumption of the innocence of the suspected person is strengthened. But the commission of the crime being proved, and also facts pointing to the prisoner as the perpetrator, evidence that a motive existed, is relevant, and is a circumstance in the chain of evidence from which guilt may be inferred. *Lauson's Presumptive Evidence* p 217. But motive alone cannot supply the want of reliable evidence. *Rannu v Emperor* 94 Ind Cis 904.

**Adequacy of motive.** In *Reg v Palmer*, Wills Cir Ev 63, *Coelle Cas* 25 Lord Chief Justice Campbell observed "With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime or whether there was not, and whether there was an improbability of it having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal Courts, that atrocious crimes of this sort have been committed from very slight motives—not merely from malice and revenge but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties."

**Circumstances which tend to excite motive.** In *Johnson v State*, 17 Ala 627 *Parsons J* said "With regard to the grounds from which a motive may be inferred, we may remark that the law has never limited them and never can limit them in number or kind." So considerable latitude is allowed on the question of motive. *Hendrickson v People* 10 N Y 13 (31). Motive is generally to be inferred from facts and circumstances. Hence a party is entitled to prove any facts or circumstances which tend even in the slightest degree to show motive. No fact or circumstance can therefore be properly excluded unless the Court is satisfied to a moral certainty that no rational presumption can be drawn from it. *Lyon v Hancock* 35 Cal (Am) 376. There is but one limitation that can be

thought of as necessary and universal, namely, the circumstance said to have excited the emotion must be shown to have probably become known to the person, because otherwise it would not have directed his emotions. *Wigmore* § 399. In *Son v Teri*, 5 Oll 526, *Dale C J* said "A motive cannot operate to influence until the facts which create the motive exist. The facts upon which a motive is based cannot operate upon the mind until they are known by the party against whom the motive is assigned. If one person should contemplate and undertake a great wrong against another,—such a wrong as would induce in the mind of the person against whom it was directed a motive to kill—and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive." But the evidence as to the motives which led a prisoner to commit a crime, must be of the strictest kind. *Queen v Zaher* 10 W R C 11

A motive is generally proved by showing the desire of gain, the gratification of passion, or the preservation of reputation, accomplished or attempted or able to be accomplished by the perpetration of the crime charged. *Lawson's Presumptive Ev* p 377. But strictly speaking the circumstances that may serve as motives for other deeds are innumerable. In many cases several passions may lead to a desire to kill. *Vide Jh's Mayhew's Case*, Notable Trial Series, where adulterous intrigue with another man was held to be a sufficient motive by *Stephen J* for getting rid of her husband. So also in *Pritchard's Case* (Not Tr) the crown suggested that the prisoner's motive for poisoning his wife was to make way for a second marriage. See also *Reg v Stauntons* (1876) Notable Trials. *Crippen's Case*, (Not Tr). So a man who courts his neighbour's wife has a motive for desiring the death of his neighbour. *State v Reed*, 53 Kan 767. Sometimes murder is committed in order to prevent the discovery of a former crime, or of evading an arrest or a prosecution for it. *R v Clewes* 4 C & P 222, *State v Kent*, 67 N W 1052. See also illustration (1). C is indicted for the murder of H. The fact that C had previously employed H to murder one P shows a motive for the crime, and is relevant. *R v Clewes*, 4 C & P 221. R is a clergy man, who, while in another and former parish had seduced a girl and got her with child. One day this girl appears at R's house, demands money, and threatens to expose him. R takes her to his room and cuts her throat with a razor. *Reimbauer's Case*, 3 Leg Obs 242. See also *R v Richardson*, Burr Cir Ev 243.

"In several ways the pecuniary circumstances, of one or another person or trying, may tend to show the excitement of a motive in some person. It will be convenient to distinguish the situation according as the evidence deals with (1) the pecuniary condition of A as exciting a motive in B, (2) the pecuniary condition of A as exciting a motive in himself, (3) the pecuniary value of a thing as exciting a motive to contract with a person, (4) pecuniary conditions in sundry respects." *Wigmore* § 392. An old lady possessed of some money goes to board with B who keeps a boarding house. B kills her, B's motive being to possess herself of the goods of the old lady, she having no friends to claim them. *R v Burdell*, Best on Presumptions, sect on 196. In *Danellous Case*, Wills Cir Ev 380, the motive was that the accused's wife would acquire a large estate on the death of his brother in law before attaining majority. See also *Patche's Case* Wills Cir Ev 442. Poverty often supplies motive to commit a crime. In *Man Singh's Case* cited in *Donough Cir Ev* p 20, the Court observed. "The motive for the crime is not far to seek. The appellant was in very poor circumstances. But the practical result of such a doctrine would be to put a poor person under so much unfair suspicion and at such a relative disadvantage as that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence. The reason is admirably stated by *Digelow C J* in *Com v Jeffries*, 7 All 548 559 266 "It is doubtless true that in a large class of cases the poverty or pecuniary embarrassment of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. It does not follow,

**S 8** because a man is destitute, that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery. Evidence of the pecuniary condition of the accused in such a case (as this) is not offered to show that he was not under a peculiar temptation to commit the offence or was more likely to cheat or defraud because he was in embarrassed circumstances but for the purpose of showing the natural and necessary consequences of his act which the law presumes he intended. If at the time of the transaction he was deeply insolvent, and was cognizant of his condition the necessary consequence of his act was to deprive the vendor of his property without recompense or the chance of payment and leads to the just and almost unavoidable inference that it was done with an intent to defraud. *Wigmore* § 392, but see *Tauell's Trial*, Woodall's Celebrated Trials I, 188. On the other hand the fact that a person was in possession of money tends to negative his desire to obtain money by crime or borrowing. So in *R v Grant*, 4 F & F 322 where the indictment was for burning the defendant's own house in order to obtain the insurance evidence of defendant's easy circumstances was admitted. In that case *Pollock C B*, said "Surely it was material to show that her circumstances were such as not to raise any temptation to the act." So "where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration." *Peel C J* in *R v Hedger* cited in *Woodroffe Stt*, Ed p 14.

**Conduct proves motive.** Motive in the sense of emotion is often proved by conduct of a person. In *Com v Webster*, 5 Cush 295 (316) *Shaw C J* said "The ordinary feelings passions and propensities under which parties act, are facts known by observation and experience and they are so uniform in their operation that a conclusion may be safely drawn that if a party acts in a particular manner, he does so under the influence of a particular motive."

**Feelings at other times.** Where an emotion of hostility is to be proved the existence of the same emotion at another time is clearly admissible. *R v Law*, 19 Man 259, *R v Sunfield*, 15 Ont L R 252. So previous threats, previous alterations prior combats, or previous litigations between parties are admitted to show motive. *Gray v State* 63 Ala 66. *Hudson v State*, 60 Ala 331. *Commander v State*, 60 Ala 1. In *Com v Laughan* 9 Cush 594, in order to show motive for burning a barn the fact was received that the same person had before begun a criminal prosecution against the owner. So also evidence of threats within a period not too remote is admissible. *Raulins v State* 40 Fla 100. But the limit of time must depend largely on the circumstances of each case. *Wigmore* § 396.

**Preparation.** Preparations on the part of the accused to accomplish the crime charged or to prevent its discovery or to aid his escape, or to avert suspicion from himself are likewise relevant on the question of his guilt. *Lauzon's Presumptive Evidence* p 590. For preparation is a part of a design or system vide notes under s 15 under the head "Theory of evidencing Design or System."

**Preparation to accomplish the crime charged or other act.** Evidence tending to show that the accused made preparation to commit the crime is always admissible. *Underhill Cr Fr* § 370. But preparation only evidences a design or plan. The presence of a design or a plan to do or not to do a given act has prohibitive value to show that the act in fact was done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence. *Wigmore* § 102.

In *State v Adams*, 20 Kan 320 which was a case for burglary, the four accused held a meeting to arrange for the crime. A bar of iron and a pair of pincers were done necessary, and the accused brought the facts were admitted of the accused having taken a carpenter's brace from a store and held it a third person removed it and the defendant never used it. *Breese J* observed "Would not the act be one tending to show preparation—a preparation made frankly by the unexpected act of another? Could it not be shown that the one charged with homicide immediately prior thereto was

providing himself with several weapons, though one only was used? If one S  
 weapon he stole, and another he borrowed and one (his own) he put in order,  
 would proof as to the first be incompetent while evidence as to the others was  
 admissible? If no act or conduct of the accused could be shown unless the  
 motive therefor or the connection between it and the crime were made indisputably  
 clear, the range of inquiry would be limited and narrow. It is enough that the  
 act has an apparent or probable connection with the crime, and then the motive  
 of the accused and the weight of it as testimony are to be considered by the jury.  
 So the acquisition or possession of instruments, tools, or other means of doing the  
 act, is admissible as a significant circumstance: the possession signifies a probable  
 design to use, the instruments need not be such as are entirely appropriate, nor  
 such as are actually put to use. *Wigmore* § 235

The fact of possession of a number of false coins wrapped in separate  
 papers etc., was admitted to show a plan to utter them. *R v James*, 7 Cox Cr  
 73. A is accused of the murder of B by poison. C of the murder of D by  
 shooting, E of committing a burglary, F of arson. G of counterfeiting. The  
 fact that A had previously purchased some poison, that C had bought,  
 borrowed or stolen a gun or pistol that E had procured in the, a pick lock, or  
 a drill bit, that F had procured a quantity of turpentine, that G had  
 made an instrument to manufacture coin are relevant and raise an inference  
 of fact of guilt in each case. *Lawson Pre E* § 106 see also *R v Hill* 20  
 How St Tr 1317. *People v Pennerly* Burr Ev 347. K is accused of the  
 murder of A by stabbing him. The fact that K had previously taken a sword  
 to a cutter, telling him that he wanted it ground "as sharp as a carving knife"  
 as he wished to use it as a carving knife, is relevant. *R v Conder Phil R*  
 221. F is accused of the murder of W by shooting him with a pistol. The  
 fact that F a few days prior, had procured a pistol and had spent sometime  
 practising at a mark is relevant. *R v Barbot* 18 How St Tr 1261. S was  
 indicted for murdering R by shooting. The fact that a day or two previous S  
 had borrowed a gun from a friend, stating that he wanted it to kill deer with,  
 is relevant. *Strangeways Case*, 5 Leg Obs 91

**Preparation to prevent discovery of crime** An inkeeper and his wife  
 are accused of a murder of a guest. It is shown that on the night the murder was  
 committed they sent the maid servant out of the house and when she returned  
 made her sleep in another part of the building. This is relevant. *Drayne's Case*  
 5 Leg Obs 123, *Fennis Case*, 19 How St Tr 904

**Preparation to aid his escape** A was charged with the murder of T. The  
 fact that the day before the murder A had drawn a quantity of money from a bank  
 in which he had it on deposit, is relevant as raising an inference that he was  
 preparing to escape, if necessary, from the country. *Adam's Case*, 11 Leg  
 Obs 415

**Preparation to avert suspicion from himself** B and P lived in the same  
 house and the former, while sitting one evening in his parlour was shot by a  
 pistol in an unseen hand. A few evenings before and while B was away from  
 home a loaded gun or pistol had been discharged into the room in which the  
 family when at home, usually sat and passed their evenings. This shot, P  
 claimed at the time, had been fired at him, but it turned out to have been fired  
 by him. This fact is relevant. *Patch's Case*, London 1806 cited in *Lawson*  
*Pre Ev* p 591. A is accused of the murder of B. It is proved that A some  
 time previous had spread a rumour that on account of ill health B would not  
 be likely to live very long. *Best Tr* § 455. In *Blandy's Trial* 18 How St Tr  
 1122, 1132, the accused had frequently told the servants that her father the deceased  
 with whose murder she was charged, would not live long, basing the prophecy  
 on the sight of his apparition and other things. *Bathurst* arguing for the pro-  
 secution said: "Mark how the destruction of this poor man is ushered into the world  
 Apparitions, noise, voices, music reported to be heard from time to time in the  
 deceased's house even his days are numbered out, and his own child hints the  
 nearness of his life but till the following month of October. What could be the  
 meaning of this but to prepare the world for a death that was pre-determined?"

**S 8 Antecedent conduct** Under this head come motives to commit the offence and opportunities of committing it, preparations for the commission of and previous attempts to commit it, declarations of intention, and threats to commit it. *Best § 462* Illustrations (d) and (e) are instances of antecedent conduct. 'In trials for murder, enmity against the dead man and previous conduct are accepted as evidence. *Per Lord Almonston in Director of Public Prosecutions v. Ball*, 80 L J K B 691 at p 692 = (1911) 1 C 47

**Previous attempts to commit it** Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the criminal act of which, however like the former, they fall short. *Best § 455, 3 Benth Jud Ev 69* So a former attempt by the accused to perpetrate the same crime in the same or in a different manner, is relevant on the question of his guilt of the latter crime. *Lauzon v. Levesque* 559 A is indicted for poisoning his wife by giving her food and drink. The fact that A had on a former occasion given her food and drink, which made her sick is relevant. *Johnson v. State*, 17 Ala 622 In that case the Court observed "If his former attempt to poison his wife had been proved by a witness on the trial, the question of the admissibility of the evidence would have been different. It might then have been very material to inquire whether he gave her the poison for which he is indicted innocently or criminally. It is very usual for the head of a family to administer medicine in the domestic circle but, in doing so, if he should poison the patient, his intention would be very material. In such cases it would deserve consideration if a former attempt to poison the patient might not be proved, although of itself a distinct felony, for the purpose of showing his guilty knowledge in the last instance." A is charged with setting fire to his house in order to obtain the insurance money. The fact that A had previously set fire to his house or that fire had previously occurred there is relevant. *Reg v. Gray* 4 F & F 1102 Z is charged with poisoning A her husband. The fact that Z had previously put poison in the food of the family is relevant. *R v. Gearing* 15 L J (M C) 215. *His Lordship's Case* 5 T Eg Obs 79, See also *R v. Donnell* 2 C & K 308 n V is indicted for shooting at P with intent to kill him. Proof that V at a previous time, had shot at P is relevant. *R v. Vole, R & R. & D* is charged with having wilfully set fire to a hay stack. The fact that on a previous day the rick was seen to be on fire, and D to be near it, is relevant. *R v. Dorgell* 2 C & K 306

**Declaration of intention, threats, etc** A threat to do a criminal or tortious act is in general admissible. *Idem Lord Ferrer's Trial*, 19 How St Tr 919. If a threat is receivable under the Hearsay exception or is in admission and the declaration thus evidenced is relevant. In *Standfield's Trial*, 11 How St Tr 1371 1373 1377 1380 which was a case of parricide it was proved that the accused who had been disinherited by his father, did declare threats, and vow at several times that he would cut his throat and did swear, if he had a sword he would run it through him and the like. *Mr Home* arguing for defendant [these circumstances] are but very remote and uncertain. For as to the expression of the defender is alleged to have threatened his father's death, it is the opinion of all lawyers who have written upon the subject that it is but very remote preparation. *The King's Advocate* in reply "And where is it is answered to this question [these circumstances] that the victim that a son would cut a father's throat is but a remote circumstance it is replied that the law and lawyers do not treat remote circumstances as *damnum sequentum* is a most pregnant qualification of these circumstances of this party's crime, especially where the threats were to cut a father's throat which of itself is a horrid and unnatural villainy that it would be doubtful if he who dared vow it wanted but an occasion to act upon it. It is acknowledged that though the declaration is a presumption yet *per se* it is a full probatum for though the son had both vowed and resolved, yet he need not have been prevented. Put the presumption at least is very strong. *See Williams § 101* So when one threatens injury to another and that of a violent injury afterwards happens this furnishes a strong presumption that he who threatened was the perpetrator or in the worst case



A son is accused of murdering his father. He has been heard to declare that "he hated his father these six or seven years." This is relevant *R v Standfield* 11 How St Tr 1397. A woman and her paramour were accused of murdering her husband. She had been heard to say of her husband that "he lived a most unhappy life with him, and she wished him dead, or if that could not be she wished herself dead." This is relevant *R v Ogilvie*, 19 How St Tr H is accused of murdering J. The fact that before the murder H was heard to say of J "He deserves to have his throat cut," is relevant *R v Harrison*, 12 How St Tr 841. J is indicted for the murder of W. The fact that J sometime previous said that he intended to "lay for W if he froze next Saturday night" is relevant *Jim v State*, Humph 146, *Republican v Rob*, 4 Dall 145. H is charged with the murder of M. He has been heard to say of M "If he don't do as he has agreed J will kill him." This is relevant *People v Hou* 2 Wheel Ct Crs 412. A woman was charged with the murder of her husband, she had previously expressed her hatred of him and said "If she had a dose she would give it to him." This is relevant *R v Ogilvie*, 19 How St Tr 1273. S was found dead in a well. It is proved that sometime previous F had said that he would put S "in the well for two coppers." This is relevant on the trial of F for the murder of S. *Mrs Spooner's Case*, 2 Chund Ct Tr 14. R is indicted for murder of S. Before the murder R was heard to say of S "I will kick hell out of her. I will break her damned neck." This is relevant *State v Reed* 62 V C 130. In this last mentioned case the Court observed "Threats are significant. Out of the abundance of the heart the mouth speaketh. Threats unexecuted amount to nothing, but when the thing threatened is done, and is done as it was threatened, then the fact of the threat becomes an article of circumstantial evidence tending to inculpate the person threatening. 'I will break her damned neck.' The dislocated neck of the victim of wrath and violence, her beaten and bruised body, show that what was threatened was done. The question is, was it done by the prisoner who was thus threatened, or by someone else from whose lips no threats proceeded." The reason why evidence of threat is admissible is thus stated by *Grover J in Stokes v People*, 53 N Y 175 "Threats to commit the crime for which a person is upon trial, are constantly received as evidence against him, as circumstance proper to be considered in determining the question whether he has in fact committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it." So threat may not be proof conclusive but it may be evidence competent to be considered with other facts in determining the question of guilt. *Worth v R Co* 51 Fed 173. In *R v Hagan*, 12 Cox Cr 357 which was a case for murder of a child brought up in the family of the accused, the following statement of the accused about a fortnight before, "the child is no good, he is eating the other children's food" was admitted.

**Time of threats** In *Redd v State* 68 Ala 492 (496) *Brickell C J* said "The length of time elapsing between the making of the threat and the criminal act when the crime is to be proved only by circumstantial evidence, is of importance in determining the weight to be accorded to it. If a long period intervenes during which there were opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat it would be a slight circumstance in connecting the accused with the injury, and there would be more reason for regarding it as having been a mere careless, thoughtless utterance or idle bravado, or ebullition of temporary passion. The length of time would impair its probative force, but would not render its inadmissible. So the probative force of the threat would be increased if it was frequently repeated during the whole time intervening and the same cause for ill will and hate continued to exist, then it could be imputed to a malignant spirit and a purpose that may have been vacillating but at last became fixed and settled. See also *Vigmore* § 108

**Plans and Intentions as to wills, contracts, Deeds** Where the issue is whether a will was executed, or whether a will was revoked or whether a will was made in a certain tenor or provision (is where an alteration is its issue),

**S. 8.** the plan or design or prior intention of the testator is relevant to show the doing or not doing of this alleged act, as any other act. The argument is "because he planned to make a will, or planned to revoke a will, or planned to will property to A therefore he probably carried out his plan. The relevancy of such a plan is well established. *Wigmore § 112*, see also illustration (d). In *Doe v Palmer* 16 Q B D 747, *Lord Campbell* said "Whether if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of the property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person on that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? It would not be creditable to the law if such evidence were to be excluded, as a legal inference might be fairly drawn from it respecting priority of two events, that is to say, the making of the alteration and the execution of the will, and I am not aware of any principle, rule of law, decided case or dictum against the admissibility of such evidence. They demonstrate that the alteration is not an after thought." In *Sugden v Leonard* L R 1 P D 154, *Mellish L J* said "The declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which corroborate the other testimony as to what is contained in the will, because it is more probable that the testator has than that he has not made a particular devise or a particular bequest when he has told a person previously that he intended to make it in as much as it shows that he had in its mind to make such a will at the time he made that declaration. See also *Keen v Keen* L R 3 P & D 107, *Dench v Dench*, L R 2 P D 60 (64), *Gould v Lales*, L R 6 P D 1.

**Contemporaneous Conduct** This would include the pleadings of parties their behaviour as such, and their demeanour as witness. *Donough Cr R p 32*

**Falsehood, fraud, fabrication and suppression of evidence, etc.** It has always been understood—the inference, indeed is one of the simplest in human experience—that a party's falsehood or other fraud in the perpetration and prevention of his cause, his fabrication or suppression of evidence by bribery or spoliation and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. *Wigmore § 278* vide illustration (e) *R v Patch*, *Wills Cir L v 142* *L v Palmer Cockle Cas L v 8*. In the last case *Lord Campbell C J* in his charge to the jury said "Then gentlemen it is impossible that you should not pay attention to the conduct of the prisoner at the bar and there are some instances of his conduct which you will say whether they belong to what might be expected from an innocent or a guilty man. He was eager to have the body fastened down in the coffin. Then with regard to the betting book, there is certainly evidence from which you may infer that he did get possession of the betting book that he abstracted it and concealed it. Then gentlemen you must not forget his conduct in trying to bribe the post boy to overturn the carriage in which the prisoner was being conveyed, to be analysed in London, and from which evil might be obtained of his guilt. Again you find him tampering with the postmaster and procuring from the postmaster the opening of a letter from D. Taylor who had been examining the contents of a jar, to Mr Gardiner the attorney employed on the part of Mr Stevens. And then, gentlemen you have tampering with the coroner and trying to induce him to procure a verdict for the coroner's jury which would amount to an acquittal. So a party who gives or produces false evidence may by so doing give rise to a general presumption against the truth of the case. *Girish Chunder v Iswar Chunder*, 3 B L L 1.

A C J 311, see also *Step Dig Et* 1st 7 illus (c), *Annesley v Earl of S. Inglesca*, 17 How St Tr 1217

In *Moriarty v R Co*, L R 5 Q B 319, *Cockburn C J* said "The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just,—just as it is evidence against a prisoner that he has said one thing at one time and another at another as showing that recourse to falsehoods leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony and has endeavoured to have recourse to perjury it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive, I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character that that which he desires, namely, the gaining of the victory is not his due or that he has not good ground for believing that justice entitles him to it. But it is always evidence." In *R v Castro (Lichborne Case)*, *Cockburn C J* in his charge to the jury said "These falsehoods [of the defendant] however must not operate unduly to the prejudice of the defendant beyond this that falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may *'prima facie'*, until the contrary be shown, be taken to be a bad and dishonest case and further the recourse to fraud and falsehood necessarily engenders distrust." Similarly *Phillimore J* in *R v Watt* 20 Cox Cr 852 said "The principle is in fact well established. It is this that the conduct in the litigation of a party to it if it is such as to lead to the reasonable inference that he disbelieves his own case, may be proved and used as evidence against him."

So also fabrication or manufacture of evidence, by forgery bribery subornation or the like raises a presumption of falsity of the case. *Annesley v Inglesca*, 17 How St Tr 1217 *Voules v Young* 13 Ves Jr 140, *Earl of Stafford's Trial*, 7 How St Tr 1461, *R v Watt*, 20 Cox Cr 852, *Lacey v Hill*, L R 1 Ch D 537, 543. In the last mentioned case *Jessel M R* said "No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit, and therefore no one can doubt for a moment that Sir R Harley was perfectly well aware that he was committing these frauds."

In criminal cases also destruction, concealment or fabrication of evidence raises a presumption against the accused. *Lord Melville's Trial*, 29 How St Tr 1191. A is accused of the murder by B by poison. The fact that A had the body of B interred with great haste is relevant on the question of A's guilt. *R v Donnell Will's Cir I v 185*. A is accused of shooting B with a pistol. A pistol is found beside B in such a position that it would appear that it is a case of suicide. But it is proved that it is A's pistol and that A placed it there. This raises a presumption of A's guilt. *R v Green*, 7 How St Tr 179.

**Fraud by agents.** Where the fraudulent act—bribery, intimidation, spoliation, or the like—has been personally committed by an agent or other third person, and not by the party-opponent himself, it is obvious that the act must be brought home to the party's connivance or sanction express or implied in order to use it as indicating any conscious mis on his part of a weak cause. In thus connecting it with the party, it is to be noted on the one hand that no mere technical theory of agency will suffice to charge him, for it is not a question of legal liability, but of actual moral connivance. On the other hand no less should mere technical deficiencies of proof be allowed to exonerate him due regard to the common probabilities of experience should be paid. For example if a witness has been suborned by B a clerk in the defendant's bank, it is idle to argue that such a clerk has no implied authority to tamper with witnesses and therefore that some conversation or letter of the defendant expressly authorising B's conduct must be proved. Why should B meddle in such fashion except upon some hint or order from the defendant?—*Wilmore* § 280. In *The Queen v Cusack & B* 302 *Abbott, C J* in answering the question whether the offer of a bribe to a person not called as a witness, by one employed as an agent to

**S. 8.** procure evidence, is admissible, and "This is a lawful employment necessary in many cases" and, being a lawful employment, it is to be presumed until the contrary be shown, that the employer means and intends that his agent shall execute it by lawful means. The prosecutor may up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent, it is no less consistent that having been informed of it, he may have rejected it with indignation and have repudiated the proffered testimony and withholden the witness from the Court and if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case or the propriety of his conduct in the other. [Nevertheless] I am by no means prepared to say that in no case and under no circumstances appearing at a trial it might not be fit and proper for a Judge to allow proof of this nature to be submitted."

**Subsequent conduct.** Subsequent conduct of a party or his agent is relevant. To this class belong sudden change of life or circumstances, silence when accused false or evasive statements made by the accused, suppression or elowment of evidence forgery of exculpatory evidence evasion of justice by flight or otherwise tampering with officers of justice, and fear, indicated either by passive deportment or a desire for secrecy. *Best Ev* § 452, *Vide illustrations (e) and (i)*

**Demeanour when charged, of accused.** One of the common and established uses of the mode of reasoning here involved is the inference from guilty conduct to the commission of the guilty deed. No one doubts that the state of mind which we call guilty consciousness is perhaps the strongest evidence that the person is the guilty doer, nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence. *Wigmore* § 273. So 'any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him. The number of such indications it is impossible to limit, nor can their nature or character be defined. Presumptions or inferences may be and often are founded on circumstances which, of themselves independent of the accusation, would not be ground of crimination.' *Mc Adory v State* 62 Ala. 154, 159. In *Johnson v State*, 17 Ala. 618, 624, *Parsons J* said "We can not say that facts such as silence which indicated unusual seriousness at such a moment are inadmissible as evidence tending in some degree to show the prisoner's guilty knowledge of the condition of his wife, or to show his crime itself. Doubtless such a circumstance by itself should weigh but little and it should be received with great caution but we cannot say that it was wholly inadmissible. A flight is universally admitted as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. But it is sufficient perhaps for all practical purposes to regard a flight as immediate evidence of crime, because it betrays conscious guilt. In this instance, then we take the flight a thing of itself harmless and innocent as evidence of conscious guilt a necessary consequence of the crime itself, and the conscious guilt of which the flight was evidence, is proof, in its turn of the crime. In this instance therefore, it is certain that the law admits evidence of the party's conduct merely to prove his conscious guilt, which is proof of crime. Now this conscious guilt is merely internal but the law allows that proof of it which consists of outward signs. Is a flight the only outward evidence of conscious guilt? So far from it any indications of it, arising from the conduct, demeanour, or expressions of the party, are legal evidence against him. The law can never limit the number or kind of such indications.' In *Moore v State* 2 Oh St 592, *Caldwell J* said 'From our knowledge of the human mind and its workings, we expect with almost positive certainty, that when it is the rule of the story of so dreadful a secret it will affect the conduct and sayings of the person hence the mind naturally looks to these with the most anxious scrutiny and would require for its satisfaction if such a thing were possible a complete transcript of the person's conduct and sayings. Sometimes a person is detected as the author of the crime by showing an unusual anxiety to discover the perpetrator at other times the discovery is led by the person showing two

much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery, at other times the inquiry is started by his appearing to know too little. These are generally acts that in themselves show no disposition to do mischief but it is because they are unnatural, because they tend to the conclusion that they are produced by a mind conscious of guilt, that they are provable against the accused. They are in themselves nothing except a showing the state of the mind of the party."

So the conduct or demeanour of a person charged or on admission being made to the charge is frequently given in evidence against him. *R v Smithers* 5 C & P 332, *R v Barlett*, 7 C. & P 532. *R v Mollory* 13 Q B D 13=15 Cox Cr C 156. So evidence of a defendant on a former occasion is admissible to prove guilty knowledge. *R v Tattershall*, 2 Leach 984. *Hoscoe* Cr Fr 57.

**Demeanour during trial.** The demeanour of an accused person in Court during trial is too elusive to be justifiably considered as any indication whatever of his guilty consciousness. *Purdy v People* 110 Ill 50. But the accused's demeanour is admissible when on the witness stand and during the trial. *Rider v People*, 110 Ill 11.

**Flight, etc.** Flight from justice and its analogous conduct, have always been deemed indicative of a consciousness of guilt. *R v Sorab Roy* 5 W L Cr 28. *R v Gobordhan*, 9 A 528 (568). *Gangaram v Emperor*, 62 Ind Cr 545. The wicked flee even when no man pursueth, but the righteous are bold as a lion. *Wigmore* § 276. In primitive times the accused who fled whether innocent or guilty suffered forfeiture and excommunication. "For although he be found not guilty, yet he shall forfeit his goods by the flying *quia factum facinus quod iudicium fugit*, and the law will not admit any proof against this presumption. It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. *Wigmore* § 276. In *Crossfield's Case*, 26 How St. Tr 216, *Fyre L C J* said: "The prosecution say—and they say truly—if they make out that the conduct of the prisoner has been that he has either originally withdrawn himself from justice or that he has taken pains to secrete himself from justice after he has been apprehended that these are circumstances which do at least infer a consciousness of a very great guilt, and if there be no other reason assigned for the conduct of the party, very much corroborating and supporting the charge." So a flight is universally admitted as evidence of the guilt of the accused though not conclusive. *Johnson v State*, 17 Ala 618 (624). But when it is shown that the accused may have run away to avoid the consequence of being charged with an offence different from that for which he was being tried no effect should be given to his running away. *hal hal v Queen Empress*, 2 C W N 81. In *R v Donmall*, 5 R Rep (1817) p 175, *Ibbot J* said: "A person however conscious of innocence, might not have courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight." But see the case of *Deacon Brodie*, Not. Tr., *R v Criffen*, Donough Cir Ev p 40.

In *R v Hazy*, 2 C & P 458 which was a case of trespass, running away from the premises when detected was admitted as evidence of not being thereby permissive. The reason of this presumption is thus stated by *Parler J* in *Start v U S* 164 U S 627, "The law says that a man is to be judged by his consciousness of the right or wrong of what he does to some extent. If he flees from justice because of that act, if he goes to a distant country, and is living under an assumed name because of that act, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as evidence of guilt, because he is an eye witness to the occurrence, he knows how it did transpire, he is presumed to have a consciousness of that act. It is a principle of human nature—and every man is conscious of it, I apprehend—that, if he does an act which he is conscious is wrong his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is—and it is 'an old scriptural adage—that

**S 8** the wicked flee when no man pursueth, but the righteous are as bold as a lion. Men who are conscious of right have nothing to fear. They do not hesitate to confront the jury of their country, because that jury will protect them."

**Explanation of flight, etc.** When a flight has been proved as furnishing evidence of guilt it is competent for the accused to prove other causes which may have influenced him to fly, and leave the jury to decide whether his flight was caused by a consciousness of guilt and apprehension of conviction or by such other causes as he may prove to have existed. *Kennedy v Com*, 14 Bush 346, *Rakkal v Queen Empress*, 2 C W N 81. Evidence of fact that he had been advised to leave, to avoid vengeance by the deceased's friends is allowed. *Bradburn v U S*, 3 Ind I 604. Post cards mailed by the accused shortly after his departure were admitted to indicate non concernment of his whereabouts, and thus to rebut the inference of guilt of a murder from his flight. *Gosforth v State*, 183 Ala 66.

**Complained by prosecutor.** The prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered that his courier bag, containing his watch, chain, and a sum of money had been stolen. He reported his loss to a railway police inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present. Evidence of this report is held admissible under s 8, illustration (h). *Queen v Macdonald*, 10 B L R App 2.

**Silence.** Silence on the part of the accused when charged with an offence is relevant to show his guilt, unless the charges are made in the course of a judicial interrogation. *Lawson Pre Ev* 628. "What is said to man before his trial" said Lord Fentenden in *Fairlie v Denton*, 3 C & P 103, "he is in some degree called on to contradict, if he does not acquiesce in it." This rule is founded upon the maxim, *qui tacet consentire videtur* (silence gives consent.) But this inference of consent may safely be made only when no other explanation is equally consistent with silence. *Wignore* § 1071. A is accused of administering a poison to his wife with the intention of killing her. A witness testifies, that the wife had declared that A had attempted to poison her, in his presence, and that A was standing near by but made no response. This is relevant. *Com v Galavan*, 9 Allen, 271. S is indicted for the murder of T. Certain observations were made by his wife in the presence of others on the subject of crime to which S made no direct reply. These statements are relevant against S. *R v Smith*, 5 C & P 332, see also *R v Mallory* 15 Cox 456 (458). The conduct, demeanour and expression of the accused at or about the time of the commission of the crime with which he is charged, are competent evidence against him. *Blount v State* 49 Ala 381. But "there must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of admission of the truth of the charge. The limitation is, I think, this. Silence is not evidence of admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not." *Bouen L J in Friedman v Walpole*, 2 Q. B 534, 539.

**Conduct as evidence of consciousness of innocence.** The lack of guilty consciousness may be useful to show innocence of a crime. This lack of guilty consciousness—in other words, this consciousness of innocence—seems not to have been doubted by Courts as having in itself evidential value. But, assuming it to be relevant, a difficulty arises in the proof of it as a proposition—the difficulty that the conduct offered to evidence it is so likely to be feigned and artificial. *Wignore* § 171. *rule also Griens Trial*, 7 How St. Tr 159 (204). *Larnord's Trial*, 19 How St 833.

**Failure to prosecute.** In general a delay in instituting a prosecution is some indication of a consciousness of the weakness of one's cause. The failure to complain especially of a rape is universally conceded to be a damaging circumstance against the woman making the charge. *Wignore* § 284.

**Failure to produce evidence.** The non production of evidence that would naturally have been produced by an honest and therefore fearless claimant

permits the inference that its tenor is unfavourable to the party's cause. *Wigmore* § 285, see also *Cunning's Trial*, 19 How St Trial 312, *Rouan's Trial* 22 How St Trial, 1140, *Bond's Trial* 27 How St Trial 605, *Boyce v Chapman*, 2 Bing N C 222, *Tracy Peerage Case* 10 Cl & F 150, 180 189, *Vaughton v R. Co* 12 Cox Cr 580 588, *R v Labouchere* 14 Cox Cr 419 (432) In *Blatch v Archer*, Cowp 66, Lord Mansfield C J said "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Similarly in *R v Burdett*, 4 B & Ald 122, Best J said "If the opposite party has in its power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just." The law does not impose impossibilities on parties, it expects that a man who has the means of knowing who may be witnesses shall call them.

**Party's failing to testify** A party's failing to appear when he had a strong motive to appear would be evidence against him. *Brown v Stocl*, 77 P 171 So refusal to testify him-self or to call available witnesses in his own behalf warrants inference unfavourable to the respondent. *Att Gen v Pelletier*, 131 NE 406 In *Taylor v Williams*, 2 B & Ad 845 (856) which was a case for malicious prosecution, and where the prosecutor failed to testify at the prosecution, it was held not inapt under the very peculiar circumstances of this case to raise an inference that his motive was a consciousness that he had no probable cause for instituting the prosecution.

**Destruction or non production of documents etc** In *Anon* 1 Ld Ryms 731, Holt C J said "If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" and so a copy sworn was admitted to prove a note of defendant torn by him. See also *R v Arundel* Hob 109, *Word v Apprice*, 6 Mod 264, *Samson v Rumsey*, 2 Vern 561, *Young v Holmes* 1 Str 70, *Armory v Delamure*, 1 Str 505 In *Cooles v Heller* 1 Ves Str 234, *Hardwicke L C* said "If deeds or writings are destroyed by a party who would take benefits thereof, a Court of equity in *adjuon spoliationis* will go further than the Court of law." See also *R v Smith*, 3 Burr 1475 So where a document is not produced after proper notice, a strong presumption is raised against the party. *Roe v Harrey* 4 Burr 284, see also *Clunes v Peggy* 94, 1 Camp 8, *James v Bion* 2 Sim & St. 600, 606 But in *Barker v Ray* 2 Russ 63, 73, Lord Eldon, L C said "To say that if you once prove spoliation, you will take it for granted that the contents of thing spoliated are what they have been alleged to be may be in great many instances going a great length. 'So suppression of a deed affecting title is always to be taken most strongly against the persons keeping it back.' *Att Gen v Dean* 21 Berr 679, *Sutton v Delonport* 27 L J C P 51, *Gray v Haug* 20 Berr 219, *Curlews v Corfield*, 1 Q B 814. This rule is based upon the maxim *omnia praesumuntur contra spoliatorem* (All things are presumed against a spoliator).

**Conduct of the accused in attempting to stifle or thwart investigation** The fact that the accused has attempted to stifle or thwart the investigation of the crime is relevant to show the guilt of the accused. S is suspected of having poisoned T. It appears that S has tried in every way to prevent the body of T from being exhumed and examined. This raises an inference of S's guilt. *R v Stansfield*, 11 How St Tr 1402 S disappeared while living in R's house R being suspected of murdering him, and it being proposed to take up the basement floor, objected strongly arguing that if the floor was taken up the house would fall down. The officers of the law persisted and the body of S was found underneath the floor. A strong inference of R's guilt arose. *State v Robinson*, Burr Ev 462 C being suspected of the murder of D, it is sought to compare her feet with certain foot-prints. C resists and has to be compelled by force to put her feet in tracks. This raises a presumption of guilt in C. *State v Cicely*, 13 S & M 205

**Fear exhibited by the accused.** The fact of fear exhibited by the accused raises an inference against the accused. A being accused of the murder of B

**S 8** shows a great repugnance to looking at the dead body of B. This is relevant. *R v Stewart*, 19 How St Tr 156, *R v Onslow*, 19 How St Tr 128. T comes into a town with a horse and immediately employs a auctioneer to sell it. While the sale is going on T is observed to look excited and apprehensive, and on receiving the purchase money leaves the place at once, and on subsequently meeting the auctioneer endeavours to avoid him. The conduct of T raises a presumption of his guilt. *Tynes v State*, 5 Humph 383.

**Possession by the accused of the fruits of crime** Where the evidence against the accused is circumstantial in its character, the possession by the accused of the fruits of the crime is relevant as a circumstance in the chain of evidence from which guilt may be inferred. *Wilson v US*, 162 US 613. M is indicted for the murder of a woman. When arrested, property belonging to the woman, such as dress and jewellery, is found in his possession. This raises an inference of guilt. *State v Millam* 3 Noy 109, *Ina v Queen*, 110 190. But a reasonable explanation by the accused of his possession overthrows the presumption, and casts the burden on the prosecution provided the explanation is not inconsistent with the identity of the property. *R v Goughurst*, 1 C & K. 370, *R v Smith* 2 C & K 206, *Queen v Evans*, 2 Cox C C 270.

**Sudden change in the circumstances of the accused.** Proof of a sudden change having taken place in the life and circumstances of the accused subsequent to the crime is relevant. *Welsh v State*, 12 South Rep 275. A rich man is found murdered and robbed. B a poor relative, immediately afterwards commences to live and spend money like a rich man. This may raise an inference of B's guilt. *Best Ev* § 459. "Such evidence may be competent. Its effect may be very slight, and in many cases, furnish not the least ground for charging a party. The possession of a large sum of money, with strong accompanying circumstances of guilt of an independent character accompanied with evidence of entire destitution of money before the time of the leaving may probably be submitted to the jury." *Com v Montgomery*, 11 Mete 334.

**Inconsistent and contradictory accounts of circumstances of the crime.** The fact that the accused has given false, inconsistent or contradictory accounts of the circumstances of the crime or of his relation to the act, is relevant. *Lau Pre Ev* 612. D was suspected of having poisoned E. It appears that he had stated to F that E had died of a cold induced by wet feet, to S that he had ruptured a blood vessel and to H and J that he had died from the effects of venereal complaint. This raises an inference that D was guilty. *R v Donellan*, Phil Tr 126.

**Conduct regarding a document** The nature of a document can be ascertained not only by the terms of the document but also to a certain extent from the circumstances existing at the time of its execution as well as by the conduct of the parties since its execution. *Robert Watson v Mohesh Narain* 24 W R 17 P C, see also *Nidhi v Nistarni* 13 B L R 416, *Radha v Girdhari*, 20 W R 243. According to English law where the instrument is an old one, and its meaning is doubtful the acts of the author, which are only modes of expressing intention more weighty than words, may be given in evidence in aid of its construction. *Tay* § 1204, see also *Att Gen v Braxator College*, 2 Cl & Fin 295, *Att Gen v Drummond* 1 Dur & W R 153. In the latter mentioned case Lord Chancellor Sugden said "Tell me, what you have done under the deed, and I will tell you what that deed means." So in order to a certain sum of an old charity grant, the evidence of the early and contemporaneous applications of the funds of the charity itself by the original trustees under the deed, is certainly admissible. *Shore v Wilson*, 9 Cl & Fin 603. *Att Gen v Sidney Sussex Coll* 38 L J Ch 637. *Att Gen v Mayor of Brighthelm* to Jic & Z W 121. Where the question is whether one of a large number of leases granted by a landlord at about the same time, under similar circumstances and on similar terms was intended to be perpetual or facts relating to acts and conduct of parties indicative of such intention are relevant facts only if they relate to a fairly large number of leases and not otherwise. *Narsingh Doyal v Ram Narayan* 30 C 883. The conduct of the parties after the transaction of sale is important in order to



ascertain whether the parties intended ownership to pass independently of payment of consideration *Bhagan v Allah Ditta* 9 Ind C 547=27 P L R 1911, see also *Ghannya Singh v Nihal Singh*, 7 P R 1897 Rev, *Ramchand v Harnam*, 68 P R 1900 Rev. In case of ambiguous grant subsequent conduct is admissible to interpret the grant *In re Purmanandas* 7 B 109, see also *Cheetum Lal v Chutlerdhari*, 19 W R 432. Conduct of parties and surrounding circumstances are relevant in order to ascertain whether a deed which appears on the face of it to be a deed of an absolute sale is not in fact a deed of mortgage or condition of sale *Hem hunder v Kallychurn*, 9 C 528 *Kashi Nath v Chandi Charan* 5 W R 68 (F B), *Balsu v Gobinda* 4 B 594 *Lincoln v Wright*, 4 De G & J 16, *Kashi Nath v Harinar*, 9 C 898. Where the meaning of a document regarding certain transactions is not clear the conduct of the parties is admissible in evidence to show in what light they themselves regarded the transactions *Badri v Sudappal*, A I R 1928 All 31=25 A L J 849.

**Explanation 1** Explanation 1 points out that mere statements as distinguished from acts do not constitute conduct. Conduct may be equivocal or insensible without statements explanatory or elucidatory of it. Statements accompanying acts are in fact part of the *res gestae* just as much as the acts themselves. They are often absolutely necessary to show the animus of the actor. They have been styled verbal acts *Bateman v Bailey* 5 Term R 512, *Hyde v Palmer* 3 B & C 657, *Benson v Cartwright*, 5 B & C 1. The admissibility of a statement depends not merely on its accompanying an act, but on the light it throws upon an act which is itself relevant *Wright v Fitham*, 7 A & L 313, *Norton* p 106, *R v Bliss* 7 A & E 550. "This explanation points to a case in which a person whose conduct is in dispute mixes up together actions and statements and in such a case those actions and statements may be proved as a whole. For instance a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken together and proved as a whole. But the case would be very different if some passers-by stopped him and suggested some name or asked some questions regarding the transaction. If a person were found making such statements without any questions first being asked then his statements might be regarded as a part of his conduct. But where the statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue but by interposition of something else." *Per Petheram C J* in *Queen Empress v Ibtulla* 7 A. 385, 395, 396. The Indian Evidence Act intends "to make those statements admissible and those only which are essential complements of acts done or refused to be done so that the act itself or the omission to the act acquires a special significance as a ground for inference with respect to the act as it does in the case under trial." *Per West J* in *Empress v Rama Baappa*, 3 B 12 (17), see also *Reg v Jora Hassi*, 11 B II C 212. A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery was admissible, though the person who made it cannot be called to depose to it on oath *Lalji v Emperor* A. I R 1928 Pat. 162-106 Ind C 698=6 P 171. Here the words are considered as acts. The question is not open to the objection of hearsay. It is not hearsay *Shilling v Ins Co I F & T* 116, 120. So where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act *Wright v Fitham*, 7 A & L 313. The words must strictly accompany the physical act, and be uttered at the time the material act is done *Powell* F 68. "It is not, however, every declaration that accompanies and purports to explain a fact that will be received—e.g. a declaration that it is equivocal (*L v Bliss* 5 C & P 550) *R v Wainwright* 13 Cox 171) or is obviously connected to a purpose (*Thompson v Ticeanton*, Skm 402 *R v Abrahams*, 2 C & K 570) *Phup Ie* 13. This section so far as it admits a statement as included in the word "conduct" must be read in connection with sections 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections *Queen Empress v Anna*, 11 B 260 (1 B). A statement made by a person is to

**S 8** the circumstances under which he executes a document a considerable time after the execution cannot be admitted to prove the facts stated by him *Anasamma v Billa Kesa*, 25 M L J 637

**Complaint** Illustrations (j) and (k) make statements of a person against whom an offence has been committed, relevant. But a mere statement is not relevant. Statement in the shape of complaint is only relevant. These illustrations are examples of conduct of a party alleging that an offence has been committed against him or her, and of his or her statements, accompanying such conduct. *Norton Fd* 107. A distinction is to be marked here between a bare statement of fact of rape and robbery, and a complaint. The latter evidences conduct, the former has no such tendency. There may be sometimes a difficulty in discriminating between a statement and a complaint. It is conceivable that the essential difference between the two is that the latter is made with a view to redress or punishment, and must be made to some one in authority—the police, for instance, or a parent, or some other person to whom the complainant is justly entitled to look for assistance and protection. The distinction is of importance, because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under the particular circumstances e.g., if it amounts to a dying declaration, or can be used as a corroborative evidence. *Norton Ev* 114.

**Complaint in cases of rape, criminal assault, etc** Illustration (j) is an example of admissibility of complaint in a case of rape as evidence of conduct. The rule is a striking exception to the general principle that statements made behind the back of a party are admissible in evidence against him. *Pouell Ev* 77. The origin of the rule is doubtful. It is either derived from the ancient law that a ravished woman should raise a "hue and cry" as soon as she could after the offence was committed or else from the ancient practice, before the law of evidence was settled, by which all prosecutors were allowed to give details of complaints in regard to any offence. *Ibid*. When a woman charges a man with rape, and testifies to the details and the accused denies the act itself its very commission thus coming into issue, the circumstance that at the time of the alleged rape the woman said nothing about it to any body constitutes in effect a self contradiction or inconsistency statement. It was entirely natural, after becoming the victim of an assault against her will that she should have spoken out. That she did not that she went about as if nothing had happened was in effect an assertion that nothing violent has been done. Thus, the failure of the woman, at the time of an alleged rape to make any complaint could be offered in evidence as a virtual self-contradiction discrediting her present testimony. As a peculiarity therefore of this kind of evidence, it is only just that the prosecution should be allowed to found still this natural assumption by showing that the woman was not silent i.e., that complaint was in fact made. This apparently irregular process of negating evidence not yet formally introduced by the opponent is regular enough in reality because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. *Wignote* § 1135, see also *State v DeWolf* 8 Conn. 99, *Baccio v People*, 41 N Y 263, *State v Neal* Utah 151. So in cases of rape indecent assault and similar offences upon females (but not in civil cases) the fact that the prosecutrix made a complaint shortly after the outrage, of the matters charged against the prisoner, together with the particulars of the complaint, are admissible as evidence in chief for the prosecution not to prove the truth of the matters stated, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as being inconsistent with her consent to that of which she complains. *H v Lillyman*, (1896) 2 Q B 165. *R v Osborne*, (1903) 1 K B 571, *Koscoe Cr Ev* 27, *Phip Ev* 99, *Beaty v Cullingworth*, (1896) 60 J P 777. *R v Lovell*, 129 L T 638. If the raped girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself. *Emperor v Phagana A I R* 1926 Pat. 38=89 In L C is. 1013. See also *Soosalal v Emperor*, 82 Ind C is 142.

Whether details of complaints are admissible Originally the details of a woman's statement could not be received *R v Clark*, 2 Stik. 242, *R v Walker*, 2 Moo & Rob 212, *R v Megson*, 9 C & P 420, *R v Alexander*, 2 Craw & D 126, *R v Osborne* 1 Cer & M 622, *R v Nicholas*, 2 C & K 246, *R v Eyre*, 2 F & F 579, *R v Wood* 14 Cox 46 In *R v Walker* (*idn supra*) which was decided in 1839, *Parke B.* excluded the statement, but said "The sense of the thing certainly is that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I can never understand, the usage has obtained that the prosecutrix's counsel should only enquire generally whether a complaint was made by the prosecution of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross examination." See also *Step Dig. Ev Note V, Reg v Eyre* 2 F & F 579 *Reg v Wood*, 14 Cox 46 A series of rulings beginning with *R v Lillyman*, (1896) 2 Q B 167, repudiated the original practice and declared the whole statement admissible In that case at p 177 *Haulins J* observed "After a very careful consideration we have arrived at the conclusion that we are not bound by any authority to support the existing usage of limiting evidence to the fact of complaint which was made, and that reason and good sense are against our doing so The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness box negating her consent, and affirming that the acts complained of were against her will and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of the question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? Are the jury bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them, and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand and in the cognizance of the witness in the box In our opinion, nothing ought unnecessarily to be left to speculation or surmise In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution" See also *R v Kiddle*, 19 Cox Cr 77, *R v Merry*, 19 Cox Cr 412 *R v Osborne* (1905) 1 K B 551, *Chesney v Newholme*, (1908) P 301, *Hedge's Case*, 3 Cr App 262 *Graham's Case*, 4 Cr App 218, *Christie's Case*, 10 Cr App 141 = 1914 A C 45, *R v Norcott*, (1916) 1 K B 347 It appears from illustrations (j) and (l) that the Indian Legislature has given effect to the sound reasoning expressed by *Parke J* in *R v Walker*, 2 M & R 212 and *Bramwell J* in *Reg v Wood*, 14 Cox 46 So under this section the particulars of a complaint are also admissible in evidence *Stoke v Anglo Indian Code*, 588 see also *Soosatal v Emperor*, 82 Ind Cas 112, *Emperor v Phaguna*, 82 Ind Cas 1013 = 1926 P 78

**Time for making the complaint.** The rule is that the complaint should be made at the earliest reasonable opportunity But what is the earliest and reasonable opportunity of complaint depends on the circumstance of each case *R v Lee* 7 Cr App 31 In *Chesney v Newholme* (1908) P 301, which was a case of immoral acts by a clergyman with a boy the boy's statement to his mother on the same evening was admitted, but not his statement on the next evening In *Graham's Case* 4 Cr App 218, complaint a month after was received In *Christie's Case* 10 Cr App 141 = (1914) A C 45 which was a case for indecent assault upon a little boy, the boy's identification of the accused within a few

**S 8** minutes was held inadmissible, on the ground that 'complaint is only admissible to negative assent'. In the case of the rape of an innocent girl of tender age the evidence of the ravished girl is of great value and where she makes a statement by way of disclosure immediately after the occasion, it is a strong piece of evidence corroborating her credibility and proving the consistence of her conduct and also negating consent on her part. *Soosalal Bania v Emperor*, 87 Ind Cr 142

**Complaint in answer to question.** The complaint must be volunteered and not in answer to questions. *R v Merry*, 19 Cox C C 442. In *King v Osborne*, (1905) 1 K B 551, the prisoner was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the prisoner, as to why the girl had not waited for the other child at the prisoner's house. Held, that the girl's reply was a complaint of the prisoner's conduct to her. In that case *Radley J* in reading the judgment of the Court consisting of five Judges observed "As to the first point, the case of *Reg v Merry* (supra) was quoted. In that case a question had been put to a girl of nine years old by her mother in a case of indecent assault, and the learned Judge ruled that as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will indeed have the effect, and will render it inadmissible but a question such as this, put by the mother or other person 'what is the matter?' or 'why are you crying?' will do so. These are natural questions which a person in charge will be likely to put, on the other hand, if she were asked, 'Did so and so' (naming the prisoner) 'assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances such as the relationship of the questioner to the complainant must be left to the discretion of the presiding Judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make it is not rendered inadmissible by the fact that the questioner happened to speak first'. See also *Soosalal v Emperor* 82 Ind Cr 142. Pressure by a proper person (e.g. a mother) to state the cause of visible mental disturbance does not invalidate the answer. *R v Norcott* 12 Cr A R 166

**Complaints in other cases.** The rule as to admissibility of such evidence is equally applicable to cases where the offence charged is with a male person. *R v Camelleri* (1922) 2 K B 123=91 I J K B 671=16 Cr A R 162=40 J P 135. In admitting this kind of evidence *Lord Hewart C J* in that case observed "It is quite true if one looks at the historical origin of the present law that there are reasons why complaints of this character might well be thought admissible only when made by female. But in view of the decision in *Lillyman's Case* (*R v Lillyman* [1896] 2 Q B 167, where no doubt the question of consent was material and in the case of *Rees v Osborne* [(1900) 1 K B 551] where no question of consent arose it does not appear to this Court that, at the present day, the question of admissibility of such evidence can depend on those historical grounds upon which in the first instance such evidence in the case of complaints by females may have been admitted. In certain other cases such as *Beatty v Cullinworth* (60 J P 710) observations were made which appear to limit the admissibility of such complaints to cases of sexual offences upon women and girls but when one looks at the facts of those cases, it is apparent that the antithesis which the Judge had in mind was not an antithesis between cases in which a complaint of this nature was made by a female and cases where a complaint of this nature was made by a male person but the antithesis is between what may be broadly described as

sexual offences on the one hand and non sexual offences on the other" But section 8 of the Evidence Act is very wide, and a complaint of any offence is admissible *Vide illustration (h)*

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In *R v Foster*, 6 C & P 325, which was a case of man-slaughter *Paley J* allowed the statement of the deceased made to a passer by immediately after the accident, to be given in evidence, saying that it was the best possible testimony that, in the circumstances, could be adduced to show what it was that had knocked the deceased down" *Roscoe C J* 28. But in that case the evidence was not admitted to show the conduct of the prosecutor but apparently as part of *res gestae*. Strictly speaking this testimonial evidence was admitted as an exception to Hearsay rule as spontaneous declaration for which no provision has been made in the Act, but the admission of which is indicated as part of *res gestae* under section 6, *illustration (a)*

**Explanation 2** Under this explanation another class of statements i.e. statements which affect the conduct of a person, whose conduct is relevant under this section, is admissible. Illustrations (f), (g) and (h) are examples of such statements. The conduct of A in illustrations (f), (g) and (h) show nothing unless the statements are put before the tribunal. Here the statements made in the presence of the party are admissible as the ground work of their conduct. Here the conduct of A is equivocal and statements are admissible to explain that conduct as part of the *res gestae* under the rule of the Verbal Act doctrine explained in s 6. In this explanation statement includes document addressed to a party. *Vide illustration (h)*, *Reg v Thompson* (1910) 1 K B 640. 'But before a bare statement made by another person in an accused's presence and prejudicial to him is allowed to be used as evidence against him, there must be something in the shape of action, conduct or words, which in the opinion of the Judge, would justify the jury in drawing in inference that the accused substantially admitted the story told against him' *Per Haulms J in R v Smith* 18 Cox 72. Moreover to make the statement admissible against a person, the evidence must 'be adduced which would justify the jury in finding that the prisoner having heard the statement and having opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make observation, explanation or denial, by his silence his conduct or demeanour, or by the character of any observations or explanations he thought fit to make substantially admitted the truth of the whole or portion of it' *Ibid*. But in *Reg v Thompson*, (1910) 1 K B 640=79 L J K. B 321 at p 322 *Lord Alverston C J* said. 'But if the case of *Reg v Smith*, is supposed to lay down the rule that such a statement is never admissible unless the prisoner has admitted that the statement is true it goes too far. I adhere to the opinion I expressed in *Reg v Bromhead* 71 J P 103 that the question of the admissibility cannot be determined solely by the consideration whether the prisoner has admitted the truth of the statement. The Court refuses to adopt the principle laid down in *Reg v Smith* that such a statement is not admissible unless the prisoner agrees with it because that would exclude the most ordinary case where the prisoner says not nothing' In *Reg v Smith* *Smith* only said of the adverse statement, 'This is not true,' and the Judge excluded it when tendered. In *Reg v Thompson* *Lord Alverston* strenuously denied the co-defendant's allegation, but *Lord Alverston C J* admitted the evidence against *Thompson*.

In *Reg v Norton*, (1910) 2 K B 496=79 L J K B 756, *Norton* was indicted for carnally knowing *Majority Fruman*, a girl under the age of thirteen years. The evidence was to the effect that on being asked by the accused who had done it, she said "you", and on being asked by another person she said *Stevie Norton* and pointed to the accused. The accused said No *Madge* you are mistaken, and she then said you have done it, *Stephen Norton* and pointed to him again. The accused then lifted his arms and said 'If I have done it I hope the Lord will strike me dead'. Now the question is whether the statement is admissible in evidence. In delivering the judgment of the Court, consisting of *Lord Alverstone C J*, *Piel ford J* and *Lord Coleridge J*, *Piel ford J* observed "As a general rule, statements as to the facts of a case under investigation are not evidence unless made by witnesses in the ordinary way but to this rule there are exceptions. One is that statements, made in the presence of a prisoner

**S 8.** upon an occasion on which he might reasonably be expected to make some observation, explanation or denial, are admissible under certain circumstances. We think it is not strictly accurate and may be misleading, to say that they are admissible in evidence against the prisoner, as such an expression may seem to imply that they are evidence of the facts stated in them, and must be considered upon the footing of other evidence. Such statements are, however, never evidence of the facts stated in them, they are admissible only as introductory to or explanatory of the answer given to them by the person in whose presence they are made. Such answer may of course be given either by words or by conduct—for example by remaining silent on an occasion which demanded an answer. If the answer given amount to an admission of the statements, or some part of them they or that part become relevant as showing what facts are admitted, if the answer be not such an admission the statements are irrelevant to the matter under consideration and should be disregarded. This seems to us to be correctly and shortly stated in Vol I of *Taylor on Evidence* (10th Ed) s 914 at p 574. The statements only become evidence when by such acceptance he makes his own statements'. We think that the contents of such statement should not be given in evidence unless the Judge is satisfied that there is evidence fit to be submitted to the jury that the prisoner by his answer to them whether given by words or conduct acknowledges the truth of all or part of them. If there be no such evidence the contents of such statements should be excluded. It is perhaps too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred but as above stated we think they should be rejected unless there is some evidence of an acknowledgment of their truth'.

The question was again considered by the *House of Lords* in *R v Christie* (1914) A C 545 = 83 L J K B 1097. In that case the accused was charged with an indecent assault on a child of tender years. Very shortly after the commission of the offence the child touched the prisoner and said 'That is the man'. To this the accused replied 'I am innocent'. The question was whether the statement made in the presence of the accused is admissible. Lord *Allmon* in giving his judgment observed. As to the second ground, the rule of law undoubtedly is that a statement made in the presence of the accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated save so far as to make it in effect his own. If he accepts the statement in part only then to that extent alone it becomes his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amount to an acceptance of it in whole or in part. It by no means follows I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them". In the same case Lord *Houlton* said. If the prisoner admits the charge the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance if he is charged with a violent assault and denies that he committed it that fact might be distinctly relevant if at the trial his defence was that he did it, but that it was in self defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character is such that it cannot in some circumstances have an evidential value. I am therefore of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour

amounts to a denial of his guilt." In the same case *Lord Reading* also observed "In general, such evidence can have little value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgment, for if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury not-withstanding his denial could infer that he acknowledged its truth in the whole or in part, the practice of the Judges has been to exclude it altogether." In this case the statement of the boy was held admissible. See also *R v Huey*, 6 Cr A R 200=27 T L R 441, *R v Wilson*, 6 Cr A R 207, *h v Adams* 17 Cr A R 77, *R v Strand*, 7 Cr A R 38.

**Which affects such conduct** The statements whether oral or written must be shown "to affect the conduct" of the person to whom they are made, and therefore, mere statement to persons, which cannot be shown to be in any way connected with or to bear upon his conduct, would be inadmissible. *Can E* 97. In *R v Bealey*, 70 J P 263, the prisoner was charged with murder of her child. She made a statement as to its death to her husband who repeated it to the police. In her presence, she made no reply, but burst into tears. This statement was held admissible as it explained her subsequent conduct. So when a statement is made by a person in the presence of accused and the accused upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances, by the refraining from an answer, acknowledges the truth of the statement, it is evidence against him. *R v Christie* (1914) A C 545, see also *Child v Grace* 2 C & P 193, *R v John* 7 C & P 324 *Jones v Monel* 1 C & K. 266, *R v Welsh*, 3 F & F 275, *Prue v Buria*, 6 W R (Eng.) 40 *h* 1 *Malloy*, 15 Cox 453, *R v Cox*, 1 F & F 90 *Hayslep v Gymer*, 1 A & E 165.

## ILLUSTRATIVE CASES

### Admissible

In cases where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. *Halsbury* Vol IX p 380, see also *R v Heeson*, 14 Cox Cr 40, *R v Steiens* 16 Cox Cr 387, *R v Klanagan* 1 Cox Cr 40, *R v Debendia* 36 C 573, Motive of a crime, while it is always satisfactory circumstance of corroboration when there is convincing evidence to prove guilt of an accused person, can never supply the want of reliable evidence direct or circumstantial of the commission of the crime with which he is charged. *Ramm v Emperor* 7 Lih 84=A I R 1926 I ih 88. Under section 8 of the Evidence Act statements accompanying conduct and explaining such conduct are relevant. *Pularam v Ajuna*, 45 Ind C 904.

The first information report against the accused is admissible under s 8 of the Evidence Act as part of the informant's conduct. *A muddin v*

### Inadmissible

It is not competent to the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried on the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to the issue. *Emperor v Stewart*, 97 Ind C 1011=A I R 1927 Sind 28, *Valm v All Gen.* (1894) A. C 57, see also *Golul v Emperor*, 29 C W N 483.

It is a matter of common knowledge that brokers sometimes for the purpose of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because an agent had been shown to be guilty of shady practice once, his evidence is to the circum-

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## Admissible

*Emperor*, 44 C L J 253 = A I R 1927 Cil 17 see also *Soosa Lal Bena v Emperor*, 82 Ind C 15 142

Where a woman who had been raped, on being questioned by a relative of her husband told him that the accused had raped her and asked him to report the matter to her father-in-law and subsequently made the same statement to her father-in-law. *Held* that the statements were inadmissible under s 6 but admissible as a complaint under s 5 of the Evidence Act. *Raman v Emperor* 4 L J L J 491

The fact that the complainant at first said that a certain person was the real culprit is relevant under section 8, of the Evidence Act. *Abdul Ghafur v The Crown* 25 P W R Cr 1910 = 6 Ind C 15 907 = 11 Cr L J 425

A prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor while travelling by train to Calcutta discovered the loss of the property and stated his loss to a Railway Police Inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not being then present. This statement was tendered in evidence, and admitted under s 8 ill (k) of the Evidence Act. *Queen v Macdonald* 10 B L R App 2

The fact that the accused pointed out the place where the weapon (with which the murder was committed) was found as being the place at which it was concealed and the fact that shortly after the crime he was in a very agitated state and made a statement which led to his being asked to show the spot where the weapon used in the commission of the murder was concealed are evidence of conduct under s 8 of the Evidence Act which renders highly probable the oral evidence in the case and indicates that the accused was the murderer. *In re Semalal Gowidan* 86 Ind C 15 661 = 26 Cr L J 840 see also *Emperor v Naga Ling Bai* 35 Ind C 15 962 = U B R (1916) Vol II 114 = 17 Cr L J 402

## Inadmissible

stances under which the contract in suit was entered into should be entirely discarded. *Lybally Abdul v Mrs James*, 1924 S 105 = 80 Ind. C 15 969

Where certain persons are charged with murder it is not open to the prosecution to adduce evidence to show that on two previous occasions the accused under trial had committed murder themselves but had falsely charged and got convicted some other persons as murderers. Such evidence is irrelevant because the fact that the previous murders had been committed by the accused does not constitute under section 8 of the Evidence Act, a motive or preparation for the subsequent murder. *Gangaram v Emperor*, 63 Ind C 15 545 = 22 Cr L J 529, see also *Emperor v Gangaram*, 22 Bom. L R 1274

If a raped girl goes to her relatives straight after the occurrence and complains on her own initiative, her conduct would have a direct bearing upon and connection with the occurrence itself, but if she only answered questions, her statement would be hearsay. *Emperor v Phaguna Bhuan*, 89 Ind C 15 1049 = 26 Cr L J 1045 See also *Naga Som v Emperor*, 43 Ind C 15 443 = 19 Cr L J 155

The accused was convicted of theft on the evidence of an accomplice which was treated as corroborated in material particulars by the depositions of a Police officer and the complainant to the effect that the accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence. *Held* that the evidence could not be treated as evidence of conduct apart from the accomplice's statements under s 8 of the Act. *Emperor v Hua Guber* 21 Bom L R 724 = 22 Ind. C 15 601 = 20 Cr L J 681

Where the evidence against a person charged with an offence under section 117 I P C is open to doubt his conduct sometime after the occurrence cannot be taken to be such evidence of conduct under s 8 of the Evidence Act as can be used against him in the case. *Enayet Karim v Emperor*, 51 Ind C 15 775 = 21 Cr L J 167

A statement made by a person as to the circumstances under which he executes a document is considerable



*Admissible**Inadmissible*

S 9

time after the execution, cannot be admitted to prove the facts stated by him. *Narasamma v Billa Kesu*, 21 M L J 637

An informant's statement to the Police that he had purchased opium from the accused is inadmissible, unless it is made in the presence of the accused. *Ali Shein v Emperor*, 12 C L J 429 = 12 Ind C 18 87

A certain witness stated that he had seen three women who were sleeping in the same *bari* as the complainant and his wife that night searching something at dusk. Held that the alleged search that evening cannot be treated as evidence as s 6 of the Evidence Act cannot make it admissible and section 5 is of no help (to the appellants) since these women were neither parties to the case nor agents to any party. *Izzu Muddin v King Emperor*, 42 C L J 111 = 90 Ind C 18 433

- 9 Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose

*Illustrations*

(a) The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8 as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

S 9

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says he delivers it—"A says you are to hide the B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

**Introductory facts.**—It would be practically impossible in the conduct of an action, to plough direct in *medias res*, and Judge and jury alike seek for some introductory evidence just as one hearing only the main incident of a story desires to know the circumstances leading up to it and the results that flow from it. Those circumstances in relation to an action or suit may not *per se* be relevant, but in connection with the main issues to be put before the tribunal, they are treated as the introduction to the main matters or by way of inducement to it. They take the place of the preamble to a statute, which, while it has no power in itself combined with the enacting clauses becomes the Statute. The variety of these introductory or preliminary proofs is great in number as the variety of causes of action prevents any attempt at classification but the rule as to their relevancy is abundantly established. *Griel v. Lomax* 86 All 132. One illustration will suffice to convey the meaning. An action was commenced by one *Hunt*, executor of the will of *Sharp* against defendant *Suqney* to compel him to convey certain lands alleged to have been held in trust for plaintiff's testator and setting out the facts relied on. *Mrs. Sharp* the widow intervened, claiming that defendant held the land in trust for her, and claiming the rents and profits setting out that defendant who was her deceased husband's law clerk, had bought the land referred to at a foreclosure sale with her money and for her. Upon direct examination *Mrs. Sharp* was asked "During the year 1881, from December 1st down to and including the month of October, 1882, was *Mr. Suqney* the defendant in this action your agent in collecting rents for you?" Objection was made that it was immaterial, irrelevant and incompetent, and not pertinent to any of the issues. The objection was overruled, upon the ground that it was introductory. The specifications did not show that any motion was afterward made to strike out while the record showed that defendant's accounts were put in evidence, bearing not only that large amounts of rents were collected by the defendant for her thus tending to show that she had moneys of her own, but also showing among other things that in his accounts to her of rents collected he charged her for the notary's fee for acknowledging the assignment of the *Rising* mortgage to him and for recording it for paying the taxes on the mortgage and for all the expenses of foreclosure of that mortgage including a witness fee to him and the expenses of the sale. In view of this evidence the preliminary question leading to its introduction was held entirely proper. *Hunt v. Suqney*, 1 Pac. 84. *Bristol Mfg. Co. v. Fabner*, 82 Vt. 138. *Burr Jones* 172. So facts which are introductory and explanatory are always relevant. *Queen v. Ameklin* 9 B. L. K. 4 (1854) 17 W. R. Cr. 15.



**S 9** alleged cause *Wigmore* § 119 Evidence of other offences committed by the prisoner is sometimes admitted, when they corroborate the testimony of a witness in some material particular. Thus on an information for a libel where the printer swore that he had received the manuscript from the defendant to produce it, other libels written by him concerning the same subject were received by *Lord Kenyon* as evidence to corroborate the statement of the printer *R v Pearce* Per R 75 So where the prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar but intellectual attempt on the following evening when the prisoner brought the duplicate pawn ticket for the coat, and which ticket was found on his person at the time of his apprehension was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day *R v Tjerton* R & R 375 cited by *Holroyd J* in *R v Ellis*, 6 B & C 143. So on a charge of highway robbery the prosecutor was allowed to rebut *alibi*, by proving that, shortly before the attack made upon him, and near the spot, the prisoner had robbed another person (*R v Briggs*, 2 M & Rob 199), and even had no such defence been set up similar evidence would, it seems, have been admissible as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed *R v Poomey* 7 C & P 517, *R v Finesy* 6 C & P 81. In civil cases too evidence of collateral facts is sometimes received for the purpose of confirming the testimony of witnesses *Fide Lleuellyn v Winculworth* 13 M & W 598 *Hollingham v Head* 27 L J Ch 211, *Morris v Bethel* 4 Lw Re C P 765—*Taylor* § 335 336 Sections 9 and 11 read with section 21 of the Evidence Act imply justify a Court in admitting into evidence all previous statements made by an accused which have a bearing upon the question of his guilt and whether the previous statement is made to a Police officer, or to a judicial officer or to a third party is immaterial if the statement is relevant to the fact in issue namely the accused's guilt. *Madan v Emperor* 73 Ind Cas 963=4 P L F 891 The absence of an entry in a book of account has no doubt been regarded as a relevant fact, not under section 34, but under sections 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made *Gangaram v Lacharam*, 19 C W N 612=28 Ind. Cas 705, *Tara Kumar v Kumar Arun Chundha* 74 Ind Cas 383=36 C L J 389, *Imrit v Sibdhari*, 15 C L J 7=17 C W N 108 *Sagarmal v Manray* 4 C W N 221, *Ali Nasir v Manil* 25 A 90 In *Emperor v Gonesh Damodar* 34 B 394 the accused published a book containing eighteen poems of which four were subject matter of charge. The general trend of the poems charged, as well as the remaining ones in the book evinced a spirit of blood thirstiness and murderous-ness directed against the Government. Held that the Court was entitled to look into the poems other than those forming the subject matter of the charge for the purpose of finding out the intention of the writer and the design of the publication. In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court the fact of the jail identification must be stated in the witness's evidence. An identification in jail is in essence a statement by the witness. I saw this man who is before me taking part in the dacoity. That statement can be used to corroborate this evidence given in Court if the witness says in his evidence, "A number of persons was shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence. It is permissible under s 9 to call in independent evidence such as that of the Magistrate who conducted the identification to prove the identity of the persons whom the witness picked out at the jail, even though the witness himself may not correctly remember who they were *Chutlan v King Emperor* A I R 1926 Oudh 36=90 Ind Cas 444=28 O C 258 *Abdul v Emperor* 47 A 39

**Basis for admission of explanatory facts** The peculiar danger, of inducive proof is that there may be other explanations than the desired one for the fact taken as the basis of proof *Sidguel Fallacies* 270 But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while in the Law of Evidence we are concerned merely with the propriety of admitting the fact at all with its quality as a possible Inference, not as absolute Proof. If, then, the potential defect of inductive Proof is that the fact offered, as the basis

of the conclusion may be open to one or more other explanations or conclusions, the test or requirement for mere Admissibility (is distinguished from Proof) must be something far short of this in strictness. The failure to exclude a single other rational hypothesis would be from the stand point of Proof a fatal defect, and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the conclusion under the Law of Evidence *Wigmore* § 32. Thus throughout the whole realm of evidence circumstantial and testimonial, the theory of the inductive argument, is practically applied from the stand point of Admissibility is that the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a mere probable or natural or at least a probable or natural hypothesis and when the other hypotheses or explanations of the fact, if any are either less probable or natural, or at least not exceedingly more probable or natural.

**General principle of Identity Evidence** Identity may be thought of as a quality of a person or thing,—the quality of sameness with another person or thing. The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged because of common features to be the same as the other. The process of inference thus has two necessary elements (1) it is a concomitant one in its logical scheme and (2) it operates by comparing common marks found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the necessity of the association between the mark and a single object. Where a certain circumstance, feature or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects a little indication of their identity, because, on the general principle of relevancy the other conceivable hypotheses are so numerous, i.e. the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances the chances of the two being different are *nil* or are comparatively small. Hence, in the process of identification of two supposed objects by a common mark, the force of the inference depends on the degree of necessity of association of that mark with a single object. For simplicity's sake, the evidentiary circumstance may thus be spoken of as a mark. But in practice it rarely occurs that the evidentiary mark is a single circumstance. The evidencing feature is usually a group of circumstances which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstances to circumstances that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object. *Wigmore* § 411. 'You compare in your mind' said *Parke B* in *Fryer v Gathercole*, 13 Jur 512 'the man you have seen with the man you see at the trial.' But 'evidence as to identity based on personal impression, however *bona fide* is perhaps of all classes of evidence the least to be relied on, and therefore, unless supported by other facts an unsafe basis for the verdict of the jury.' *Vide Oscar Slater's Case*, Not Trial Ser.

**Test of Admissibility** The only matter that is here of concern is the admissibility of circumstantial evidence of identification, and it will easily be seen that very few questions can arise from this point of view. So far as there can be any general principle of Admissibility it is perhaps to be stated as follows: A mark common to two supposed objects is receivable to show them to be identical whenever the mark does not in human experience occur with so many objects that the chances of the two supposed objects are too small to be appreciable. But the mark must be understood that this test applies to the total combination of circumstances offered as a mark and not to any one circumstance alone, with others to make it up. *Wigmore* § 412.

**Circumstances which identify a person** Identity of a person can be sustained by the following circumstances—

- (1) Corporal marks [*Id v Castro*, (*Trichiburn Case*) charge of *Crack*]

**S 9** alleged cause *Higmore* § 119 Evidence of other offences committed by the prisoner is sometimes admitted, when they corroborate the testimony of a witness in some material particular. Thus on an information for a libel, where the printer swore that he had received the manuscript from the defendant to produce it, other libels written by him concerning the same subject were received by *Lord Kenyon*, as evidence to corroborate the statement of the printer *R v Pearce*, 11 R 75. So where the prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar but intellectual attempt on the following evening, when the prisoner brought the duplicate pawn ticket for the coat, and which ticket was found on his person at the time of his apprehension was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day *R v Egerton* R & R 375 cited by *Holroyd J* in *R v Ellis*, 6 B & C 142. So on a charge of highway robbery, the prosecutor was allowed to rebut alibi, by proving that, shortly before the attack made upon him, and near the spot, the prisoner had robbed another person (*R v Briggs*, 2 M & Rob 199), and even had no such defence been set up, similar evidence would, it seems, have been admissible as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed *R v Poomey* 7 C & P 517, *R v Furesy* 6 C & P 81. In civil cases too evidence of collateral facts is sometimes received for the purpose of confirming the testimony of witness. *Vide Llewellyn v Wadsworth* 13 M & W 298. *Hollingham v Head* 27 L J Ch 241, *Morris v Belhel* 1 Law Re C P 765—*Taylor* § 335 336 Section 9 and 11 read with section 21 of the Evidence Act imply justify a Court in admitting into evidence all previous statements made by an accused which have a bearing upon the question of his guilt and whether the previous statement made to a Police officer or to a judicial officer, or to a third party is immaterial if the statement is relevant to the fact in issue, namely the accused's guilt. *Madan v Emperor* 73 Ind Crs 963=4 P L F 881. The absence of an entry in a book of account has no doubt been regarded as a relevant fact, not under section 34 but under sections 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made *Gangaram v Lachuram*, 19 C W N 612=28 Ind Crs 705 *Tara Kumar v Kumar Arun Chandra* 74 Ind Crs 383=36 C L J 389, *Imrit v Sibdhan* 15 C L J 7=17 C W N 108 *Sagarmal v Manay* 4 C W N 200 *Ali Nasir v Mamul*, 25 A 90. In *Emperor v Gonesh Damodar*, 34 B 394 the accused published a book containing eighteen poems of which four were subject matter of charge. The general trend of the poems charged, as well as the remaining ones in the book evinced a spirit of blood thirstiness and murderous eagerness directed against the Government. Held that the Court was entitled to look into the poems other than those forming the subject matter of the charge for the purpose of finding out the intention of the writer and the design of the publication. In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court, the fact of the jail identification must be stated in the witness's evidence. An identification in jail is in essence a statement by the witness. 'I saw this man who is before me taking part in the conspiracy.' That statement can be used to corroborate this evidence given in Court if the witness says in his evidence "A number of persons was shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence." It is permissible under s 9 to call in independent evidence such as that of the Magistrate who conducted the identification to prove the identity of the persons whom the witness picked out at the jail even though the witness himself may not correctly remember who they were *Chullan v King Emperor* A I R 1926 Oudh 36=90 Ind Crs 444=28 O C 258 *Abdul v Emperor* 47 A 39.

**Basis for admission of explanatory facts** The peculiar danger, of inductive proof is that there may be other explanations than the desired one for the fact taken as the basis of proof *Sidgwick Fallacies*, 270. But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while in the Law of Evidence we are concerned merely with the propriety of admitting the fact at all with its quality as a possible Inference not as absolute Proof. If, then, the potential defect of inductive Proof is that the fact offered, as the basis

of the conclusion may be open to one or more other explanations or conclusions, the test or requirement for mere Admissibility (is distinguished from Proof) must be something far short of this in strictness. The failure to exclude a single other rational hypothesis would be from the stand point of Proof a fatal defect, and yet, if only that single other hypothesis were open there might still be an extremely high degree of probability for the conclusion under the Law of Evidence *Wigmore* § 32. Thus throughout the whole realm of evidential circumstantial and testimonial, the theory of the inductive argument, is practically applied from the stand point of Admissibility is that the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a mere probable or natural, or at least a probable or natural hypothesis and when the other hypotheses or explanations of the fact, if any are either, less probable or natural, or at least not exceedingly more probable or natural *Ibid*

**General principle of Identity-Evidence** Identity may be thought of as a quality of a person or thing,—the quality of sameness with another person or thing. The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged because of common features to be the same as the other. The process of inference thus has two necessary elements (1) it is a concomitant one in its logical scheme and (2) it operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the necessity of the association between the mark and a single object. While a certain circumstance, feature or mark, may commonly be found associated with a large number of objects the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy the other conceivable hypotheses are so numerous, i.e. the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few and the mark is found in two supposed instances, the chances of the two being different are nil or are comparatively small. Hence, in the process of identification of two supposed objects by a common mark, the force of the inference depends on the degree of necessity of association of that mark with a single object. For simplicity's sake, the evidential circumstance may thus be spoken of as "a mark." But in practice it rarely occurs that the evidential mark is a single circumstance. The evidencing feature is usually a group of circumstances, which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstance to circumstance that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object. *Wigmore* § 411 "You compare in your mind," said *Parle B* in *Fryer v Gathercole*, 13 Jur 542, "the man you have seen with the man you see at the trial." But "evidence is to identity based on personal impression, however *bona fide* is perhaps of all classes of evidence the least to be relied on and therefore, unless supported by other facts an unsafe basis for the verdict of the jury." Vide *Oscar Slater's Case*, Not Trial Ser

**Test of Admissibility** The only matter that is here of concern is the admissibility of circumstantial evidence of identification, and it will easily be seen that very few questions can arise from this point of view. So far as there can be any general principle of Admissibility, it is perhaps to be stated as follows: A mark common to two supposed objects is receivable to show them to be identical whenever the mark does not in human experience occur with so many objects that the chances of the two supposed objects are too small to be appreciable. But it must be understood that this test applies to the total combination of circumstances offered as a mark, and not to any one circumstance going with others to make it up. *Wigmore* § 412

**Circumstances which identify a person** Identity of a person can be ascertained by the following circumstances—

- (1) Corporal marks [*R v Castro*, (*Trichborne Case*)] charge of *Coelburn*

**S 9** C J II 1 ff 307 ff, 1 I, 670 ff, 718 ff, *Comm v Sturtuant*, 117 M 131, (139), *R v Broome, Danough*, 81, *R v Crippen*, Wills 490, *R v Hauright*, Not Tr

(2) Voice (*Patton v State* 117 Ga. 230, *Brown v Com*, 187 Ky 829)

(3) Mental peculiarities (*Webster's Trial*, Bemis' Rep 59), where knowledge of anatomy is shown in the mode of dissecting the body of the deceased, was admitted to identify the accused a medical professor)

(4) Clothing *Story v State*, 99 Ind 413, *R v Nash*, Wills 349, *R v Kallos*, Lyon p 58, *Mahabulja* Lyon 58, *Reg v Sudarcm*, Lyon 58

(5) Weapons *Deans' Case* 32 Gratt Mass 912, 923 In this case the murder was committed with a gun It was proved that upon the examination of a large number of guns within a radius of eight miles of the scene of the murder none were found of the same bore or which would carry precisely the same ball as that found in the deceased's body

(6) Residence, and other circumstances of family history *Lowat Pearce Case* L R 10 App Cas 763 775

(7) Specimens of spelling, is indicating a person's authorship of a written *Hale's Trial* 17 How St Tr 173, *Norman v Horrell*, 4 Ves 770 In *Brooks v Tichborne* 5 Exch 929 *Park B* said "It was hardly disputed that if a habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel Indeed we think that proposition can not be disputed the value of such evidence depending on the degree of peculiarity in the mode of spelling and the number of occasions in which the plaintiff used it" See also *Cresswell v Jackson* 4 F & F 1 (5) *Wigmore Et* § 413

(8) Voice *R v Keating*, 2 Cr A R 61 (1909)  
So whenever the identity of a person is in question all facts which establish the identity of that person are relevant *R v Crippen*, 1910 Times, October 1910, see also *R v Ball* (1911) A C 47 *R v Clewes*, 4 C & P 221 Evidence of other offences committed by the prisoner is sometimes admitted, with a view to establish identity *Taylor* § 335 At a trial for offences under ss 302, 120 B and 380 I P C the Judge admitted evidence of theft committed some two years subsequently in somewhat similar circumstances, as showing identity, design and motive and illegal association and that a system had been pursued by the accused *Held*, that having regard to the dates of the incidents alleged in the subsequent case the evidence was not admissible either under s 9 or section 11 or 14 or 15 of the Evidence Act *Empcor v Panchu Das*, 58 Ind Cas 929=21 C W N 501=31 C L J 402=47 C 671

**Circumstances identifying a person—criminality of Act immaterial** In *R v Fursey* 6 C & P 83 the kind of wound given to a third person by the accused was admitted to identify the weapon See also *R v Rooney*, 7 C & P 517 which was a case of robbery of W, who was riding with U, evidence of the finding of U's watch on the accused was admitted as identifying him as one of the taking put "it makes no difference that Mr U's Watch is the subject of the next indictment" So the general principle that where a circumstance is relevant for some purpose the incidental revelation, in offering it, of other criminal conduct by an accused does not stand in the way of receiving the evidence *Wigmore* § 116

**Identity of name** Identity of names is a presumption of identity of person where there is similarity of residence or trade or circumstance or where the name is an unusual one but *aliter* where the name is a common one and there are several persons known of the same name and of the same place *Tolson Pre Ft* 307 "A concordance in name alone is always some evidence of identity and it is not correct to say with the books that the best proof of the facts in relation to the persons named their identity must be shown, implying that the agreement of name goes for nothing, where as it is always of considerable help towards that conclusion" *Groves v Groves* 9 L J R N 111 In *Taylor's Trustees* 21 L J R N 795 *Re Wolous Trusts* L R 111 305 *Milner's Estate* 1 R 11 L 215 *Mason v Taylor* 15 L J Ch 763 *Daniel v Hampton* 18 Ch D 213, *Re Hocking* (1893) 2 Ch 367, *Re H* (1901) 1 Ch 770



The question is whether one Samuel Fry of Plymouth Rock has written certain letters—he being the defendant in the case. A witness testifies that he knows the handwriting of a Samuel Fry of Plymouth Rock, the only person of that name at the place. The presumption is that he is the defendant in *Harrington v Fry*, 1 Ry & M 90. Sues for medicines and attendance furnished by him as a licensed apothecary. Under the law he cannot recover unless he is licensed. He produces a license to a person of his name and proves that he practiced as an apothecary. The presumption is that he is the person licensed in *Simpson v Dismore*, 9 M & W 47. In that case Parkes said: We find him, acting as an apothecary, prescribing and dispensing medicines to his patients, and then producing a certificate or license for that purpose in his name from the body empowered by law to grant it. That is quite sufficient evidence of identity. Similarly in *Smith v Henderson*, 9 M & W 518, an action was brought against a pilot named Wm Henderson for negligently navigating a vessel. A pilot named Henderson was in Court and answered this description. The presumption was that he was the defendant. There the Court observed: The action was brought against William Henderson, a pilot, and a person in Court answers to the name of Henderson, and is proved to be a pilot and to have been the pilot on board the vessel in question. This is evidence for which the jury might assume him to be the defendant. But then the counsel objects that the statement is not made under oath. As to that there are many things which are incapable of strict legal proof. A man's name is a mere matter of reputation, and if proved in Scotch law the status of a man is matter of reputation, and if proved evidence of the relationship of one man to another or other matters of that nature were always required, no fact of that kind could ever be proved in practice. Here there was evidence of the identity of the defendant although it was not proved directly that the name of the party who answered in Court was William. There was evidence that he was a pilot, that he was the pilot on board the vessel, and he answered to the name of Henderson. I think that is sufficient. In an action against Charles Lyon for goods sold to his intestate, and a plea of *plene administravit* the plaintiff in order to show assets offered a copy of a bill and answer by one Charles Lyon to a bill filed in Chancery against him in the character of an administrator. The presumption is that they are the same persons and evidence is admitted. *Hennell v Lyon* 1 B & Ald 182. In that case Bayley J observed: There is nothing to show two administrations and it is rather extraordinary to suppose that two persons of the same name should sustain the same character. It is not to be presumed that there are two persons but the identity is rather to be presumed, unless the plaintiff could have shown the contrary.

An action is brought on a bill of exchange directed to, "Charles Banner Crawford, Last India House and accepted 'C B Crawford'." A witness proves that the signature was that of a gentleman of that name formerly a clerk in the East India House, but he does not know whether that W Crawford is the defendant here. The presumption is that the two are the same. *Green Shields v Crawford*, 9 M & W 311. Lord Abinger said: "I am of opinion that the evidence is quite sufficient. Here the bill is drawn upon by Charles Banner Crawford, and addressed to him at the India House. The evidence is that there is a person of the name of Charles Banner Crawford, that he once belonged to the India House, and the acceptance is in his hand writing. That is surely sufficient evidence of identity. In an action against one William Evans for goods sold and delivered it appears that five years before a person of that name had been a customer of plaintiff and had written a letter acknowledging the receipt of the goods. The witness who proves this does not know whether the defendant who answered to the same name is the same person. The presumption is that he is. *Suett v Evans*, 4 Q B 626. In the course of argument Denman CJ asked: "Does the name go for nothing at all in my case? Suppose the name of the defendant had been William Launel Gulliver Evans and a bill had been proved to a party so named. An action is brought against Henry Thomas Ryda is acceptor of a bill of exchange. The cashier of the bank testifies that a person of that name had kept cash at the bank when the bill was made payable and that the acceptance is in his hand writing. He cannot identify him with

**S 9** the defendant of the same name. This is sufficient *prima facie* case. *Roden v Ryde*, 4 Q B 626. In this case Lord Denham said: "In cases where a particular circumstance tends to raise a question as to the party being the same, even identity or name is some thing from which an inference may be drawn. If the name were only John Smith, which is of very frequent concurrence, there might not be much ground for drawing the conclusion. But Henry Thomas Rydes are not so numerous, and from that and the circumstances generally, there is every reason to believe that the acceptor and the defendant are identical." Lord Lydhurst asks (in *Whitelock v Musgrove*, 3 Ljw 513) 'why the onus of proving a negatve in these cases should be thrown upon the defendant,' the answer is because the proof is so easy. He might come into Court and have the witness asked whether he was the man."

A note signed "Hugh Jones" is sued upon. It appears that there are several "Hugh Jones" at the place where the note was signed, and there is no evidence to show that the "Hugh Jones" who is sued is the "Hugh Jones" who signed the note. The plaintiff is non suited. *Jones v Jones*, 9 M & W 7.

**Identity from family name and initial.** The fact that family name and initials are the same raises no presumption that the parties are the same. *Ambs v R Co* 44 Minn 266. *London v Walpole* 1 Ind 321, *Bennet v Libhart*, 97 Mich 499. *Burford v McCru*, 53 Pa St 431, *Law Pre Ev* 314.

**Two persons of same name but of different position.** Where two persons of the same name occupy different positions or relations the presumption is that they are different persons. *Law Pre Ev* 315, *Nicholas v Lansdale*, 111 St Crs 21. *Ellisworth v Moore*, 5 Iowa 486. *Coxens v Gillispie*, 4 Mo 82.

**Identity of things.** The identity of things may be presumed from circumstances. *Morris v Landaur* 48 Iowa 234. *Byrd v Fleming*, 4 Bible 145. *Beatty v Michon* 9 Ha Ann 102, *Lawson Pre Ev* 320. A certain case is proved to have been on a certain day removed from a justice's Court to supreme Court. A subsequent order of the Supreme Court dismissing from its docket a cause having the same title is introduced. The presumption is that it is the same cause. *Houard v Roelwell*, 1 Dong (Mich) 315. A contract to convey "a house on Church Street" is dated at Boston. The presumption is that the house is situated in Boston. *Mead v Parler* 115 Mass 413. An action is brought on a note made by B to C. The action is barred by limitation, but C relies on a new promise. The promise is made in a letter in which B acknowledges and undertakes to pay "his debt." The presumption is that this refers to the debt sued on. *Colas v Kelsey*, 2 Tex 541. The presumption is that an engine bearing the initials of a certain railroad company belongs to and is operated by, such company. *Ryan v R Co* 60 Ill App 612, *Lawson Pre Ev* 320 321.

**Identity of a person by voice or appearance.** A witness may testify to a person's identity from his voice alone. *Hulet's Trial* 5 How St Tr 119, *Harrison's Trial* 12 How St Tr 1816. *The Threshers' Trial* 30 How St Tr 197. *Pitons Trial* 30 How St Tr 245. *R v Castro Tichborne Case*, see also *Ashad v Emperor*, 30 C W N 166, *Mahm v Emperor*, A I R 1925 Lah 13, *Lajam v Emperor* 86 Ind Crs 817.

So also a person's identity can be testified from observing his stature, complexion, clothing or other marks or from the sight of the person's photograph, and a witness may also testify to a person's age or intoxication merely from his appearance. Chattels may be identified by their appearance and other qualities. *Wignore* § 660.

**Identity of person by photograph.** The photograph was admissible and *Hills J in L v Tolson* 4 F & F 103, because it is only a visible representation of the image or impression made upon the minds of the witness by the sight of the person or the object it represents and therefore is in reality only another species of the evidence which persons give of identity when they speak from memory. The identity of a person may be under certain circumstances proved by a person's photograph. *Frith v Frith* L R P D (1900) p 71. In the above case, which was a case for divorce, *Goulet Barnes J* observed "I cannot rest upon a photograph alone, and this is a very small one."

I am continually asked to do this, but it should be known that it is not the practice of the Court, except under very special circumstances to act upon a photograph alone. It is high time that this should be understood. As regards identification by photograph, *vide Emperor v Panchu Das* 24 C W N 501 (F B) at p 521. In cases of identification by photographs it is not right for a police officer to show to persons who are to be called as identifying witnesses, photographs of those whom they are asked to identify. *R v Dwyer* (1924) W N 319. *Ex p Leigson*, (1921) W N 319. A prosecutor identified a photograph as that of a prisoner whom the police subsequently arrested. After arrest the prisoner was picked out by the prosecutor from a number of men in a room. *Held*, that there was no ground for complaint against the method of identification. *R v Melaney* 157 L J 16. See also *Bundeshaup v Emperor*, A I R. 1927 A 163, *Piotap v Emperor*, 92 Ind Cas 167.

**Identity evidence and Opinion Rule** The fact that a person is of such a nature that a fact in issue, or relevant to the issue does or does not exist is not relevant to the existence of such fact and the opinion of such person is not admissible in evidence to prove such fact. This is the general rule of law, and is founded on the principle that the triers of matters in dispute—the Judge or jury, is the one who may be called upon to form their conclusions from the facts before them, and not upon the opinions which may be entertained on the subject by the multitude. Therefore, facts and not opinions, are listened to by judicial tribunals. *Lauson, Expert and Opinion* L. 1. This Opinion rule has been used as a bludgeon against every conceivable sort of testimony, even against such simple statements as estimates of distance, time, size, identity, and the like. Fortunately, however, such attempts have been usually unsuccessful in that class of cases. *Wigmore* § 1927. In *R v Castro* (1874) Tichborne Case, II 121. *Coelburn C J* excluded whether the defendant was Tichborne so far as the witness proposed, not merely to speak of the apparent sameness of appearance with the person he knew but of the general fact of individual identity on the whole of the case. In *Whitaker v Franklin*, 46 N H 21, *Bellous J* in admitting opinion evidence as regards identity observed. The opinions admitted are formed from minute peculiarities of form, shape, colour, sound, etc, that can not be described in human language, so as to convey any accurate impression of the object and therefore, unless opinions are received there must be a failure of evidence. When facts and peculiarities upon which the opinion is formed can be stated and described they must be and it is then for the jury and not the witness to form an opinion. The reasons for its admission is thus also stated in *Cooper v State*, 23 Tex 331. 'I may feel a strong conviction, not however, amounting to certainty that a man who stands before me in the Court room to day is the same man whom I knew ten years ago in a distant part of the world. I cannot explain to others the grounds of my strong belief, yet this belief amounts to a species of knowledge. If called as a witness I may press my opinion that the man before me is the same man whom I knew in another place. My opinion is entitled to some weight because it is the statement of a fact about which, to be sure I can not speak with absolute certainty, but yet with so much certainty as to satisfy the minds of others that the thing stated is a fact. The statement is also true when identification is made from voice. *Vide Com v Williams* 105 Miss 63, *Com v Cunningham* 101 Miss 545, *Price v State*, 34 S W R 622 Tex. In *Hardy v Merrill*, 56 N H 241, *Foster C J* observed. All concede the admissibility of the opinions of non professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. There are questions of identity, hand writing, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, variety, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention.

**Cases of identification in other cases** Two persons A and B were tried on 21st July, 1919 in the High Court Sessions for murdering one D, a woman of the

**S 9** town, on the 10th December 1911, of conspiring to rob her, of theft of property from her house and for abetment of the offences of murder and theft, under 302/114, 120 B 380/114 I P C. Accused A was arrested on 11th March 1918. B was arrested on 29th December 1918. At the trial the prosecution wanted to adduce evidence (1) of association of the two accused, (2) of their association with other women of the town in connection with the charge of theft which they made against them and (3) generally of a series of incidents from 1914 to 1918 that they used to go about together under different names, A taken with him to his Durum and introducing himself as a Babu to rich proprietors of the town and thus being followed by their subsequent disappearance, discovery of loss of money and ornaments. Held that the evidence was inadmissible. *Emperor v. Pandu Das*, 24 C W N 501 (F B) = 17 C 671 = 3 L J 402 (F B). *Chaudhuri* dissenting. The appellant was indicted for gross indecency with boys. His Defence was that he was not the man and gave evidence of an alibi. The prosecution proved that when he was arrested certain photographs and powder puffs were found upon him and in his rooms. Held that the evidence was admissible as it tended to show that the appellant had abnormal propensities of the kind in question and therefore that it was some evidence of identity. *Thompson v. R* (1915) A C 221 = 87 L J K B 478 = 118 L 418. So photographs could properly be put in evidence as being things usually found in possession of persons addicted to the offence of gross indecency with male persons and as such it is some evidence of identity. *R v. Parris*, (1922) K B 553. Identification evidence *per se* is not unsafe basis for conviction. Where therefore the accused are very clearly identified by persons who were undoubtedly present on the spot and picked out of a crowd in circumstances precluding all reasonable probability of fraud or error, conviction based on such evidence is incontestable. *Mathura v. Emperor* 2 Luck 444 = 101 Ind Cr 4 = A I R 1927 Oudh 196, (*Lal Singh v. Dindyalal* 81 Ind Cr 919 dissent from). The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in judicial proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court. *Parbhu v. Emperor*, 104 Ind Cr 626 = 28 Cr L J 850, see also *Rampersad v. Emperor* 1 Luck C 339 = A I R 1927 Oudh 369. There is no section in the Evidence Act which renders identification proceedings in judicial proceedings inadmissible and a conviction based mostly on that evidence is illegal. *Bimdesher v. Emperor*, 7 L R 170 Cr = 6 Cr R 361. As regards other cases, see *Mahmud v. Emperor* A I R 1925 Lah 307. *Lajam v. Emperor*, 86 Ind Cr 817. *Lal Singh v. Emperor*, 5 L 396. *Hahab v. Emperor* 47 A 39.

**Verification of time and place.** Under this section facts which are necessary to fix the time and place of an occurrence are admissible. The time and place of the crime should be stated with certainty in the indictment, though it is not necessary to prove them precisely as stated, unless they are necessary ingredients in the crime. *Underhill Cr. Ev.* 56. When, however, time and place are material to the details of time and place must be proved previously as alleged. But the question of place and time, becomes of utmost importance in a case of alibi. "To render an alibi satisfactory the evidence must cover the whole of the time of the transaction in question." *Bar v. People* 30 Colo 522. In *R v. Richard* son Wills p. 46 William Richardson was charged with the murder of a young woman. On being asked where he was the day the deceased was murdered, he replied seemingly without embarrassment, that he had been all day employed at his master's work, a statement which his master and fellow servant, who was present, confirmed. Subsequently it was proved that he was absent from his work about half an hour (the time being distinctly ascertained) in the forenoon of that day. It was also proved by a young girl, that she saw a person exactly like him in dress and appearance running hastily towards the cottage where the deceased lived and that murder was committed about the time when Richardson was absent from his work. So in this case it was very material to fix the time of the crime. See also *L. v. Thornton Wills*, 293 *Empress v. Sudhabala Bhattacharya* 1908. *Ind. Jurisprudence*. Where the defence rests on alibi the accused must show that he was present at some other place before the time of the alleged crime for

such a length of time that it was impossible for him to have been at the place where the crime was committed either before or after the time he was at such other place. *Mays v State*, 72 Neb 723=101 N W 979. So the question of time is material in the case of an execution of a document when both persons die from a common accident, etc. Similarly the place of occurrence is very material in many cases.

This section makes admissible all facts which fix the time and place. Often a time is proved by opinion evidence. In *State v Babbitt* 36 Kan 10, Johnston J said "Facts which are made up of a great variety of circumstances and a combination of appearances which from the infirmity of language cannot properly be described [are admissible] in this category may be placed matters involving magnitude or quantity, portions of time, space, motion, gravitation value, and such as relate to the condition or appearance of persons or things."

"Amongst the numerous physical and mechanical circumstances which occasionally lead to the detection of forgery and find a discrepancy between date of writing and the *anno domini* water mark in the fabric of the paper is one of the most striking. In an old case a criminal design was detected by the circumstance that a letter, purporting to come from Venice, was written upon paper made in England." *Hills Cir Ct* 242. In the case of the death of a person, by violent means it often becomes necessary to ascertain the time of his death. In such a case in the absence of any direct evidence, the time of death is ascertained by *post mortem* examination. Time of death is generally ascertained by digestion, by putrefaction, by *rigor mortis* and by temperature of the body.

#### Lyon's Med Juris

In the case of *Impress v Sudhabode Bhattacharya*, Reported in *Lyon's Medical Juris* at p 151, the hour of the death of the deceased became very important. The facts of the case were as follows. Deceased had taken a meal of *chupatties* curry and rice a little before returning to rest at 10 p.m. with her husband (the prisoner). She was not again seen alive, prisoner left the house at 1 p.m. deceased was found dead with her throat cut before he returned. The question to be determined was—did death occur during the period 10 p.m. to 4 a.m. during which the prisoner was in her room or did it occur after his leaving the house? After examining the contents of the stomach the medical expert gave the opinion that in all probability the death occurred before the prisoner left the house. So in such a case in order to ascertain the time of death, evidence is admissible to show what food she took, when she took the food condition of her health, her age etc. vide *Lyon's Med Juris* p 154.

**Admissibility of other evidence in question of identity.** One of the questions in issue in a suit is to pedigree of a certain family being whether one Gauri Shankar was son of Balwant Singh or one Moajan Singh belonging to a totally different family from that of Balwant Singh. An attested copy of a rublar in some proceeding long anterior to the suit was tendered in evidence in which rublar Gauri Shankar was described as the son of Balwant Singh. Held that the rublar was admissible in evidence under this section. *Radhan Singh v Kaurji Dabhi* 18 A 98, see also *Collector Goralpur v Palal dhari* 12 A (F B), pp 12, 27. In a case of burglary the thief had gained admittance to the house by means of a pen knife which was broken in the attempt, and part left at the window frame, the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment. In another case identification was established by the correspondence of the wadding of fire arms with a part of a torn letter found in the prisoner's possession and in a case on the Northern circuit where a man had been shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad which corresponded with another part found in the pocket of the prisoner. *Hills Cir Ct* 3rd Ed 96, 6th Ed 209. Judgment in a previous case is evidence under this section bearing upon the question of identity of the tenure. *Per Vitter J in Swender Nath v Brojo Nath*, 13 C 352 at p 356. see also *Ganyu Lal v Fatch Lal* 6 C 171.

**Question of paternity.** In *Douglas Peccage Case* 2 Hurgr Collect. Jud 402 Lord Mansfield C J observed "I have always considered likeness as an argument of a child's being the son of a parent and the rather is the distinction between individuals in the human species is more discernible than in other animals."

**S 9** A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of an hundred thousand men every one may be known from another. If there should be a likeness of features there may be a discrimination of voice, a difference in the gesture, the smile, and various other things whereas a family likeness generally runs through all these. For in everything there is a resemblance as of features, size, attitude and action." See also *Piercy's Case*, 1 P How St Tr 1199, *Amesley v Angelsea*, 17 How St Tr 1139, *Day v Day* quoted in *Hubbock's Succession* 384, *Andrius v Isley*, 8 C & P 7, *Morris v Davis*, 3 C & P 214 = 5 Cl & I 1836, *Dagot v Dagot*, (1878) 1 L R 1 R 308, *Burnaby v Bailie* 12 Ch D 282 (290).

**Thumb Impression** A comparison of thumb impression of the person, who presented the document before the Registrar with that of another person is admissible under this section if the similarity of those impressions can establish the identity of that person with the second person or under clause (2) of section 11 of the Act, if then dissimilarity makes such identification improbable. In order to come under this section such comparison must be made by the Court itself. *Per Banerjee J in Queen Empress v Faku Sheikh*, 1 C W N 33. The opinion of an expert as to the similarity of such impression is now admissible under s 4 of the Act. Often a criminal is detected from finger prints. From the finding of the trace or mark it is inferred that some person bearing that trace or mark was present at the time or place of doing the act charged, and from the peculiarity of the trace or mark it is inferred that the accused was identical with that person. Now the question is do human finger prints present a combination having that highest degree of certainty? Science answers that they do. In brief, the accepted conclusion, after widest observation is that several fixed and typical varieties of skin marks on finger tips are clearly distinguishable, and that by the mathematical theory of probabilities the chance of two individuals bearing the same combination of such marks is so small as to be negligible, and that experience has confirmed this theory. Hence identity of a combination of such fixed and typical marks is the strongest evidence of identity of a person. Courts have therefore properly held such evidence admissible. *Castleton's Case* 3 Cr App 74, 119 more § 114.

In the case of finger prints the inference from identical marks is extra ordinarily strong. But in the case of foot marks this inference is a peculiarly weak. This is because the features usually taken as the basis of inference—i.e. depth, colour, etc.—may not be distinctive and fixed in type for every individual, but may apply, even in combination to many individuals. Hence their probative significance is apt to be small. This ordinarily should not negative admissibility, it merely affects weight. *Higmore* § 115.

**Illustration (a)** This illustration is an example of introductory fact. This may also serve to illustrate section 7, as being an instance of fact 'which may constitute the state of things' under which a fact happened. It is to be observed says *Mr Norton* 'that the factum and not the construction of the will is here the matter in issue'. *Nort Ex* 116. In cases of construction of a will the state of the testator's property and of his family at the date of the alleged will are relevant facts. *Vide* section 13 of the Indian Succession Act (XXXIX of 1925), see also *Rabuttly Das v Shub Chunder* 6 M I A 1 (17), *Hiscocks v Hiscocks*, 3 M & W 363, *Strenger v Gardner*, 27 Bca 38, *Shore v Wilson*, 9 Cl & F 556 and other cases cited in *Das's Succession Act* under section 75. So where the factum of the will—in issue such evidence is ordinarily admissible as introductory facts. Where the question is whether a will is forged or not, these facts may rebut an inference suggested by a fact in issue. *Ide* *Nort* 117.

**Illustration (b)** This is also an example of introductory facts. The position and relations of the parties at the time when the libel was published may also be relevant in order to prove or disprove malice. If the occasion is privileged the plaintiff must prove malice in fact, the burden of proving this is on him. *Clarl v Votequeux* 3 Q B D 237, *Jenoure v Delmege* (1891) 14 P Cas 73, *Loyal Aquarium & Soc v Parlmanson* (1892) 1 Q B 413. Malice is proved when it is shown that the plaintiff and defendant previously quarrelled.



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## Admissible

forged and negotiation attempted in Bombay. A second telegram was received from *Nayasaland* in reply to inquiries made by Bombay Police. The accused cashed a draft at the French Bank, Bombay and presented another at the Eastern Bank, Bombay. The clerk informed his superiors and as a result the accused was arrested. It was held that the telegrams purporting to be sent by the *Nayasaland* Police were relevant to explain the conduct of the clerk of the Eastern Bank and of the Bombay Police and were therefore admissible in evidence under this section. *Emperor v Abdul Gani* 91 Ind C 18 690=27 Bom L R 1373=49 B 878=A I R 1926 Bom 71.

Evidence that there is no entry in *jama uasil bal* papers is not admissible under s 34 of the Evidence Act but may be admissible under ss 9 and 11 of the act. *Deoha v Jape*, 11 N L J 21=A I R 1928 Nag 153.

## Inadmissible

## 10 Where there is reasonable ground to believe that two or

Things said or done by more persons have conspired together to conspire in reference to commit an offence or in reference to anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

## Illustration

Reasonable ground exist for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view, A, D, and F transmitted from Delhi to G at Calcutta the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant both to prove the existence of the conspiracy and to prove A's complicity in it although he may have been ignorant of all of them and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it.

**Conspiracy** A conspiracy may be described in general terms as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Greenleaf L 1 of Ill § 89* see also *Drake v Stuart* 40 U S App 173, *U v Benson* 14 Fed 219 *State v Clark* 9 Howst 536 *Pettibone v U S*, 148 U S 197. Similarly in *O Connell v R* 11 Cl & F 155 *Timbal C J* observed. The crime of



conspiracy is complete, if two to more than two should agree to do an illegal thing, that is, to effect something in itself unlawful or to effect by unlawful means something which in itself may be indifferent or even lawful. It has accordingly been always held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. Notwithstanding the high authority on which the definition just cited is founded it is unsatisfactory, in as much as the word unlawful, on which it turns, is ambiguous and appears to be used in a sense which is unique. *Kenny, Outlines* C. p. 18. It does not mean criminal, for there are many cases in which a combination to do a thing is a crime, although the act itself, if done by an individual, would not be a crime, on the other hand "unlawful" does not mean 'tortious' for there are torts which it is not a crime to conspire to commit. Nor again, does any case go so far as to decide that a combination to commit a breach of contract is a criminal conspiracy. *Roscoe* C. 1. 26. Hence, the word "unlawful" in the definition of conspiracy has no precise meaning. *Ibid*. But "a conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When the two agree to carry it into effect, the very plot is in act in itself and the act of each parties, promise against promise *actus contra actum*, capable of being enforced, if lawful punishable if for criminal object for the use of criminal means. The number and the compact give weight and cause danger." *Per* Willes J. in *Mulcahy v Queen* L. R. 3 H. L. 506 (117), *Per* Lord Brampton in *Quinn v Leatham*, (1901) A. C. p. 529 see also *Barunda Kumar v Emperor* 37 C. 467, *Nirmal v Emperor* 31 C. W. N. 239. In *Reg v Warburton* L. R. 1 C. C. 276 *Colburn C. J.* said, "It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *re*, amount to a civil wrong."

So a conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements whether of a criminal or of an actionable conspiracy, are in my opinion the same, though to sustain an action special damage must be proved.

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts no one of which taken singly and alone would if done by one individual acting alone and apart from any conspiracy constitutes a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy and if by those acts substantial damage was caused to the person against whom the conspiracy was directed my opinion is that they would. In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal though not actionable unless damage is the result. The overt acts which follow a conspiracy form of themselves no part of the conspiracy they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it it is immaterial whether singly the acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief and it is wilful doing of that mischief coupled with the resulting damage which constitutes the cause of action not of necessity the means by which it was accomplished. Much consideration of the matter had led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may with conspiracy, become dangerous and harmful just as a grain of gunpowder is harmless but a pound may be highly destructive or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently or in

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larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested but I need them not if I have made myself understood. "*Per Lord Brampton in Quinn v Leatham*, (1901) A C 41 pp 529, 530, see also *Mogul Case*, (1892) A C 25, *Rex v Journeyman Tailors* 8 Mod 11, *Rex v Eccles* 1 Lea L C 274. In *Rex v Eccles Lord Mansfield* said "The offence does not consist in doing those acts, for they may be perfectly indifferent but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence." See also *per Giose J in R v Maubey* 6 T R 619, *R v Vincent*, 9 C & P 91. So the gist of the offence of conspiracy is an agreement between the accused persons. *Emperor v Osman Sardar* 39 C L J 264, see also *Amrita Lal v Emperor*, 42 C 957 = 19 C W N 676. "It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or caused to be done has not been done." *Ibid*

So conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act to carry out that intention, conspiracy on the other hand consists simply in the agreement of confederacy to do some act no matter whether it is done or not. *Per Chesby B in R v Hubert* 13 Cox 82, *R v Most*, 7 Q B D 244, *Kahl Munda v King Emperor*, 28 C 797. But a conspiracy to do certain acts gives right of action only where acts agreed to be done, and in fact done would had they been without preconcert, have involved a civil injury to the plaintiff. *Huttley v Simmons*, 1 Q B 151, *Kearney v Lloyd*, 26 L R Ir 268, *Salamon v Warner* 65 L T 132, *Templeton v Laurie*, 25 B 230.

**Combination to commit crime** A combination to commit any substantive crime is an indictable offence. *Roscoe Cr Ev* 526. Husband and wife who are considered as one person are incapable of conspiring together. *1 Russ. Cr 116*. But they can severally or jointly conspire with other persons. *R v Whitham* 6 Cox 38. It is immaterial whether the principal offence is a felony, or misdemeanor or whether it is an offence at common law or by statute. *1 Russ. Cr 170*, *1 Right on Conspiracy*, 80. *R v Best*, 2 Ld Raym 1167. A combination to cause public mischief is punishable. *R v Baitford* (1905) 2 K B 730 (11). *J v Boulton* 12 Cox 87. Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is undoubtedly true the law does not take notice of the intention or the state of the mind of the offender and there must be some overt act to give expression to that intention. *Arnold v King Emperor* 31 C W N 239.

**Combination to Commit Torts** A combination to commit a civil injury is an indictable conspiracy in many though it is impossible to say precisely in what cases. *Kenny* says any tort that is malicious thus excluding for instance the pass committed, bona fide by persons eager to assert their supposed right of way. *Roscoe Cr Ev* 526. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy at common law though the same act, if done separately by each individual without any agreement amongst themselves, would not have been criminal or even actionable. *1 Russ. Cr* 171, *R v Maubey* 6 T R 636. *J v Journeyman Tailors* 8 Mod 11. *R v Boulton* 17 Q B 771. *R v Parnell* 11 Cox 30. This is well illustrated by premeditated and systematic tumults at the elections. The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment and nobody has ever hindered or would ever question the exercise of that right. But if any of men were to go to the theatre with the settled intention of hissing in a preconcerted scheme would amount to a conspiracy and that the person concerned in it might be brought to punishment. *Per Mansfield C J in the case of London & County* 20 C 201. See also *Gregory v Dale of Brunswick* 6 M & G 1. *J v Leigh* 1 C & K 289. *Wright on Conspiracy* 37. The law on the subject is thus summarized by *Leven J. J in Mead Stanshop C v Mc Gregor* 11 Q B D 315. "Of the general proposition that certain kinds of combina-

criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason for a combination may make oppressive or dangerous that which it proceeds only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm and not to exercise one's just rights." This case was approved by the *House of Lords* on appeal *vide* (1892) A. C. 25, see also *Allen v Flood* (1898) A. C. 1 *Quinn v Leatham* (1901) A. C. 195, *S. Wales Miners' Federation v Glamorgan* (1905) A. C. 239, 252. But in the application of this undoubted principle it is necessary to be very careful not to press the doctrine of individual conspiracy beyond that which is necessary for the protection of individuals or of the public. *Mogul Steamship v McGregor* 23 Q. B. D. 598 *Giblan v National Amalgamated Labourers*, (1903) 2 K. B. 600. So a combination to violate without just cause private rights contractual or other, in which the public has a sufficient interest is a criminal conspiracy if the violation of the private right is actionable as wrong. *Mogul Steamship v McGregor* (1892) A. C. 25 (18), see also *R v Warburton*, L. R. 1 C. C. R. 276. A conspiracy to commit fraud is indictable though the fraud is not in itself indictable. *R v Warburton* 11 Cox C. C. 54. If several defendants in trespass be proved to be co-trespassers by other competent evidence the declarations of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object. *Per Lord Ellenborough* in *R v Hardwell* 11 East 330, *Pouell Et* 74 see also *Pilot v Crae*, 52 J. P. 311.

**Combination to do outrageous acts** Combinations to do acts which the Courts regard as outrageous on morality and decency, or as dangerous to the public peace or injurious to the public interest, called generically acts involving public mischief have in many cases been held to be conspiracies. *Roscoe Cr* 43 526.

**Agree to commit breach of contract** Agreement to commit a breach of contract in circumstances that are peculiarly injurious to the public, is conspiracy. *Fertue v L. Clue & Burr* 2473, see also *Roscoe Cr* 43 527.

**Proof of conspiracy** Direct evidence is not essential to prove the conspiracy. It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. *Enderhill Cr* 43 491. In many cases the existence of conspiracy is a matter of inference deduced from criminal or unlawful acts done in pursuance of a common criminal purpose. *R v Briscoe & East*, 164 (1717), *Milcahy v R*, L. R. 3 H. L. 306 (317). The existence of the assents of minds which is involved in a conspiracy may be and from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together apparently indicate that they are merely parts of some complete whole. *R v Parsons* 1 W. Bl. 392 *Emperor v Annappa* 9 Bom. L. R. 347 *Kripian Chand v Emperor* 92 Ind. Cr. 119. Although the common design is the root of the charge, it is not necessary to prove that the defendants came together and actually agreed in express terms to live the common design and to pursue it by common means and so to carry it into execution, for in many cases of the most clearly established conspiracies there are no means of proving any such thing. *R v Murphy* 8 C. & P. 297 *R v Br* 3 Cox 76 *R v Parnell* 14 Cox 605 1 Russ Cr 191. When two persons pursue by their acts the same object often by the same means one pursuing one part of an act, and the other another part of the same act so as to complete it with a view to the attainment of the common object they were pursuing, the jury are free to infer that they have been engaged in a conspiracy to effect that object. *R v Murphy* 8 C. & P. 297 1 Russ Cr 191. The unlawful conspiracy is to be inferred from the conduct of the parties. *R v Duffield*, 5 Cox 404; *R v* 1 Sir 144.

When the proof of a conspiracy depends upon proof of the parties to the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence. However, the accused may legally be charged merely with the offence of criminal conspiracy and a conviction of an accused with any of the conspirators is not enough.

**S. 10** convict him of being a member of the conspiracy *Kahdas v Emperor* 39 C L J 151 = 83 Ind Cas 513 Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from these the existence of the conspiracy may be proved *Abdur v King Emperor*, 35 C L J 279, *Subramania v Emperor*, 25 M 61 distinguished

**Scope of the section.** The operation of this section is strictly conditioned upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence *Per Jenkins C J in Barindra v Emperor*, 37 C 167 at p 504 So it is only reasonable, as a general rule, that some *prima facie* and satisfactory evidence should, in the first instance, be given of the common purpose, before evidence of the acts in it by a multitude of persons, who but for such common purpose would be absolute strangers, should be received. *Nort E v 120* In *R v Mc Kenna*, 1r Cuc Rep 461, *Pennfather C J* said It is necessary to prove the evidence of a conspiracy, and to connect the prisoner with it in the first instance where you seek to give in evidence against him the declaration of a co conspirator, and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy, but when a party's own declarations are to be given in evidence such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions. So if a *prima facie* evidence of a conspiracy is given and accepted, the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all *Rex v Blalce* 6 Q B D 126, *Rex v Biskerville*, (1916) 2 K B 658 = 86 L J K B 28 The Indian Evidence Act did not mean to depart from the law as expounded in those cases *Lalaram Gangannull, In re*, 81 Ind Cas 817 = 25 Cr L J 1041 = 20 L W 202 But a conspiracy within the terms of section 10 of the Act contemplates something more than the joint action of two or more persons to commit an offence If that were not so, this section would be applicable to any offence committed by two or more persons jointly with deliberation and this would import into a trial a mass of hearsay evidence which the accused persons would find it impossible to meet *Agencia bala v The Empress* 4 C W N 528 For the application of this section there must be reasonable ground to believe that two or more persons have conspired together to commit an offence, and that being shown anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it *Kahl v King Emperor* 28 C 797 see also *Shahabur Ma v Emperor*, 18 C L J 590 But statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue or (b) that the plaintiff was a party to it *Kadambini Dassi v Kumudini*, 30 C 983, see also *Prin v Emperor* 15 C L J 517 Where an agreement exists between two parties, in pursuance of which speeches are delivered by them such speeches are admissible to prove the object of the agreement *Chidambaran v Emperor*, 32 M 3

It is a rule of substantive law and not a rule of Evidence The rule underlying this section is a rule of substantive law and not a rule of evidence The following extracts from the writings of Professor James Bradley Thayer from American Law Review XV 80, is very instructive on the point The term *res gesta* is freely used in another class of cases where the specific question is whether a party to the suit shall be affected with responsibility for the declaration of another not merely whether it may be used as evidence against him but whether it shall be so used as having been brought home to him and whether he shall be chargeable with it as if it were his own When the enquiry is whether the utterance of an agent, or a co-conspirator is receivable against a party and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed and while actually engaged in that business, and of a co-conspirator, that he must have made his declaration while

engaged in the common enterprise and regarding that,—in such cases it is common to express this idea by saying that the declarations must be made as a part of the *res gesta*, and if it is not so made it is deemed to be *res inter alios gesta*. Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regarding conspiracy,—a question in substantive law. Observe then that the rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence, and when in stating and applying this rule it is said that the agent's declaration must have been made in or about his principal's business while actually engaged in it, and as part of the *res gesta*, or again, when it is said of a conspirator's declaration, that it must have been made while he was actually engaged in the common enterprise, about the affairs of it, and as a part of the *res gesta*, the Latin phrase adds nothing, it is used as a complete expression for the business, as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above named requirements.

**Principle** The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body the attitude of individuality so far as regards the prosecution of the common design thus rendering whatever is done or said by any one in furtherance of that design a part of the *res gesta* and therefore the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals, and of partners, as against the partnership. And here, also, as in those cases, the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending and in furtherance of the design, what was said or done by them before or afterwards not being within the principle of admissibility. *Greenleaf Et. Vol. III § 94*. Secrecy is a necessity of conspiracy and revelations of what passes among conspirators can hardly, by any possibility, be obtained without assistance of some of the conspirators themselves, or of persons who have placed themselves in the position of or in a position not readily distinguishable from that of conspirators. *Saya Ky v Queen Empress*, U B R. (1892—1896) Vol. I, 148.

**Difference between English and Indian Law** This section renders admissible in cases of conspiracy much evidence which is not ordinarily admissible under the English Law. The provisions of the section are wider than those of the English Law. *Ramprosad v Emperor*, A I R 1927 Oudh 369 (378). According to English law everyone who agrees with others to effect a common illegal purpose is generally considered in law as a party to every act, which either had before been done, or may afterwards be done by the confederates in furtherance of the common design. *Per Coleridge J in R v Murphy* 8 C & P 311. So also it does not matter whether the acts were done or the declarations made, in the presence or in the absence of the accused but everything said or done, by any one of the conspirators or accomplices in furtherance of the common object, is evidence against each and all the parties concerned whether they were present or absent, and whether or not they were individually aware of what was taking place. *R v Brandreth*, 32 How St Tr 857, *R v Geo Gordon* 21 How St Tr 435. As the English law on the subject was supposed to be based on the *res gesta* doctrine a distinction was made between declarations, which are either made by themselves purporting to advance the objects of criminal enterprise, or which accompany and explain those acts and those statements, whether written or oral, which although made during the continuance of the plot, are in fact a mere narrative of the measures that have already been taken. The latter statement accordingly is inadmissible. So a letter, written by a conspirator to a private friend unconnected with the plot, which gave an account of previous

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of a society to which the writer and the defendant were proved to have belonged and which enclosed several seditious songs stated to have been composed by the writer and sung by him at a meeting of the society, was rejected on the ground that it was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot and is such only admissible against himself. *R v Ld Geo Gordon*, 24 How St Tr 451-453 per *Fry CJ*. *Macdonald v B and Hotham B Buller and Grose JJ* diss. In *R v Watson*, 32 How St Tr 352 Lord Ellenborough observed that there was great weight in the arguments of *Buller and Grose, JJ*. It appears the Indian Legislature wisely departed from the English rule as laid down by the majority in 24 How St Tr 451-453 and laid down the law which is consistent with the principle indicated above. It has already been stated that this rule is not a rule of evidence is erroneously believed but is a rule of substantive law which considers the conspirators as one person and as such any statement made by one should be considered as an admission by each one of them. Such declarations may also be used against other co-conspirators on the principle of spontaneous declarations as explained under section 6. However in England the law is settled that declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or when they accompany and explain acts for which the others are responsible but not when they are in the nature of narratives, descriptions, or subsequent confessions. *Taggart* §§ 792-994. The provisions of section 10 are wider than those of English law, according to which the act or declaration must have been done or said, not only with reference to the common intention but also in pursuance of the same. *Mendia v King Emperor* 5 Oudh Cr 321.

This section makes evidence communications between different conspirators while conspiracy is going on with reference to the carrying out of a conspiracy. But it is not intended to make evidence the confession of a co-accused and put it on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy. *Imperial v Khan* 15 C W N 25=38 C 169. So letters written by one co-conspirator may be evidence against others even when they are not written in furtherance of the conspiracy. *Rule Queen v Amir Khan*, 17 W R Cr 1. *Queen v Amiruddin* 7 B I R 63=15 W R Cr 25. The illustration to this section is inconsistent with the section. The way that the words "and to prove A's complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things cannot of its own force help towards the conviction of A it does not matter much whether it is technically relevant against A or not. *Balmohanani v Emperor*, 35 Ind Cr 738=11 P W R 191=17 P R 1115 Cr.

**Existence of Reasonable Ground.** For the application of this section it must be a reasonable ground to believe that two or more persons have conspired together to commit an offence and that being shown anything said done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as well as for showing that any such person was party to it. *Asadi v King Emperor* 28 C 797. See also *Sahibul Ma v Emperor* 18 C I J 390. *Imperial v Emperor* 11 C W N 1111=37 C 167. But before admitting evidence under this section the Court should take the portions of the evidence which afford a reasonable ground for believing the existence of a conspiracy. *Mendia v Emperor* 5 Oudh Cr 321. In that case the prisoner was convicted for the murder of *Jagah* by his wife *Lungru*. Previous to his trial *Lungru* had been convicted of having administered arsenic to her husband *Jagah* and having thereby intentionally caused his death. The Sessions Judge in his judgment said that the evidence in the case consisted of the statements of *Lungru* given during the prosecution and the statements of the claim for the same. The Sessions Judge referred to the witness *Thanihar* being one of the persons who had been called in reference to the common intention of *Lungru* and *Jagah* for which *Lungru* was held to be guilty. The Sessions Judge also referred to the fact of *Bhaya* recalling the fact for believing that *R* and the prisoner were the persons who had been referred to the provisions of section 10.

Indian Evidence Act but he did not say what portions of the evidence of B afforded a reasonable ground for believing that the prisoner and R had conspired to murder J. The appellate Court consisting of *Muttoo O J C* and *Spence J J C* said, The Sessions Judge refers to the provisions of section 10 of the Evidence Act. The Sessions Judge does not state the portions of the evidence of *Buraja* which afforded a reasonable ground for believing that the prisoner and *hamraji* conspired to murder *Jangli*. The matter is of more importance than the Sessions Judge seems to have attached to it as will presently be shown. Turning again to section 10 Indian Evidence Act it is clear from its provisions that there must be reasonable ground for believing that the prisoner conspired with *Ramraji* to poison *Jangli* before anything said or done by *hamraji* is a relevant fact as against the prisoner and that unless such reasonable ground exists things said and done by *hamraji* when the prisoner was not present are not relevant facts as against the prisoner, as the prisoner was not present when they were told unless there was, apart from *hamraji's* statements, reasonable ground for believing that the prisoner had conspired with her to poison *Jangli*. This is why it was a matter of importance that the Sessions Judge should have referred to the parts of *Buraja's* evidence on which he relied as affording a reasonable ground for such belief. The question whether the statements said to have been made by *hamraji* to *Buraja* are relevant facts against the prisoner under Section 10 does not arise, for as already stated we are not disposed to find that the statements were made but the question will be noticed again further on in this Judgment. See also *Kusu Bap v Emperor*, 11 Cr L J 586 = 21 Ind C 378 = 18 C L J 590.

**Communications between conspirators** This section is intended to rule evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. It is not intended to make evidence the confession of a co-accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other person with reference to the conspiracy. *Emperor v Iban*, 8 Ind C 770 = 15 C W N 25 = 11 Cr L J 710 = 38 C 169. The provisions of this section are wider than those of the English law according to which the act or declaration must have been done or said not only with reference to the common intention but also in pursuance of the same. *Menday v King Emperor*, 5 Oudh C 321 (326). As soon as it is proved that the prisoner was privy to the general conspiracy, everything done by each of his fellow conspirators must be imputed to him as a part of the conspiracy if it was done to carry out their general purpose. *Per Eyre J in R v Hardy* 24 How St Tr 451. The dry book kept by one of the conspirators is evidence of something done in the course of the transaction. *(Per Lord Dunsan C J in R v Blale* 6 Q B 157) and as such it is receivable in evidence as a step in the proof of the conspiracy. *Ibid per Patterson J*. In the same case *Coleridge J* said at p 140 "As to the counterfoil, it is quite clear that no declaration of *Eyre* can be received in evidence against *Blale* which was made in *Blale's* absence and did not relate to the furtherance of the object. What then was the statement? It was made by *Eyre* after the common object was effected." In *Hardy's Case* 24 How St Tr 451, evidence was tendered by the prosecution of a letter written by one of the conspirators, *Thelwall*, not then on trial, to his wife, who was not a party to the conspiracy, in which he simply detailed the part he had taken in the crime. *Eyre C J* refused to admit the evidence, and summed the whole matter up thus "I doubt whether we ought to consider the private letter as anything more than Mr *Thelwall's* declarations, and Mr *Thelwall's* declarations ought not to be evidence of anything which though remotely connected with this plot yet does not amount to any transaction done in the course of the plot for the furtherance of the plot, but is a new recital of his sort of confession of his of some part that he had taken. It appears to me that it is not like the evidence which we before admitted of a fact done by Mr *Thelwall* in carrying the papers and delivering them to the printer which is a part of the transaction itself." See also *Parll* 76. But it appears that such a letter is admissible under this section.

**Order of Proof** It has already been stated that this section comes into application where there is a reasonable ground to believe that two or more persons

**S 10** have conspired together to commit an offence or an actionable wrong. *Jude v. King Emperor*, 23 C 797. So first of all evidence of reasonable ground for believing in the existence of a conspiracy should be given. *Menda v. King Emperor* 5 Outh C 1321. The English law is also the same. In *R. v. O'Connell* 5 State Tr N S 710, *Pennefather C J* said: "When evidence is once given to the jury of a conspiracy against A, B and C, whatever is done by A, B, or C in furtherance of the common criminal object is evidence against A, B, and C, though no direct proof be given that A, B or C knew of it or actually participated in it. If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all, and whatever one does in the furtherance of common design, he does as the agent of the co-conspirators," see also *R. v. Hardy* 21 How St Tr 151. *R. v. Stone*, 21 How St Tr 1. *R. v. Watson* 32 How St Tr 50 359 539. *R. v. Brandith*, 21 How St Tr 766, 852, *R. v. Hunt* 3 B & Ald 566. So the existence of the conspiracy must be proved before giving evidence of the acts of the alleged conspirator, and isolated acts may be proved as steps by which the conspiracy itself may be established. *Lord v. Elliot* 1 Ex 78. In *R. v. Duffield* 5 Cox 401, *Ede, J* directed the jury that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together and when they agreed to carry out their unlawful purposes that species of evidence is hardly ever to be adduced before a jury but the unlawful conspiracy is to be inferred from the conduct of the parties and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate. 1 Russ Cr 192. So the fact of conspiracy must be established before the act of one can be made the act of all. But the conspiracy may be proved by direct or indirect evidence. *R. v. Blake* 6 Q B 126, *In re Liliam*, 81 Ind C 817. *R. v. Basterville*, (1916) 2 K B 658, *R. v. Melenna Jr* Cu Rep 461, *Nort* 120, 1 East P C 96, 2 Stark L 326, 1 Phall Ev 477, *Queen Caroline's Case* 2 B & B 302, *R. v. Jacobs*, 1 Cox 17, *R. v. Duffield*, 5 Cox 401, *R. v. Gurney*, 11 Cox 414.

The rule is applied by *East* as follows: "In this (high treason), as in case founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must generally speaking be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." But it may also be done by "evidence of the acts of the prisoner and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object." East P C 96. But it is observed by *Starkie* that "although in general the act or declaration of one man is not evidence against another who is charged as a fellow conspirator, until such a privity and community of design has been established between them as afford a reasonable presumption that the act or declaration of one is the declaration of the other and although such a connection must be established before the act, etc. of one can properly be used as evidence to show designs of another, yet in some peculiar instances where it would be difficult to establish the defendant's privity without first proving the existence of the conspiracy, a deviation has been made from this rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity." 2 Stark Ev 326.

In *Hardy's Trial* 24 How St Tr 473, *Eyre C J* said "It is perfectly clear that in the case of a conspiracy, the general evidence of the thing conspired is received, and then the party is to be affected for his hand in it." To this remark *Starkie* adds "Although the Courts in cases of conspiracy have, out of convenience and on account of the difficulty in otherwise



proving the guilt of the parties, admitted the acts and declarations of strangers in order to establish the fact of a conspiracy it is to be remembered that it is in inversion of the usual order for the sake of convenience, and such evidence is, in the result, material so far only as the consent of the accused to what has been done by others is proved. *Hoar v. The King*, 4 St. Tr. N. S. 85, 229, 244, *R. v. Cuffery* State Tr. N. S. 467. So it is clear that the general principle affecting the order of evidence leaves it ultimately to be controlled by the trial Court's discretion. In the present application the rule of conditional relevancy naturally applies to statement of A being receivable against B on the hypothesis that A and B have conspired. Some evidence of conspiracy must ordinarily be furnished before offering the statements of A, in a given case, the trial Court's discretion may be guided by the rule *Wigmore* § 1079, see also the *Queen's Case* 2 B. & B. 303. In *Hoar v. The King*, 4 St. Tr. N. S. 85, 229, 244, *R. v. Cuffery* State Tr. N. S. 467. In many cases evidence has been first given of general conspiracy before any of the particular part which the accused parties have taken. Vide *1108 S. v. Hoar*, 7 St. Tr. 1218. *Lord Russell's Case*, 18 St. Tr. 500, *Hoar v. The King*, 4 St. Tr. 1 R. v. *Hammond*, 2 F. p. 718, *R. v. Frost* 9 C. & P. 129. *Hoar v. The King*, 15 Cox C. C. 334. In the *Queen's Case* 2 B. & B. 303 (310) the Court observed: We are of opinion that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance, be received as a preliminary step to that more particular evidence, by which it is shown that the individual defendants were guilty participants in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account we presume, it is permitted. But it is to be observed that in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy, and if upon such opening it should appear manifest that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the Judge to stop the case *in limine*, and not to allow the general evidence to be received which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.

The admissibility of the act or declaration of a co-conspirator against the party defendant before the Court, does not depend on whether such co-conspirator is indicted or not or tried or not with the defendant. 2 *Starkie* Tr. 329. See also *R. v. Duguid*, 94 L. J. 887. In the case of a conspiracy to carry on the business of common cheats proof at different times of similar acts is admissible as cumulative instances not necessary to prove the offence. *Hoar v. The King*, 1 Cump. 399.

**Anything said or done etc.** The provisions of this section are wider than the English Law, according to which the act or declaration must have been done or said not only with reference to the common intention but also in pursuance of the same. *Mandau v. King Emperor* 5 Oudh C. 321. In England originally such evidence was admissible on the principle of *res gestae*. Vide *Phil Tr. 9th Ed. Vol I 199*. It follows that any writings or verbal expressions being acts in themselves, or accompanying, and explaining, other acts, and therefore part of the *res gestae*, and which were brought home to one conspirator are evidence against the other conspirators, provided it sufficiently appears that they were used in the furtherance of a common design. *Phil Tr. 9th Ed. Vol I 200*. See also *Harding's Case*, 24 How. St. Tr. 701. What the effect of such evidence will be must depend on a variety of circumstances, as whether the prisoner was attending to the conversation, whether he approved or disapproved. *Per Fry C. J. in The King v. Stone*, 61 R. 527, *Rex v. Salter*, 11 p. 125. So also can letters in furtherance of a conspiracy be received in evidence. (*Lord Russell's Case* 18 St. Tr. 508), as do letters or drafts of answers to letters and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose to which the prisoner was a

**S 10** partly *Horne Toole's Case*, 25 St 1r 220 For the same reason declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged together with others are receivable in evidence, provided they accompany acts done in the prosecution of such an object arising naturally out of the act and not being in the nature of a subsequent statement or confession of them Upon this principle (namely that the evidence offered is part of the transaction) in the prosecution of *Dumtree* for high treason the expressions of the mob in the *Sacheverell* riots that they designed to pull down the meeting house were admitted in evidence 15 Howell's St 1r 552 The same kind of evidence was received in *Lord George Gordon's Case* 21 How St 1r 512 On the same principle the hissings of a mob their declarations upon hangers have been held to be admissible as original evidence *Rex v Hunt*, 3 B & A 566, *Reelford v Buley* 3 Stark C 76 So according to that theory where words or writings are not acts in themselves, no part of the *res gestae*, but a mere relation of some part of the transaction or as to the share which other persons have had in the execution of a common design the evidence is not in its nature original It depends on the credit of the narrator who is not before the Court, and therefore it cannot be received *Phil Li* Vol I 20 In *Watson Case*, 32 How St 1r 348, some papers containing a variety of plans and lists of names which had been found in the house of a co-conspirator and which had a reference to the design of the conspiracy and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner Originally such evidence was admitted in cases of conspiracies in criminal cases On the same principle such evidence is also admissible in cases of conspiracies to do civil injuries *Rex v Hardwell* 11 East 58; *Pouell v Hodgkiss* 2 C & P 432, *North v Miles* 1 Compb 589, *Bousher v Cally* 1 Compb 391 In *Rex v Hardwell*, *Lord Ellenborough* said "Although an admission by one of several defendants in the past will not establish others to be co-trespassers, yet if that is proved by other competent evidence the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object" See also *Wright v Court* 2 C & P 232

"It seems to make no difference as to the admissibility of the act or declaration of a fellow conspirator against a defendant whether the former be indicted or not, or tried or not with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before, the principle upon which they are admissible at all, that the act or declaration of one is that of both united in common design a principle which is wholly unaffected by the consideration of their being jointly indicted" 2 *Starke* Ed 329 3rd Ed But where the conspiracy was charged with "divers other persons" *Watson J* made in order for the names to be given forthwith *R v Perrin* 72 J P 144

A letter written by a person who is a stranger to the transaction is not admissible *King Emperor v Keshab* 25 Bom L R 248

**Illustration** In *Dalmul and v Emperor* 28 Ind Cas 738=17 P R 1910 Cr =16 Cr L J *Johnston v J* observed "I am however inclined to agree with *Mr Beechey* as to point (2) in support of which he quoted *Barindia Kumar Ghosh v Emperor* 7 Ind Cas 359=14 C W N 1114=11 Cr L J 453=37 C 467 They say that the words and to prove A's complicity in it come into the illustration are not quite in accordance with common sense or with the section I read it I am unable to see how what B did in Europe and C in Calcutta and so forth can *per se* possibly touch the "question of A's complicity A's complicity can from the nature of things only be shown by A's acts, or A being otherwise shown to be a member of the conspiracy by acts of B C and so forth implicating him Other acts of B, C and the rest seem to me capable as regards A only of adding proof of the existence and nature of conspiracy At the risk of being tedious I must give an illustration to explain my view In the case given in the illustration if B in ordering arms in Europe tells the manufacturer to send the bill to A or to consign the arms to him this if A is otherwise *prima facie* shown to be a member of the conspiracy, would be relevant both as to the nature of the conspiracy and as to A's complicity but if B does not mention A and A's name in no way comes into the business of ordering arms in Europe,

how can it be said that B's ordering of arms there can produce in the mind of the Judge any added conviction that A was a member of the conspiracy? Of course, in framing a law the Legislature can lay it down that any given thing is 'relevant for the purpose of proving such and such' but I think I am justified in rejecting the idea that the Legislature intended, by a provision of the law of evidence, to create a burden useless and merely nominal relevancy. Anyhow, one sees after an analysis of this kind, that the question is not very important, it seems not to matter much whether a thing is technically 'relevant' against A or not, if as a matter of fact from the nature of things, it can not of its own force help towards the conviction of A." From the illustration it appears that the rule underlying this section holds, although the acts and declarations were done in the absence of the party against whom they are offered, or without his knowledge, or even before he joined the combination (see also *R v Blandith*, 32 How St Tr 57; *h v Murphy* 8 C & P 311, *R v Dwyer* 21 Ir L T R 111 *Phipps* 73) or even after he left the conspiracy. But on principle acts or declarations of a conspirator left the conspiracy should not be admitted against him to show his complicity in it. Persons who are guilty of illegally conspiring together or of committing jointly any criminal offence are deemed to be mutual agents or confederates for the purpose only of the execution of the joint purpose. Accordingly any act done by one of them in the execution of common purpose is deemed the act of the others (see also *Wills* 167, see also *R v Caton*, 12 Cox 624 *R v Blale* 6 Q B 126, *R v Murphy*, 8 C & P 297. So when a co-conspirator leaves a conspiracy, the mutual agency terminates so far as he is concerned and as such acts and declarations of other conspirators should not be admissible against him. In England also a conversation held by D and E, two members of the conspiracy on their return from a meeting of the conspirators and about an hour after the meeting, was held inadmissible against A and B, two other members of the conspiracy. *R v O'Connell*, 1 Cox 403, see also *R v O'Donnell* 7 St Tr N S 650, *R v Whithead*, 1 Dowl & Ry 61. Neither the admission of such evidence is justified by *res gestae* principle, as the transaction came to an end so far as the particular conspirator is concerned, when he left the conspiracy. In *R v Worr*, 33 L J 615, A was charged with the murder of B as a result of an abortion which A and B conspired to procure on July 22. Evidence of the doctor that B called on him in June and asked for a remedy for her condition was held admissible against A as the act was in furtherance of the common purpose. But a diary kept by B, incriminating A, and a letter intended for but not sent to him, both written after the abortion were rejected as not in furtherance of the common purpose. Statement of a co-accused after arrest is not admissible against other co-accused, *Sital v Emperor*, 46 C 700=30 C L J 20. The acts and declarations of other conspirators before any particular defendant joined the association are only receivable to prove the character of the conspiracy and not his participation therein. *Phipps* 73 see also *R v Dwyer*, 21 Ir L T R 111, *O'Keefe v Walsh*, (1903) 2 I R 681 (703).

**Conspiracy--Acquittal of some** Where more than two persons are charged with a conspiracy, it does not follow that all the conspirators must be convicted. If one is acquitted *Emmra v Emperor*, 14 C W N 114, 37 C 467, see also *King v Plumer*, (1902) 2 K B 339. Where two persons are charged in a conspiracy both of them must either be acquitted or convicted. *Queen v [unclear]*, 12 Q B D 211. Where conspiracy alleged in the charge is one in which only three persons are said to have been participants and two of them were acquitted, the other is entitled to an acquittal as a matter of course. *Profulla v King Emperor*, 30 C W N 94=91 Ind Cts 813, *R v Manning*, 12 Q B D 211.

## ILLUSTRATIVE CASES

## Admissible

A and B are indicted in *Middlesex* for a conspiracy to destroy property. After proof of acts done in *Middlesex* by both the conspirators, acts done by

## Inadmissible

A and B are indicted in England for a conspiracy to commit a felony. The only evidence of the conspiracy consists of acts done by A in Scotland

S 11

either of them in *Surrey* in execution of the conspiracy is admissible against each *R v Gardon*, 21 How St 11 535, *R v Boues*, 11 East 171, *R v Quinn*, 33 Ir L R 154, *Phypp* Et 81

The accused who was a warden in the jail was being tried under s 222, Penal Code in respect of intention ally aiding the prisoners under sentence of death in attempting to escape from confinement in jail. He procured saw blades and loosened the rivets of the grates. Previously he was seen by some witness who were warders conversing and carrying on negotiations with certain fellow prisoners of the convicts. A constable who was called in as witness and had escorted the convicts while under trial deposed that after the death sentence was pronounced and the convicts were brought out one of the convicts called out to his fellowman and told him to give the accused Rs 100. The request was repeated twice. Held that the evidence of the constable was admissible under the circumstances under section 10. *Maula Baksh v Emperor*, A I R 1929 Lah 631

and letters written by him to B in England inciting B to commit the crime, but which letters B did not answer or assent to. The acts and letters are not admissible against either A or B. *R v Banton*, 12 Cox 87, *Phypp* Et 81

When facts not otherwise relevant become relevant—

# 11 Facts not otherwise relevant are relevant—

- (1) if they are inconsistent with any fact in issue or relevant fact,
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable

## Illustrations

(a) The question is whether A committed a crime at Calcutta on a certain day

The fact that on that day A was at Lahore is relevant

The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it improbable though not impossible that he committed it is relevant

(b) The question is whether A committed a crime

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D is relevant

**Scope of the section** This section is no doubt expressed in terms so extensive that any fact which can, by a chain of reasoning be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far reaching that thus to take the section in its wide admissible sense would be to complicate every trial with

7 marks of collateral inquiries limited only by the patience and the means of the parties. One of the objects of the law of evidence is to restrict the investigations made by courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues growing up in endless succession, as the inquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The illustrations to s 11 do not go beyond familiar cases in the English Law of Evidence. *Per West J in Reg v Prabhudas* 11 B H C R 490, see also *Ambica v Kumud*, A I R 1928 Cal 893 = 110 Ind Cr 521. So it is clear that all evidence which would be admissible by the English law would be properly admitted under the Indian Evidence Act. *Queen v Vajiram*, 16 B 411 (430). The application of this section is one of considerable importance in the law of Evidence and has given rise to much conflict of judicial authority. *Ranchoddas v Bapu* 10 B 439 (441) see also *Emperor v Alloomiya Husan*, 28 B 129 = 5 Bom L R 805. In order to make a collateral fact admissible as relevant under this section the requirements of the law are (1) that the collateral fact must itself be established by reasonable conclusive evidence and (2) that it must when established afford a reasonable presumption or inference as to the matter in dispute. *Per Chandrasekar, J in Khair v Rukha Sultan*, 6 Bom L R 983 (986) (affirmed in 29 B 468 = 7 Bom L R 443) see also *Hill v Metropolitan Asylum District, Justice Banerjee* observed. I agree with *Mahabir Singh* 34 A 341 at p 344. *Justice Banerjee* observed. I agree with the learned Chief Justice that the statements relied on cannot be admitted in evidence. They are the statements of persons who are dead. Statements of such persons can only be admitted under sections 32 and 33 of the Evidence Act. It is conceded that the statements in question do not come within the purview of those sections and are, therefore, not admissible under those sections, but it is contended that they are admissible under section 11 as being facts which make the existence or non-existence of a fact in issue highly probable. The making of such a statement is, no doubt, a fact which would make the fact in issue highly probable and, as such might be admissible in evidence, but it must be proved before it can be admitted. The terms of section 11 are, it is true wide, but they must be read subject to the other sections of the Act and therefore the fact relied on must be proved in accordance with the provisions of the Act. If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act, for example, sections 32 and 33. If it such was the intention of the Legislature is manifest from the elaborate provisions of the Act as to relevancy of evidence. Surely it cannot be said that the statement of a person who said to another person that he had seen a murder committed can be admitted unless the person who made the statement is called. As I have pointed out above a statement made by a person who is not produced as a witness is only admissible in the exceptional cases provided by the Evidence Act and in no other cases. See also *Munna v Kameshwar*, 1929 Oudh 113. It is this was also the intention of the Legislature would appear from the following extracts of *Stephen's Introduction to Evidence* Act, 160 where he stated that they all may possibly be used that the effect of the second paragraph of section 11 could be to admit proof of such facts as these (namely statements as to facts by persons not called as witnesses transactions similar to but unconnected with the facts in issue, opinions formed by persons as to the facts in issue or relevant facts). It may, for instance, be said A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore A's statement is a relevant fact under section 11. This was not the intention of the section as is shown by the elaborate provisions contained in the following part of the Chapter II (sections 32-39) as to particular classes of statements which are regarded as relevant facts either because the circumstances under which they are made invest them with importance or because no better evidence can be got. The

**S 11** sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it—“No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act.”

This section is not always controlled by Section 32. As a general rule s 11 of the Evidence Act is controlled by s 32 of the Act where the evidence consists of statements of persons who are dead or who cannot be found, but this rule is subject to certain exceptions. *R D Sethna v Musa Mahamed Shuran*, 9 Bom L R 1017. *Ambica v Kumud*, A I R 1928 Crs 593=110 Ind Cr. 521. In that former case *Beaman J* in delivering the judgment says: “The question being whether a will was made in or about (say) 1880 or whether it was forged for the first time in (say) 1900, a letter which is formally proved to have been written by a person who died in (say) 1885 containing a mention of the will is tendered. It is objected to as being the statement of a person who is dead or cannot be found etc. and not fulfilling the conditions of s 32. It is supported on the ground that it is itself a relevant fact under s 11. While I adhere to the correctness of the opinion I expressed when the point was first argued, that as a general rule s 11 is controlled by s 32 where the evidence consists of statements of persons who are dead or cannot be found, further consideration suggests exceptions. The case law on the subject is so confused that it is difficult to extract from it any consistent principle much less any simple test for ascertaining what are and what are not exceptions. There is a test simple and sufficient test, which reasonably applied yields consistent and intelligible results. Section 32 imposes restrictions upon admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions and the reason for them are plain. The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be they must be brought before the Court to tell what they know at first hand. Then veracity can then be tested by the art of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence of a kind that a Court would not except under necessity, receive at all. The conditions which when compelled by necessity to take this evidence or none are imposed upon its admissibility plainly aim at affording some guarantee of its truth. As there is to be no chance of a man, the man by cross-examination his statement will not be admitted unless it has been made under conditions which looking to the ordinary course of human affairs are pretty strong presumptions that it was a true statement. Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. And it follows that where the person tendering such a statement is indifferent as to its truth or falsehood there is nothing to bring that section into play. Briefly the test whether the statement of a person who is dead or who cannot be found is relevant under section 11 and admissible under that section (presuming of course that it is in other respects within the intention of the section) although it would not be admissible under s 32 is this: It is admissible under s 11 when it is altogether immaterial whether what the dead man said was true or false but highly material that he did say it. In these circumstances no amount of cross-examination could alter the fact if it be a fact that he did say the thing and if nothing more is needed to bring the thing in under s 11 then the case is outside s 32. In such a case as this for example suppose that the person who died in 1885 can be proved to have said any time before he died “A was mad when he made his will that is material to show that there was a will of some sort before 1900. And it makes not the slightest difference whether the statement that A was mad when he made it, is true or false. The evidence would have the same and no more or less value under s 11 if the person had said A was not mad when he made his will where the fact that it is relevant under s 11 is not what it concerns I presume

chose to predicate about a thing, but that he mentioned it at all whether what he predicted of it were true or false, then and then only it is relevant to the case."

**Facts not otherwise relevant.** As regards clause (2) of the section Mr Stephen in his introduction said "The meaning of this section would have been more fully expressed if words to the following effect had been added to it. 'No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be relevant fact under some other section of this Act.' To this Mr Field says 'The section can hardly be limited, as has been suggested to those facts which are relevant under some other provisions of the Act, for this would render the section meaningless.'"  
*Field's Evidence* 6th Ed p 73. But Mr Stephen explains his remark thus "The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (see section 173) are various. In the first place it is a matter of common experience that statements in common conversation are made so lightly, and are liable to be misunderstood or misrepresented that they cannot be depended upon for any important purpose unless they are made under special circumstances. All the statements are relevant under this section if they render the matter stated highly probable within the meaning of this section and if they are not relevant under ss 17-39 or under there may be statements which may not be relevant under such they should be other sections, still their probative force is undiminished and as such they should be admitted. Vide the judgment of *Bennett J* in 9 Bom L R 1017 cited *supra*.

**Facts inconsistent with any facts in issue.** The usual theory of essential inconsistency is that a certain fact cannot co-exist with the doing of the act in question and therefore that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The inconsistency, to be conclusive in proof must be essential, i.e. absolute and universal, but since, in offering evidence, we are not required to furnish demonstration but only fair ground for inference, the fact offered need not have this essential or absolute inconsistency, but merely a probable or probable inconsistency, and its evidentiary strength will increase with its approach to absolute inconsistency. There are five common cases of this form of the argument (though more are conceivable) (1) the absence of the person charged in another place (*Alibi*) (2) the absence of a husband (non access)—a variety of the preceding, (3) the survival of an alleged deceased person after the supposed time of death, (4) the doing of a crime by a third person and (5) the self-infliction of the harm alleged. *Higmore* § 135.

**Alibi.** Theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged, and therefore with person's participation in the act. Thus, the evidentiary fact is a new affirmative proposition, considered as a *factum probandum* though its logical operation is a negative one. *Higmore* § 136, see illustration (i). The proof of an opponent is not properly the proof of a negative, but the proof of the same proposition totally inconsistent with what is affirmed. If the defendant be charged with a trespass, and if the fact be proved he can only prove a proposition inconsistent with the charge and that he was in another place at the time when the fact is supposed to be done or the like. *Gilbert* Ec 145 "If it (*alibi*) appears to be founded in truth, it is the best negative evidence that can be offered. It is really positive evidence which in the nature of things necessarily implied a negative. When a defence rests on proof of an alibi, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder for if it be possible that he could have been at both places, the proof of the alibi is valueless. *Per* *Higmore* *J* in *Bruceland v Com*, 71 P L 463, 469. Such expressions, however seen in truth to refer only to the weight of the alibi argument, by pointing out that it falls short of complete proof except on these conditions. If they were intended to mean anything more, they are clearly unsound and would exclude nine alibi arguments out of ten. Even as affecting the weight of the argument (with which we have in this place no concern), such statements seem erroneous, for an alibi

**S 11.** may not involve absolute impossibility, but only high improbability, and yet be convincing. *Wigmore* § 136

**Non access of husband to show illegitimacy** Since legitimacy of off implies a begetting by the husband, it would be irrelevant, in disproving legitimacy, to use his absence from wife at the probable time of begetting as showing the impossibility of the act of begetting. *Wigmore* § 137, *Isabury Peerage Case*, App p 1 etc, *The Merchants Rep of Gardner Poirer*, 135, 189, 1 Sim & St 123, *Morris v Davies*, 3 C & P 215, 217, *Gordon v Gordon*, Prob 141

**Survival of the alleged deceased** Where the *corpus delicti* is disputed, and for example, in a charge of homicide the alleged deceased is claimed by the defendant not to have been killed the argument is obviously available that he is still alive after the time of the supposed death, for this would be absolutely inconsistent with his death as supposed. *Wigmore* § 135

**Commission of crime by a third person** If X is charged with homicide, committed by himself alone, and it is shown in proof that Y did the killing X is clearly exonerated for the fact that Y has done it is inconsistent with exclusive of X's guilt. *Wigmore* § 139 In *State v May*, 4 Dev 323, *Gaston, J* observed The criminal act imputed to the prisoner might as well be committed by many as by one. Both [W M and the defendant] must be guilty or both might be innocent, and a common guilt or a common innocence was as presumable as the guilt of one only. But proof that certain acts constituting a part of the criminal transaction itself were done by W M might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him. Proof that the killing was by any one other than the prisoner perhaps might compel the inference (of guilt),—not because the guilt of one shows the innocence of the other, but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another.

**Self infliction of harm** If the deceased, with whose death the defendant is charged committed suicide, obviously the defendant could not have killed the deceased. There ought to be no doubt about the admissibility of plans or desires to commit suicide even where no other evidence of its particulars or probability or feasibility is offered. Its improbability or non feasibility should be matter for rebuttal and should not exclude the evidence of its probability. That the evidence may be manufactured is no reason for its exclusion, for it may also not be manufactured, and if not, it is most cogent. The distance of time ought not to exclude the evidence of plans. *Wigmore* § 113 In *Com v Prefethen*, 157 Mass 180 *Field C J* said "If it could be shown that during the week before her death she had actually attempted to drown her self, and had been prevented from doing so it seems manifest that this act according to the general experience of mankind would have some tendency to show that she might have made a second attempt." In *Spencer Couper's Trial* 13 How St Tr 1166, where the issue was whether the deceased had committed suicide or was killed, evidence was received of her being melancholy and depressed "he said her disposition was in her mind and the sooner it did kill her the better, he neglected herself in doing those things that were necessary for her health in hope it would carry her off and often wished herself dead."

**Highly probable** The words "highly probable" point out that the connection between the facts in issue and the collateral facts sought to be proved must be somediate as to render the co-existence of the two highly probable. Per *Water J* in *Empress v M J Vayapoor* 6 C 555 at p 662 In *Gout of Bombay v Menanga*, 10 Bom L R 907 at p 914 *Batchelor J*, observed "In s 11 of the Evidence Act provision is made for the admission of facts not otherwise relevant when they make the existence or non existence of any fact in issue or relevant fact highly probable or improbable and the adverb was not introduced into the section without good reason." In *Sahib Dyal Singh v Harn Bibi* 13 M L 282=15 Ind C 1 997 at p 1004 *Tayalji J* said "It has recently been pointed out by the Bombay High Court in *Government of Bombay v Maric v Menchaur*, 10 Bom L R 907, that the words 'highly probable' are of great



importance in considering this section. It is clear that in regard to this section the admissibility of the particular piece of evidence that is offered, is closely connected with and in fact depends upon the weight to be attached to that piece of evidence if it is taken into consideration. In other words this section makes only those facts admissible which assuming that they are admitted in evidence, will be of great weight in bringing the Court to a conclusion one way or the other as regards the existence or non-existence of the facts in question. I agree with the learned Chief Justice that if these letters were admitted in evidence they would not be of much assistance to us in coming to the conclusion one way or the other on the fact in question. That being so, it seems to me that under section 11 of the Evidence Act that cannot be claimable at all. So there must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmation or negation of a proposition highly probable. *See Irish Dist. 11 B II C R 10*. The following extract from professor *Hayes's* article in *Harvard Law Review* p 113 is very instructive. In stating thus our two fundamental conceptions we must not fall into the error of supposing that relevancy, logical connection, real or supposed is the only test of admissibility for so we should drop out of sight the chief part of the law of evidence. When we have said (1) that without any exception nothing which is not supposed to be logically relevant is admissible and (2) that subject to many exceptions and qualifications whatever is logically relevant is admissible it is obvious that in reality there are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance or as having too conjectural and remote a connection others as being dangerous and likely to be misused or over-limited by a jury, others as being impolitic or unbecoming for the State, others on the bare ground of precedent. [The law] assuming, as it does, that in general what is evidential is receivable, is occupied in pointing out what part of this matter is excluded. It denies to this excluded part, not the name of evidence but the name of admissible evidence. Admissibility is determined, first, by relevancy—in other words logic and not of law,—secondly but only indirectly by the law of evidence which in strictness only declares whether matter which is logically probative is excluded.

It is here that *Mr Justice Stephen's* treatment of the law of evidence is perplexing, indeed it comes to have the aspect of a *tour de force*. How are we to know what those things are (that are logically probative)? Not by any rule of the law. The law furnishes no test of relevancy. For this it tacitly refers to logic assuming that the principles of reasoning are known to its Judges and ministers just as a vast multitude of other things are assumed as already sufficiently known. Admissibility is determined first by relevancy,—in other words logic and not of law. But the statement is not accurately true. So long as Courts continue to declare in judicial rulings what their notions of logic are just so long will there be rules of law which must be observed. *Hyman* § 12 in *State v. Lapage* 37 N H 283 *Curtis C J* thus differentiates the rules of logic and the rules of law. "Although undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts is bearing upon particular issues has been so often the subject of discussion in Courts of law, and so often ruled upon, that the united logic of great many Judges and lawyers may be said to furnish the evidence of the sense common to a great many individuals, and therefore the test of evidence of what may be properly called common sense, and thus to require the authority of law. It is for this reason that the subject of the relevancy of testimony has become to so great an extent, matter of precedent and authority that we may with entire propriety speak of its legal relevancy."

Admissibility on the other hand, falls short of Proof or Demonstration. The distinction is due to the circumstance that each evidential fact is offered separately, and the quality of complete demonstration could therefore never be expected of it. Since the production of evidence takes time and since one piece of evidence must precede another, the rule of admissibility if there be any at all can have nothing to do with the inquiry whether certain evidence effects complete proof. *Hyman* § 12



*Ali and Abululla v Kunj Behari*, must be taken to overrule the decision in *Duarla Nath v Mulunda Lal* 5 C L J 55, where it was held that a document of this nature was admissible under the provisions of sections 11 and 13 of the Indian Evidence Act. See also *Farand v Zafar*, 16 Ind Cas 119, *Abdul Ali v Sayed Riyam*, 19 C W N 468, *Chetag Ali v Moham Baridhan*, 19 Ind Cas 615, *Sirat Chandra v Sarala Bala* 105 Ind Cas 61 *Kumud Kumari v Dilsook*, 45 C L J 138=101 Ind Cas 512. A lessor's statement in the *pattah* previously granted would not be said to be a fact within the meaning of section 11 and that section could not be invoked for admitting the statement. *Radha v Sarbeswar*, 29 C W N 469=86 Ind Cas 674.

Where certain lands are entered in the record-of-rights as *chaukidari* *chakran* lands, so far as a stranger is concerned the only way in which those papers can be treated as evidence would be under this section. *Rahimuddin v Lmesh Chandra*, A I R 1926 Cal 115=87 Ind Cas 694.

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document. *Abdul Karim v Chhale Ahmed* 91 Ind Cas 688=A I R 1926 Cal 479, see also *Radha Kissen v Sarbeswar*, 86 Ind Cas 674=29 C W N 469.

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter alleging that the same was acquired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property was acquired, and he produced a mortgage bond executed by him long before the date of the purchase in which he described his father as dead. Held that the statement made by the plaintiff in the mortgage bond to which the defendant was not a party might be admissible in evidence as against the latter either under section 21 clause (3) read with section 11 clause (2) of the Evidence Act, or under section 32 clause (5), or under section 159 of the Act. *Sayeruddin v Samiruddin*, 72 Ind Cas 985=A I R 1923 Cal 378.

Documents containing recitals that a particular plot of land belongs to a particular will be admissible in evidence either under section 11 (b) or section 13 of the Evidence Act, although they are not between parties to the suit. *Farand v Zafar Ali* 46 Ind Cas 119=132 P W R 1918. This case was decided relying on *Duarla Nath Bakshi v Mulunda Lal*, 5 C L J 55 in which also reliance was placed in *Vijhalinga v Venkata Chata*, 16 M 194 and *Dattani Mohanti v Jugabundhoo* 23 W R 293. But the case of *Duarla Nath v Mulunda Lal*, 5 C L J 55 was overruled by *Surya Das v Umud Ali*, 25 C W N 1022=35 C L J 19.

**Recital in old documents.** In the case of a house said to have been built over half a century ago direct evidence as to who constructed it may not be easily available and old documents mentioning by whom it was built are admissible in evidence. *Laghunath v Bindeshwari* 82 Ind Cas 582=A I R 1921 All 526.

**Admission.** Where the defendants nos 2 and 4 sold a *jote* to defendant No 1, which they obtained under a partition and subsequently colluded with the plaintiff and denied the said partition as well as the statements previously made by him, which went to show that there had been a partition and they had entered upon their attitude, could be proved against him, and the statements were admissible in evidence under sections 21 (3) and 11 (2) of the Evidence Act. *Bibi Gyanessa v Messamat Mobarrat*, 2 C W N 91=25 C 210, see also *Auro Majal v Aaihan*, 16 B 125.

**Statements made by testatrix to prove the will.** In *Nana v Shanler*, 3 Bom L R 465 which was a probate case, a witness who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to the disposition of her ornaments by will. The District Judge disallowed the question. On appeal to the High Court, in delivering the judgment of the Court *Jenkins C J* observed "For the appellant it is urged that it would be admissible under section 11 of the Evidence Act."

**S. 11** The defendant on the other hand refers to *Allinson v Morris*, L R 1897 P D 40 as a conclusive authority against its admissibility, for it was there held that statements made by a testator are not admissible to prove the execution by him of a will. This case, however, and the others on which it proceeds, are based on the fact that the English Wills Act prescribes a particular form of proof, while to the Will in this case no such rule applies (the testator being an inhabitant of Poona). *Allinson v Morris*, therefore, throws no light on the point, we have to decide and it must be determined by other principles. Now this Will would only operate on that, which, in its absence, would devolve on *Gangu's* representatives, and a statement by her suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence.

**History of a family** Where the history and status of a particular family, which is one of a group is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under this section. *Sarada v Uma Kanta*, 77 Ind Cas 450=37 C L J 433=50 C 370

**Absence of entry** The fact that no entry of the alleged payment was to be found in the defendant's books is relevant under this section. *Kasam v Firm of Haji Jamal* 76 Ind Cas 327=A I R 1924 Nig 22, see also *Sagar mull v Mamaj*, 4 C W N 669, *Imrit v Sridhar*, 15 C L J 7=17 C W N 108, *Ali Nasu v Mam*, 25 A 90, but see *Queen Empress v Grees Chandra* 10C 1024. In the matter of *Jaggun Lal* 7 C L R 356, *Ramprasad Singh v Lalpathi Kuar*, 3 O C 231 (247)=7 C W N 162. So it is clear that on this point there is some divergence of judicial opinion. It was pointed out in *Imam bandi v Mutsaddi*, 45 C 878=28 C L J 409=23 C W N 50 P C, and *Imrit v Sridhar*, *ubi supra*, the cases of *Queen Empress*, v, *Grees Chunder Banerjee*, *ubi supra* and *In the matter of J Jaggun Lal*, *ubi supra* assume that though entries in a book of account are relevant to the extent provided by section 35 of the Indian Evidence Act, such a book is not by itself relevant to raise an inference from the absence of any entry. The same view is supported by the observations of Lord Darey and Lord Robertson in *Ram Pershad Singh v Lalpathi Kuar*, 30 C 231 at 247=30 I A 1=7 C W N 162=5 Bom L R 103 P C. In *Sugarmull v Manraj*, *ubi supra*, it was ruled however, that the cases just mentioned did not decide that the fact of absence of an entry is no evidence at all under any section of the Indian Evidence Act and that evidence that there is no entry in the account-books, though not admissible under section 34 may be admissible under sections 9 and 11. The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu v Raja Ram*, 4 C W N 669 and the Judges were divided in opinion. The point may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imambandi v Mutsaddi*, *ubi supra* where the fact of absence of entry was held relevant its effect to be determined in the light of the general evidence in the case. This fits in with the opinion expressed by Turner L J in *Wise v Lhoobou Monce*, 10 M I A 165 at 174. In that case reliance was placed on the fact that a disputed Taluk was not mentioned in the Decennial or Quinquennial Settlement as such the relevancy of the circumstances was not questioned, but the Judicial Committee observed that even assuming the statements to be accurate in the absence of particulars of the settlements the fact did not seem to afford any strong inference against the existence of the Taluk, see *Nath Roy v Horonauth* W R (1864) 239 *Ena Kumar Ghosh v Kum* *Arun Chandra*, 36 C L J 389=A I R 1923 C 261, *Ganga Ram v Lachu Ram*, 28 Ind Cas 705=19 C W N 611

**Highly probable—Cases** Accused were charged with having obtained money from complainants by falsely representing that they were servants of one Akbar Begum a wealthy lady of Rampur who was anxious to lend money on easy terms held, that the evidence that at or about the very same time when the accused were alleged to have made such a representation to the complainants they had been making precisely the same representation to a third person, was admissible under section 11 and 14 of the Evidence Act to corroborate the story of the prosecution.

and to prove the intention of the accused *Emperor v Yalub*, 39 Ind Crs 673= S 15 A L J 241=39 A 273=18 Cr L J 529

Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and effect, and after having become so aware had taken steps to cancel it or to nullify its effect the conduct of the executant from the moment that he became admittedly aware of the existence purport and effect of the deed is not merely a relevant fact, but a very important fact in the case, and the evidence offered by the defendant as to statements made by the executant in the interval of the execution of the deed and his death expressing the view taken by him of the deed after he had known of its existence, or the action which he had conceived himself to have taken regarding it, cannot be excluded as irrelevant, but is admissible under the head of admissions under ss 18 19 and 21 or section 11 of the Act. *Mir Sayed v Tanyaba Begam*, 26 Ind Crs 547=1 O L J 591

Self serving statements are admissible where they make relevant fact highly probable or improbable or where they are *res gestae* *Harihar Prosad v Kesho Prosad*, A I R 1925 Pat 68=92 Ind Crs 954

A cablegram purporting to be from one, in Calcutta, was sent to P in London. On the receipt of the cablegram and expressly referring to it P posted a reply to B in Calcutta. Held that P's reply to B would be a relevant fact under section 11 and cogent evidence to show that B was the sender of the cablegram. *C H Booth v Emperor*, 22 Ind Crs 179=18 C L J 367=18 C W N 386=15 Cr L J 33, see also *R v Derrington*, 2 C & P 418

An admission made by one of the defendants in a previous suit (to which he was himself a party) as to the common character of a portion of a lane, may be used in evidence against other defendants even though they may not be parties to that previous suit. A statement to the same effect made by one of the defendants in a deed put in by him to prove his title to his own house is admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff under section 11 of the Evidence Act. Facts are relevant which make the existence of a fact in issue highly probable, therefore, the fact of common ownership in other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane. *Naro Vinayal v Narhari*, 16 B 125

Where in a suit for rent under a lease of land, alleged to be purchased from and leased to the defendant again, the defendant totally denied the sale and lease, if the defendant proved that he did not sell the land, the fact that he did not sell it would be inconsistent with the fact of the lease, and hence relevant under 11 (1). *Ang Hla Pru v San Pau* 3 L B R 90

Frequent transfers of the interest in a tank without any change in the terms of the holding, or in the amount of rent paid extending over a period of more than 60 years, were held to prove that the tenure was permanent and transferable, the fact of the transfer being inconsistent with the interest being terminable at will. *Aulla Krishna v Nistaram* 13 B L R 116=21 W R 316

On the question whether certain leases were perpetual, it was held that the fact that the intention implicated by the acts and conduct of the parties was to make certain other leases granted it about the same time under similar circumstances perpetual, would make it highly probable that the same was the intention with regard to the leases in dispute and that the facts relating to these leases would be relevant under clause (2) of this section. *Narsing Dayal v Ram Narayan* 30 C 883

In a charge of forgery evidence of possession by the accused of other documents suspected or even proved to be forged is admissible under this section. *Dej v Prabhudas*, 11 B H C 90

The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point. *Pej v Sakharani*, 11 B H C 166

S 11

In a trial for an offence under s 4 (a) of the Prevention of Gambling Act 1887, the evidence that he was previously convicted of similar offence cannot be let in either under s 54 or s 11 of the Evidence Act *Emperor v Alloomiya*, 28 B 129

## ILLUSTRATIVE CASES

## Admissible

Where a person is charged with an offence of conspiracy to give false evidence in a case the previous activities of the accused against the complainants are admissible under this section *Hatin Gyaw v Emperor* 6 Rung 6-109 Ind C 491=A I R Rung 118

Where the accused had during a period of extremely strained communal feeling enunciated that it was the Hindus' inherent right to pass with music before all mosques at all time of the day and night and it appeared that he had organized a movement with this object and the statements of the accused while in conversation with the District Magistrate and Superintendent of Police showed that accused had no idea of obeying preventive orders the statements made to the Magistrate and Police Superintendent were admissible in evidence under s 11 of the Evidence Act *Satindra Nath Sen v Emperor* 32 C W N 477=47 C L J 444=111 Ind C 396

Judgments *inter partes* are relevant as authoritative statements of facts as found by the Court *Gopal Rao v Sitaram* A I R 1927 Nag 19

The author of a book was proceeded against by the Government for creating class hatred and the books themselves were forfeited. The author applied to the High Court under section 99 of the Criminal Procedure Code to set aside that order. It was dismissed. The judgment was held admissible in a prosecution against the same person under s 153 A of the Penal Code *Kali v Emperor* 25 A L J 846=A I R 1927 All 654=28 Cr L J 785

Batuara papers are admissible in evidence against strangers if they can be under s 11 of the Evidence Act *Rahimuddin v Umesh* 87 Ind C 694

*Ex parte* decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter, are evidence of the existence of the tenancy at the date of those decrees *Indul v Kamala* A I R 1923 Cal 270

Evidence adduced to prove the custom prevailing in connected families may be admissible to prove the custom in the

## Inadmissible

Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them *Ghulam v Kahn*, 10 Lah L J 370=109 Ind C 723=A I R 1928 Lah 428, *Imbica v Kumud*, 110 Ind C 521=A I R 1928 Cal 993, *Laypat v Fariz*, 8 Lah 651=103 Ind C 889=A I R 1927 Lah 418, *Kumud v Dilsook*, 101 Ind C 542=45 C L J 138, *Sheikh Katabuddin v Nafar*, 44 C L J 552=A I R 1927 Cal 230=99 Ind C 906, *Pramatha v Krishna* 29 C W N 1097, *Abdul v Jonabali* A I R 1923 Cal 299, *Trimbal v Ganesh* A I R 1923 Nag 22 *Suroj Kumar v Ummed Ali*, 23 C W N 1022=63 Ind C 954

In a suit for rent a statement contained in an order for delivery of possession as to the rent payable is not admissible in evidence *Chandra v Sheikh* 87 Ind C 512

When the charges against the accused are of dacoity and rioting, evidence that on the day after the occurrence, the accused who was a Mussalman wanted another a Hindu to embrace Islam, and threatened to beat him if he did not, is wholly irrelevant to either of the charges and should not be admitted, notwithstanding that the riots in which the accused was involved were due to Hindu Muslim dissension *Dargahi v Emperor* 52 C 499=88 Ind C 733

Prior deposition of a third party is inadmissible to contradict the evidence or impeach the credit of a witness in a case *Pobba v Bobba* 78 Ind C 176=A I R 1924 Mad 537

Where a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence. But the recitals are not evidence especially if they are used as assertions by a person who is alive and who might have been brought before the Court as a witness *Akhar v Kader*, A I R 1923 C L J 290

The accused was charged with having caused grievous hurt to one of his

## Admissible

only in question in *Suadav* v. *Ma* 30 C 370 = 37 C L J 233

Where the question was whether proceedings in lunacy held under Act XXIV of 1858 are admissible in evidence in a subsequent suit to show that the defendant was a lunatic at a particular time it was held that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were held, were admissible in evidence. *Srimati Padmabati v. Monomati*, 21 C W N 378 = 78 Ind C 366

A full horoscope prepared from a short one is admissible in evidence so far as the date of the birth and the parentage is concerned. *Hirbahadur v. Chand Raj*, 21 O C 298 = 18 Ind C 100

An entry made in a register of in-door patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date. *Imolal v. Emperor*, 56 P L R 1918 = 13 P W R Cr 1918 = 13 Ind C 429

The judgment and the proceedings in a civil suit against a villain, out of which a charge of professional misconduct is framed against him, are admissible in evidence in an enquiry into the latter charge under s 11 of the Evidence Act, but the decision of Civil Court is not conclusive proof against him in such enquiry. *Muni Reddi v. Venkata Rou*, 23 M L J 447 = 13 Cr L J 800 = 17 Ind C 544 = 37 M 238

The absence of an entry of payment in an account book is a relevant fact under sections 9 and 11 of the Evidence Act. *Ganqaram v. Lachiram*, 19 C W N 611 = 24 Ind Cas 705

Where the case was that a forcible entry was made on behalf of a lessor upon a particular occasion, then the fact that a report to the police complaining of the use of force or intimidation was made soon after the occurrence was a relevant fact under s 11 of the Evidence Act and admissible in evidence. *Habib Ullah v. Baljit Bah Singh*, 30 Ind C 292

On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on her behalf in the arrangements for loans, to be made with the complainants out of the money she possessed and thereby obtaining money from them on or

## Inadmissible

wives and killed another. The wounded woman on the day of occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was the accused who had attacked her self and her co-wife. Held, that the contents of the statement are not admissible under s 11. *Emperor v. Abdul*, 23 C W N 933

A statement by a person who is dead in a petition for guardianship, that a certain person was born at a certain time, is not admissible in evidence under s 32 of the Evidence Act. Such a statement alone is not admissible under s 11 of the said Act. *Ram Krishna Sadhu Khan v. Monundia Mohan*, 20 C L J 302 = 27 Ind C 30

A witness's statement as to what a deceased person had said to him regarding the ownership of the property alleged to be stolen is not admissible in evidence under s 11 or under s 32 of the Evidence Act. *In re Doraisami Ayyar*, 16 Cr L J 640 = 30 Ind C 464

Where the suit was for ejectment, the fact that the proprietor of a neighbouring piece of land in describing the boundaries of his parcel, stated that the land of the predecessor of the defendant was situated on that boundary is not relevant under section 11. *Abdullah Kunj Behary*, 14 C L J 167

## § 12

## Admissible

## Inadmissible

pretext or another in connection with this affair held that evidence of instances of similar but unconnected transactions with other persons, during the period covered by the evidence of the complainants is admissible under s 11 in order to corroborate the prosecution evidence in support of the putative offence charged. *Emperor v Dalub Ali*, 15 A L J 241 = 39 A 273

Where the question was whether a channel was an old one or recently constructed and what was the custom as to the flow of water a prior decision on these questions, though it is no evidence of the custom as against one who was not a party to it, is yet *prima facie* evidence of the fact of the existence of the channel at the date of the litigation. *Karupam v Merangi*, 5 M 253

Where in a suit for rent of land from defendant plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year and the defendant totally denied the sale and the lease, evidence may be given of the fact of the sale also. *Kaung Hla v San Paw* 3 L B R 90,

In suits for damages, facts tending to enable Court to determine amount, are relevant

**12** In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant

**Scope of the section** In a case for damage no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted—*vide Roscoe's Aisi Prius Fi* 286 So in a suit in which damages are claimed, the amount of damages is always a fact in issue Any fact which enables the Court to determine the amount of damages is thus clearly admissible The substantive law states the fact which would enable the Court to determine the amount of damages

**Damage—definition of** Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether such act or default is a breach of contract or tort or, to put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him *Halsbury*, Vol 10 p 302

**Amount of damages how ascertained** Theoretically speaking the great underlying principle by which the Courts are guided in awarding damage is *restitutio in integrum* *Per Bowen J in The Argentines*, 13 P D 191 at p 200, 201 By this is meant that the law will endeavour so far as money can do it, to place the injured person in the same situation as if the contract has been performed (*Robinson v Harman* 1 Exch 850, *Bain v Fothergill* L R 7 H L 100 *Gins v Fowler* L R 8 Exch 249 *France v Gandet* L R 6 Q B 199) or in the position he occupied before the occurrence of the tort (*Philips v London and South Western Rail Co* (1879) 5 Q B D 78 *Livingston v Bauyards Coal Co* 5 App Cas 25 *The Mediana*, (1900) A C 113) which adversely affects him *Halsbury Vol A p 303* In cases of exemplary damages the principle of *restitutio in integrum* has no application Exemplary damages are generally



awarded to punish the defendant for his wrongful act *Finlay v Churney* 2 Q. B. D. 495 (504) So far as breaches of contract are concerned, an exemplary damage is only awarded in the case of breach of promise of marriage *Smith v Woodfine*, 1 C. B. N. S. 660, *Berry v Da Costa*, L. R. 1 C. P. 331 Such damages are generally awarded in an action for tort, as for instance assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment *Halsbury Vol 10, p 307*

**Measure of damages in cases of breach of contract** Upon a breach of contract such damages are to be awarded as may reasonably be supposed to have been in the contemplation of both parties when they made the contracts as the probable result of the breach of it *Hadley v Barendale*, 9 Exch. 341 But where the contracting parties arrange beforehand among themselves at what sum the amount of damages for breach of contract shall be estimated, it is the duty of the Courts to enforce the provisions of the contract, as it transpires no rule of law *Palm v The Secretary of State*, 2 Agra 194 Ordinarily the plaintiff cannot recover as damages anything beyond what he has actually sustained *Madhab v Lukhu*, 9 W. R. 212 So the extent of damages must be proved before a Court can give a decree for damages *Kisto Mohun v Juggurnath* 11 W. R. 236 The measure of damages in a suit for breach of contract is the difference between the contract price and the market price at the date of breach *Cohen v Cassim Nana*, 1 C. 264 *Mohamed v Khoo sui*, 1 L. B. R. 146, *Basdeo v John Smidt*, 22A 55 F. B., *Ramalingam v Messrs Golul Das*, 97 Ind. C. 871=51 M. L. J. 243 *Keshav Lal v Deuan Chand*, 27 C. W. N. 974=47 B. 563 P. C. The leading case on this point is that of *Hadley v Barendale* 9 Ex. 341, where Alderson B. said "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it" On this case section 73 of the Contract Act is based

**Damages in cases of torts** In cases of torts "one who commits a wrongful act is responsible for the ordinary consequences which are likely to occur but generally speaking he is not liable for damage which is not the natural or ordinary consequence, unless it is shown that he knows or has reasonable means of knowing that the consequences not usually resulting from the act are, by reason of some existing cause likely to intervene so as to cause damage" *Sharp v Powell*, (1872) L. R. 7 C. P. 253

**Aggravation and mitigation** In actions of contracts as a rule the motives or conduct of the defendants are not to be taken into account in assessing damages nor are damages to be awarded in respect of disappointment wounded feelings, injury to reputation or inconvenience *Halsbury Vol 10 p 323* In *Hamlin v Great Northern Railway*, 1 H. & N. 408 the Court observed generally speaking the rule is this, in the case of a wrong the damages are entirely left to the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as, for instance, the extent of violation in an action of assault, and many topics and many elements of damage find place in an action for tort or wrong of any kind, which could find no place whatever in an ordinary action of contract, See also *William v Cartier*, 1 C. B. 841, *Pearce v Iyons*, 2 Stark 317 But even in cases of torts no exact money value can be fixed for pain and suffering of the plaintiff In the *Mahana*, (1900) A. C. 113 Lord Halsbury L. C. at p. 116 said The whole reason of inquiry into damages is one of extreme difficulty You very often cannot even lay down any principle upon which you can give damages nevertheless it is committed to the jury or those who stand in the place of the jury to consider what compensation shall be given in money for what is a wrongful act. Take the most familiar or ordinary case how is anybody to measure pain and suffering in money counted? No body can suggest that you can by any arithmetical calculation establish what is the exact

**S 12** amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident nevertheless the law recognises that as a topic upon which damages can be given."

Evidence in mitigation of damages may be given by the defendant *Thompson v Place* 1 Mood & R 210 *Denev v Dairall*, 3 Camp 451. But in giving such evidence the defendant should not be allowed to prove collateral matters *Simpson v Thompson*, 3 App Cas 279, *Yates v Whyte*, 4 Bing N C 272, *Jessen v East and West India Dock Co* (1875) L R 10 C P 300 *Creely v Curr*, 7 C & P 64.

**Breach of contract—Mitigation of Damages** The respondent contracted for supply to them by the appellants of a large quantity of steel cartridge clips, the respondent to supply the steel. They broke their contract to supply the steel and to take delivery of the clips. The appellants in an action for damages claimed the difference between the contract price and the cost of manufacture. At the trial the respondent's counsel sought to cross examine a member of the appellants' firm with a view to the mitigation of damages by showing that the appellants' mills had been fully employed on other equally profitable work and that the appellants could not have undertaken this other work if they had been occupied with their contract with the respondents. *Bailhache, J* stopped this evidence *in limine* as being inadmissible and irrelevant and gave judgment for the full amount claimed. The Court of Appeal held that the cross-examination should not have been stopped and ordered a new trial of the issue as to damages. *Hill (Johns) v Shovel (Edum)* 87 L J K B 1106=1918 W N 261. In that case *Viscount Haldane* observed 'If in the course of business the loss had been diminished by taking on new contracts, credit must be given for this diminution. Further investigation was necessary in view of the possibility that the appellants could have used machinery other than their own in effecting the manufacture of the clips and so carried out all their contract. A litigant ought never to be refused a reasonable chance of stating facts, which were on the face of them possibly relevant merely because a Judge thought that he would probably fail in establishing his case.'

**Libel and slander—Evidence of character** The evidence of character is generally inadmissible with regard to the cause of action or defence as the case may be. But although in civil action evidence of character is not admissible to sustain the cause of action or defeat a recovery, there is a class of actions in which, from the nature of the issue, evidence of character is relevant as to the measure of damages. Perhaps this is most frequently illustrated in actions for slander and libel. *Lord Ellenborough* long since tersely stated the doctrine which still prevails. 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished and it is competent to show that by evidence.'—*v Moor*, 1 M & S 284. In *Lduard v Kansas City Times Co* 32 Fed-813—a leading American case, *Breuer J* puts it a little better. After stating the effect of a libellous statement on a man honest and of good repute he proceeds 'Now if it so happens that my life has been dishonest and impure and you charge me with that and prove that that is the fact, then I am entitled to nothing for you have simply made public the actual truth. So, on the other hand, if whatever may have been my actual life, the community here believes that I am dishonest that I am impure then your statement to that effect makes very little impression upon my reputation, the people already believe it already think that it is so, and so I have not suffered, my reputation has not been damaged by your statement. Now, a little further, suppose it be true that I am known in the community and justly so, as a common drunkard, a bar room loiterer, one that every man despises as he meets, and one of you should circulate and publish a statement against me that I had told a lie or that I had stolen money. That may not have been my reputation before. People may simply have looked upon me as a mere wreck—a dissipated and worthless man and may not have looked upon me as one who was a liar or a thief. (Of course in a certain sense by the publication or statement you have injured my reputation—you have gotten people to believe I am worse than they thought me before but on the other hand, if I had such a reputation, how naturally you would

say "Well, it does not hurt much" People thought of me about as badly before as they do after the statement, my character and reputation in the community is not worth much, you cannot hurt that which is already injured" And inasmuch as the action for libel or slander is brought for the injury to the reputation the less valuable that reputation is the less proportionate damage is suffered" In the last mentioned case the learned Judge thus applies his reasoning. He says 'Now that thought comes right into his case. The defendant says that the plaintiff's character is bad, that her reputation in the community was not that of a pure, truthful, honest, upright woman, and though this specific charge may not be technically true, yet she was not hurt much, because it only added to a bad reputation that she had already. Now in respect to her reputation, you have the testimony of their witnesses as to what it was in that community, you have also the testimony of one witness in which he says that he saw this plaintiff and her brother having improper intercourse. If it be true that she did have that incestuous intercourse with her brother, then, although it may not be true that she was pregnant as a result of that intercourse, your common sense tells you her reputation was not badly injured. She has suffered very little by this additional charge.' So that with a view to mitigate the damages the defendant may show that the plaintiff, although injured by the libel or slander was injured by reason of his previous character to an extent for which a small sum by way of damages will compensate. *Burr Jones* § 149, for further elucidation *vide section 55 and notes thereunder*

**Conduct of the defendant** In an action for libel the plaintiff may show that the libel was scattered broad-cast when the defendant was under no duty and had no right to publish it except to a limited number of persons. *De Crespigny v Wellsley*, 3 Bing 402, *Stool v de Hansard*, 9 A & E 149, *Gathercole v Mall*, 15 L J Ex 179. So also in a libel case the defendant's conduct at the time of the suit, may aggravate the amount of the damage. In *Simpson v Robinson* 12 Q B 511 at pp 513-514, Lord Denman C J said "The defendant's conduct in putting a justification on the record which he does not attempt to prove and will not abandon may be taken into consideration as proving malice and aggravating the injury." So in actions for libel the jury, in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what misconduct has been before action, after action, and in Court during the trial. *Per Lord Esher*, *W R in Praed Graham* 24 Q B D p 75. So also in cases of seduction the conduct of the defendant in effecting the ruin of the plaintiff's daughter by fraud and under cover of a promise of marriage may be taken into consideration. *Halsbury* Vol 10, p 325. So also where a trespass to land or the seizure of goods is accompanied by insulting or oppressive conduct, damages of large amount may be awarded although actual injury is trifling. *Meres v Harvey*, 5 Taunt 412. *Massey v Sladen*, L R 4 Exch 13. *Moore v Shelley*, 8 App Cas 287, 291 P C. The defendant's conduct may also be proved in mitigation of damages. *Mountford v Gibson*, 4 East 411, *Cook v Hostle*, 8 C & P 568.

**Proof of financial standing of defendant** It comes rather as a shock to the lay mind that there is one law for the rich and another for the poor although in the administration of justice, the process of the dealing out is for the better of the community. The logic of the position is unassailable and may be easily analysed. We have seen that in exceptional cases character becomes relevant in civil actions and that generally when admitted, such evidence is received to affect the measure of damages. This stage marks one law for the man of good repute and another for him who is said to live evilly. Under ordinary circumstances the financial situation and standing of the parties are wholly irrelevant. The amount of damages depends upon the terms of the contract or in action of tort upon other circumstances wholly independent of the wealth or poverty of the parties but it is well settled that there is a class of cases in which the wealth of the defendant becomes a material fact, and which may be proved on the question of the amount of damages. For example in those cases where exemplary or punitive damages are allowed, this testimony

**S. 13** becomes relevant on the ground that a verdict, which might sufficiently punish one of limited means, would seem insignificant to a defendant having a large fortune. Evidence of the wealth or standing of the defendant is sometimes relevant for the purpose of determining compensatory damages. This is for the reason that the financial standing of the defendant is one of the elements contributing to his influence in his social environment, and there are injuries which are aggravated or increased by the fact that the persons responsible for them are persons of rank or influence. *Burr Jones Ex* § 159. So far as the cause of action rests upon an injury to the character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from the wrongful acts the greater. *Johnson v Smith*, 64 Mc 573 (555). Evidence of the pecuniary circumstances of the defendant is admissible in two classes of cases: (1) where the case is one in which exemplary damages may be awarded, (2) where the case is of such a nature that the wealth of the defendant increases the wrong inflicted. And a third class might perhaps be made in actions for breach of promise of marriage where the wealth of the defendant is admissible to show the extent of the plaintiff's loss, though this class may properly fall under the second of the above classes. Exemplary damages are given as a punishment where loss is committed with fraud, actual malice or deliberate violence or oppression, or where the defendant acts wilfully or with such gross negligence as to indicate a wanton disregard of the rights of others, and in such cases the colouring facts are always relevant. *Burr Jones Ex* § 159.

**Defendant's fortune.** In an action for breach of promise of marriage, plaintiff may give evidence of the defendant's fortune, for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery (*James v Buddington*, 6 C & P 589), nor for seduction (*Hodgson v Taylor* L R 9 Q B 79), nor for malicious prosecution for it is nothing to the purpose "that damages are taken from a deep pocket." *Short v Story*, Winsor Sun, *Roscoe N P Ex* 86.

**Time and place.** In an action for assault and battery the circumstances of the time and place, when and where the insult was given require different damages, thus it is a greater insult to be beaten upon the Royal Exchange than in a private room. *Per Bathurst J in Tullidge v Wade* 3 Wils 19, *Brace Girdle v Oxford*, 2 M & S 77. *Merest v Harvey*, 5 Taunt 442.

**Proof of financial standing of plaintiff—American Rule.**—In actions in which compensatory damages are allowed the financial standing of the plaintiff is irrelevant. For example, evidence cannot be received in an action for negligence against a railroad company that the plaintiff is of limited means, and that since the injury he has not been able to support his family. The evidence should be confined to the plaintiff and his capacity for business and to the nature of his injuries and the probability of recovery. The damages in such cases are not at all dependent upon his condition as to wealth or poverty. But in those actions where exemplary damages are awarded proof is allowed not only of the condition in life and of the circumstances of the defendant, but also of those of the plaintiff. In an action for assault and battery, the pecuniary circumstances of the plaintiff and the defendant, and condition of his family may be given in evidence to increase the damages, especially where the case is one of exemplary damages. And this evidence is also admissible on the ground that the poverty of the plaintiff makes the injury inflicted by the tort the greater. The consequences of a personal injury would be more disastrous to a person destitute of pecuniary resources and dependent wholly upon his manual exertions for the support of himself and family, than to an individual differently situated in life. So evidence of the circumstances and financial standing and rank in life of the plaintiff has been allowed in actions of libel and slander although the authorities are not all in accord. *Burr Jones Ex* 161.

Facts relevant when right or custom is in question

**13** Where the question is as to the existence of any right or custom, the following facts are relevant —

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence,
- (b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from

### Illustration

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right or in which the exercise of the right was stopped by A's neighbours, are relevant facts

**Principle and Scope** The general rule is that a party may prove all facts that are relevant to the facts in issue and no others. *Wright v Doe*, 7 A & E 313 (384). "The general rule is well illustrated" says *William Wills* 'by cases of possession, and especially by the possession of real rights, whether incorporeal, as an ancient water course or a right of common, or corporeal, as a field, or a road strip. In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of use or exercised *animo domini*. But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the jury is whether the act proved are so numerous and so connected that the right of possession may be inferred from them. If they are so frequent and of such a character as to indicate that the exercise of one continuous open claim at all times when it would be natural for the person claiming it to exercise it the jury will ordinarily infer the general right inasmuch as the mere discontinuity of evidence is not in itself any ground of suspicion. The acts of enjoyment from which ownership of real property may be inferred are very various, as for instance, the cutting of timber (*Stanley v White* 11 E.R. 332) the repairing of fences or bunks (*Jones v Williams*, 2 M & W 326) the perambulation of boundaries of a manor or parish (*Hecks v Sparle* 1 M & S 679 *Woolway v Rouse* A & E 114), the taking of wreck on the fore shore (*lit Gen v Emerson* 1891, A C 619), and the granting to others of licenses (*Rogers v Allen*, 1 Camp 309) or licenses under which possession is taken and held (*Bristow v Cornman* 3 App Cas 611) also the receipt of rents from tenants of the property (*Malcolmson v O'Dea*, 10 H L 593), for all these acts are fractions of that sum total of enjoyment which characterises *dominium*, and which the law presumes to be proved by the acts of ownership. *Collector of Rayshahy v Doorga*, 2 W R. 212.

A custom may also be evidenced by distinct and repeated acts, the conditions being that they should be sufficiently numerous, and should have occurred under fairly similar circumstances. In the field of contracts the principle is applicable to proof of an agency by other acts of authorization to the same person about the same matter (*Gibson v Hunter* 2 H Bl 283, *Barter v Giffell*, 3 L R 61) to proof of a contract by other similar contracts with the same person (*Bourne v Gathiff*, 11 Cl & F 11) and even in some instances to proof of a contract by other similar contracts with other persons (*Carter v Frye*, 10 L R 95, *Spencer v Wilnot* 7 East 108, *Hollingham v Head*, 1 C B 283, *Smith v Wilkins* 6 C & P 181, *Woodford v Buchanan* L R 2 Q B 250, *Buden v Kelterberg* 2 M & W 61). As applied in proving prescriptive possession the principle sanctions the use of other acts of possession on premises so connected—the parts of the same manor estate or the like—that acts done upon the one would be done only as a part of a system or habit of doing upon the rest. (*Stanley v White* 11 E.R. 332 *Burnes v Munson*, 1 M & W 25, *Doe v Kemp*, 7 Bing 333, *Jones v William*, 2 M & W 326.

**S 13** *Doe v Roberst*, 13 M & W 520, *Bristow v Cornman*, L R 3 App Cts 641, *Neill v Devonshire* L R 8 App Cts 130 166) So also a custom in one place or one trade may be evidence of a custom in another place provided the place or the trades are such that a uniformity of practice may be assumed (*Noble v Kennouay*, 2 Dougl 510, *Milward v Hilbert* 3 Q B 120, 139, *Falkner v Earle* 3 B & S 360, *Place v Allcock* 4 F & F 1074, *Fleet v Morton*, L R 7 Q B 126, *M Fadden v Mundoe*, 1 Ir C L 215) In the application of this principle in England to customs of descent, to this, and the like it has been regarded as admitting in evidence the custom in the same manor (*Doe v Sisson*, 12 East 62), or in the same township or other entity (*Blundell v Howard*, 1 M & S 292, *Jaurson v Dayson* 9 M & W 540), and even in other manors where the conditions on the matter in question were presumably the same (*Moulin v Dallison*, Cro Cir 454, *Champion v Allinson*, 3 Keb 90, *Somerset v France*, 1 Str 654, *Jumcauz v Hutchins*, 2 Cowp 807, *Beche v Parler*, 5 T R 26 31, *R v Ellis* 1 M & S 652, *Roue v Brenton*, 8 B & C 737, *Anglesey v Hatherston*, 10 M & W 215, *Greenl Fv* § 14

Public or general rights or customs can also be proved by reputation or opinion of persons who are dead *Higham v Ridgway*, 10 List 109 120. ~~32 clause (4)~~ But the most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced. *Per Turner J in Lachman Bai v Akbar Khan*, 1 A 410 (441) So customs should be supported by actual examples of the usage asserted *Gopalayan v Raghupatnyayan*, 7 M H C R 200, see also *Bhaquan Das v Hajmal* 10 B H C R 261 Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself. *Per Parle B in Jones v Williams*, 2 M & W 326 In a case where the question is whether a particular land is *man* or *jote*, an *elarnama* executed by a third person in favour of the plaintiff's ancestor and describing the land as *man* is relevant under section 13 of the Evidence Act. In delivering the judgment in that case *Coutts J* said Now in the present case the question is of the existence of a right and the *elarnama* comes both within clauses (a) and (b) it is both a transaction in which the right was claimed and an instance in which the right was exercised. If authority that such a document is relevant were needed there are the cases of *Jones v Williams*, 2 M & W 326 *Ingham v (Lord) Hatherston* 10 M & W 215 *Dalton v Judge*, 23 W R 293 (Eng) and *Tythlingqua v Tentatachala* 16 M 194 We have however been referred by the learned Vakil for the appellant to the case of *Abdul Ali v Syed Iqbal* 19 C W N 168 I confess that this decision appears to lend support to the contention of the learned Vakil of the appellant, but if it lays down the proposition that in such a case as the one before us a transaction by which a right is claimed or asserted or a particular instance in which the right is exercised is not evidence under section 13 of the Evidence Act, I must respectfully differ from this view. *Sabran Sheikh v Oloy Mahto* 70 Ind Cas 18=1 Pat 370= A I R (1922) 148=3 P I J 792=1923 Pat 125 Possession must be considered in every case with reference to the peculiar circumstances. The character and value of the property the suitable and natural mode of using it the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things are constantly varying, as they must under various conditions, and to be taken into account in determining the sufficiency of proof. *Per Lord O'Hagan in Lord Threlkeld v Lord Tont*, 3 App Cts 273 (288) and with approval by Lord Macclesfield in *Johnston v O'Neill* (1911) A C 212 and by Lord Shaw in *Kirby v Cowler* (1912) A C 799=81 L J P C 222. No title to real or personal property may be inferred from acts of ownership done by the party for or on whom they are entered as possessor in respect of rents and profit or the discharge of burdens and repairs of the property. Planting or sowing with a view to the exercise of a right to the soil. (See *Perle v Warner* 21 L J 10) and a perambulation by the holder of evidence of the title of the land, as an attempt to prove ignorance of it. (*Woodley v Perle* 1 L J 141)

114) Similarly user of an easement is evidence of title thereto, the character of the user determining the event of the right. (*Coaling v Haggison*, 4 M & W 245, *Gingall v Steptey Council*, (1906) 1 K B 468) Such facts are receivable not as admissions, but as original evidence, and in rebuttal proof is admissible of their non-existence, or that they were disputed, or done in the absence of person interested in disputing them, or in some cases of acts of ownership done by strangers not claiming through the alleged owner. *Phip Et* 91 Under the head of hearsay are usually classed those cases in which expired leases, grants, or other documents of a similar kind actively asserting a right on the part of the maker have been admitted as evidence of that right in favour of persons claiming under him, they are in fact, acts of ownership and as such evidence of property. Thus, old leases of fishing places by the lord of an adjacent manor are evidence of a right to the bed of the river in favour of those who claim under him. *Neill v Duke of Devonshire*, 8 App Cas 135. Where the question was, whether certain lands within a manor were subject to a right of common counter part of old leases, produced from among the monuments of the lord of the manor from which it might be inferred that the land was demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under him though possession under the lease was not shown. *Clarkson v Woodhouse* 3 Dug 189 *Bustow v Cormican* 3 App Cas 641 And such counterparts are evidence of claim, though only executed by the lessor. *Doe v Pulman* 3 Q B D 622, *Magdalen v Knotts* 8 Ch D 709 C 1, *Roscoe Et* 15th Ed p 53

Clause (a) Where the question was whether the defendants have a *niskar brahmattar* right in a certain piece of land a *lobala*, which purported to show that the father of the defendant sold a portion of that land to his *Niskar brahmattar* land was produced. In declaring the *lobala* not admissible under section 13 cl. (a) Mr Justice Matherjee said. That the deed is evidence of transaction cannot be disputed the very illustration to the section shows that it is. The deed therefor is evidence of a transaction which may come in under clause (a) of section 13 if the requirements of that clause are satisfied. The question being whether the defendants have a *niskar brahmattar* right, a deed confirming the *niskar brahmattar* right on the defendant's produce or would be admissible as a transaction by which the right was created but not a sale deed executed by the defendants in respect of that right. The word, *claimed*, need not be construed, as the word implies a demand which involves the presence of the party to whom such demand is made and who may have an opportunity either to comply with it or refuse it. There is no question of modification 'recognition' or 'denial' in such a case as that of a deed of sale. The sale of a right is not inconsistent with the existence of the right but is on the other hand inconsistent with its non-existence. The deed, however, is a transaction in which the right is asserted, for the sale involves an assertion of the existence of the right. As pointed out by *Geidt J* in the case of *Bansi Singh v Mar Umri* 11 C W N 703 the word *by* and not *in* appears in the clause and that *by* should be read on the basis of the word *by* in this clause is also the view expressed by *Seshagiri Iyer J* in the case of *Sripatti v Fola* (1911) M W N 779. The question therefore arises whether the assertion of the *niskar brahmattar* right in the deed is an assertion of that right by the transaction constituted by the deed, or in other words, was this right asserted by the business or dealing as between the vendors and the vendee in respect of this deed. I am of opinion that it is not. The transaction is one by which the vendor asserted his competency to transfer the property, that is to say, that he had such interest in the property as would enable him to sell it, but that is all and by this transaction the other incidents of the right are not asserted. The deed therefore does not come within clause (a) *Brijendra Kishore v Mohan Chandra*, 99 Ind Cas 153-31 C W N 32 at p 33. In the same case Mr Justice Cumming J said. "Now the transaction was the sale of the property. Can it be said that the *niskar* right was asserted or claimed by this sale? I think not. All that could be said to be asserted by the sale was that the vendor had some saleable interest in the property not what the nature of that saleable interest was. The *niskar* right of the vendor was no doubt asserted in the document by which the sale was effected but not by the transaction or sale. Clause (a) does not I think help the respondent."

**S 13** men's statement of boundary cannot be classed with any of the verbs in section 13, erected, claimed, modified, recognised, asserted or denied." It is therefore not admissible in evidence under section 13. *Kusuppannu v Rangaswami*, A I R 1928 Mad 105=107 Ind Cis 293. A document under which a party derives his title can be used in evidence where a question of title is raised with reference to the land covered by it or outside it as the case may be. *Sutu Houladar v Allep* 101 Ind Cis 792=A I R 1927 Cal 576. The words of section 13 are very wide. There is nothing in the section which requires that the right asserted should further have been successfully asserted. Giving a wide interpretation to the section, the mere assertion of the right is sufficient. *Ram Kumar Das v Hornarayan* 92 Ind Cis 101=A I R 1926 Cal 727. Documents containing assertions of the right of a tenureholder to hold the tenure at a certain rental are admissible under section 13 of the Evidence Act. *Ram Dinaman v Jagat Chunder*, 23 Ind C 773. A document containing an assertion of certain rights though not a public document within the meaning of section 35 of the Evidence Act is admissible in evidence under section 13. *Ambalavana v Minalshy*, 26 Ind. Cas 841=38 M L J 217=17 M L T 271=(1915) M W N 76. To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction, in which, or in the course of which, the right or custom was asserted or denied. The transaction will be relevant under clause (1) if it be one by which the right or custom was asserted or denied. *Dansi v Ali Amir Ali*, 11 C W N 703. Long possession of land in assertion of a particular title may be relied upon as proof of that title. *Mahomed Ali v The Secretary of State for India*, 8 C L J 466=36 C 1=12 C W N 1095=10 Bom L R 1102.

**Clause (b)** Where the question was whether the defendants have a *nisfar brahmattar* right in a certain piece of land a *lobala*, which purported to show that the father of the defendants sold a portion of that land as his *nisfar brahmattar* land, was produced. In declaring the evidence not admissible under s 13(b) *Mr Justice Matherjee* said: "To turn now to clause (b). The wording of this clause is different from that of clause (a) in several respects. It speaks in the first place of particular instances, showing that evidence to be admissible must relate to such instances as distinguished from transactions. An instance of the creation or modification of a right or custom would be inconceivable apart from the transaction by which it was created or modified and so the words 'created' or 'modified' are omitted in clause (b). There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so 'recognised' appears in both the clauses. Instead of the words 'by which the right or custom is asserted or denied or which was inconsistent with its existence' we have the words in which the right or custom was exercised or in which the exercise was disputed, asserted or departed from." It is clear that in clause (b) instances of assertions or denials of right or custom do not come in, but only instances of its exercise or instances when its exercise was disputed, asserted or departed from. Can any conceivable ground be suggested why if a mere assertion or denial in respect of a right or custom was to be evidence, no evidence of particular instances of such assertion or denial could be given and yet evidence would be admissible in respect of transactions in which there has been such assertion or denial? I fail to see any. I am therefore of opinion that a transaction or instance in which there is mere assertion or denial of a right or custom does not come within section 13 but only such a transaction is admissible by which the right or custom is asserted or denied. It has been urged that the illustration militates against this view but I do not see that it does. The illustration speaks of a case where the question is whether A has a right to a fishery. In such a case a deed conferring the fishery on A's ancestors should be relevant by which a right to the fishery was created, so a mortgage by which a right to the fishery would be lost of the fishery by A's reconveyance would be a transaction by which a right to the fishery was also a subsequent grant of the fishery. All the transactions in which the exercise of the right by the neighbour was exercised.



are admissible has been clearly explained by *Parke B* in *Jones v Williams* 2 M. & W 326. The ground on which such acts are admissible is not the acquiescence of any party. They are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil, though if they are done in the absence of all persons interested to dispute them, they are of less weight. Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under clause (a) nor under clause (b). They are statements which unless they are relevant under some other provisions of the law *e.g.*, as admissions or statements of deceased persons etc. are not admissible in evidence." *Brojendra Kishore v Mohun Chandra*, 31 C W N 32 (38, 39)

The word "claim" denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim though in some circumstances a statement may amount to a claim. A statement in the *pattah* that the land to the west of the land demised under that *pattah* belongs to the executant of the *pattah* is not a claim but a mere recital. *Radha v Sarbeswan*, 229 C W N 469=86 Ind Cas 647 (17 C W N 1016 and 31 C 380 Foll)

Opinions of living persons as to the usage of a family will be admissible though grounded on statements made by deceased persons. Statements made by deceased persons as to the usage after the controversy has arisen are inadmissible in evidence. Statements made by persons are not instances within the meaning of section 13, clause (b) of the Evidence Act but the whole litigation ending with a judgment may be an instance. *Sri Protap Chandra v Sri Raja Jagadish*, 82 Ind Cas 886=40 C L J 331. An admission may be proved on behalf of the person making it under section 21, clause (3) of the Evidence Act if it is relevant otherwise than as admission. In the case of a house said to have been built over half a century ago, direct evidence as to who constructed it may not be easily available, and old documents mentioning by whom it was built may be admissible in evidence under section 11, clause (2) and section 13 clause (b) of the Indian Evidence Act for what they are worth. *Roghunath v Boudeshwari*, 82 Ind. Cas 582=1924 All. 526

**Right, meaning of—**In *Gyugu Lal v Fattah Lal*, 6 C 171 (F B), at page 186, *Garth C J* said. It may be difficult, perhaps, to define precisely the scope of the word 'right' but I think it was here intended to include those parties only of an incorporeal nature, which in legal phraseology are generally called 'rights' more especially, as it is used in conjunction with the word 'custom'. It is certainly used in that sense in subsequent parts of the Act (see s 19 and sub-section 4 of s 32) which deal with matters of public or general rights or customs and in s 13 the word is probably intended to include both public or private rights of that nature. The 'right of fishery' mentioned in the illustration is a right which may be either public or private. That the expression is used in this limited sense is shown also as it seems to me, by the words with which it is associated. The right mentioned in the section is one which can be 'created or exercised' which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word 'right' when used in its more extended sense. It would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but no lawyer would think of giving that a right to a chattel or to damages had been 'created or exercised'. In the same case *Jackson J* said. 'It seems to me is clear as anything can be that the right here spoken of is something quite distinct from ownership. What is referred to in the section cited is evidently a right which attaches either to some property or to status in short incorporeal right which though transmissible are not tangible or objects of the bodily senses. To this interpretation the object, the particular facts selected, and the illustrations to the section all seem to me to conduce.' But in the same case *Millet J* in dissenting from the Full Bench gave a very wide interpretation to the word right. At p. 190 he said. 'Then it has been said that, in s. 13 of the Evidence Act, it

**S 13** Legislature intended to refer to incorporeal rights only, because in other parts of the Act, for example in ss 32 and 48, where the same words occur in conjunction with the word 'custom' it has been used in that sense. In the first place, it is by no means clear that ss 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that, in the generality of cases, such rights are incorporeal but it is by no means confined to that class only. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights respectively, whether of a public or of a private nature." In *Teppu Khan v Rayon Mohun*, 2 C W N 501 (F B) in referring the case to the Full Bench *Banerjee J* observed "It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used in the section." On the other hand the view taken by *Garth C J* and *Jarvis* in *Gujjural v Fattah Lal* was approved of in *Kalidhan v Shiba Nath* 8 C 483 (505) F B. In *Collector of Gwalior v Palakdhari*, 19 A. 1 (F B) the Full Bench dissented from the view taken by the majority of the Full Bench in *Gujjural v Fattah Lal*, as regards the interpretation of the word 'right'. At page 13 *Edge C J* observed "I think however as did Sir Charles Sargeant, C J and Mr Justice Nanabhai Haridas in *Ranchhodas v Bapu*, 10 B. 439 that the majority of the Full Bench of the Calcutta High Court in *Gujjural v Fattah Lal* put too narrow a construction on the word 'right' in s 13, and that 'right' there includes not only incorporeal rights but a right of owner ship." This view was also accepted by *Ranade J* in *Lal smuin v Amrit*, 24 B 391 (599) see also *Rama Suami v Appaun*, 12 M 14, *Venkata Sami v Venkataraddi* 15 M 12, *Vytuhnga v Venkatachala*, 16 M 194, *Stephen Dig Ed Article 5*. The illustration to this section shows that the right mentioned in it is not a public right only, the right there mentioned being a private one—viz—A's right to a share *Surja v Bishambhar* 23 W R 311.

**Custom.** A custom is a particular rule which had existed either actually or pre-emptively from time immemorial and has obtained the force of law in a particular locality, although contrary to and not inconsistent with the general common law of the realm. *Lockwood v Wood* 6 Q B 50, *Halsbury Vol X p 218*. A custom must be confined to a definite limited locality. It may impart a general right in a district. *Millar v Taylor*, 4 Burr 2305. A custom cannot extend to the whole realm nor can it embrace every member of the public, for in either case, it would then amount to the common law of the land. *Halsbury Vol X p 219*. In *Lari Coventry v Willes* 12 W R 127 Eng. *Cockburn C J* said "There cannot be a custom as of right in all the Queen's subjects generally inasmuch as the rights possessed by the Queen's subjects generally are part of the general law of the land, and not the custom of a particular place." See also *Gifford v Yarborough* 5 Bing 163. *R v Rolatt*, (1875) L R 10 Q B 469. So a custom is a rule which in a particular family or a particular district has from long usage, obtained the force of law. *Hurpurshad v Sheo Dyal*, 26 W R 55 P 6. 3 I A 259, see also *Field's Ev* 6th Ed p 495. According to the view of customary law taken by *Mr Justin* (*Justin Vol I*, 148, Vol II 229) a custom can never be considered binding until it has become a law by some act, legislative or judicial of some sovereign power. I imagine pointing to the same view in *Charu* 1 Mad H C 424. But such a view cannot now be sustained. It is open to the obvious objection that, in the absence of legislation no custom could ever be judicially recognized for the first time. A decision in its favour would be that it was already binding. The sounder view appears to be that law and custom act and react upon each other. A belief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour following it and a uniformity of behaviour in following a particular course of conduct produces a belief that it is in operation or proper, to do so. When from either cause, or from both causes a uniform and persistent usage has moulded itself, and regulated the dealing, of a particular class of the community, it becomes

a custom, which is a part of their personal law. Such a custom deserves to be recognized and enforced by the Courts, unless it is injurious to the public interests, or is in conflict with any express law of the ruling power. *Khojah's Case*, Perry O C 110, *Houard v Pestonji* Perry O C 535, *Tara Chand v Reeb Ram*, 3 M. H. C 56, *Bhan Nanaji v Sundra bai*, 11 B. H. C 249, *Mathura v Esu* 4 B 545, *Mayne's Hindu Law*, 6th Ed 56. So local customary law has its source in those immemorial customs which prevail in particular parts of a country and have there the force of law in derogation of the general law of the land. *Salmond's Jurisprudence*, p 96. An immemorial custom does upon occasion give rise to rights as well as to law. In respect of the former operation, it is peculiarly distinguished as prescription, which as a source of law retains the generic title of custom. *Ibid* p 169.

**Customs, legal and conventional.** All customs which have the force of law are of two kinds which are essentially distinct in their mode of operation. The first kind consists of custom which is operative *per se* as a binding rule of law, independently of any agreement on the part of those subject to it. The second kind consists of custom which operates only indirectly, through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties. These two kinds of customs may be conveniently distinguished as legal and conventional. A legal custom is one whose legal authority is absolute—one which in itself and *proprio vigore* possesses the force of law. A conventional custom is one whose authority is conditional on its acceptance and in corporation in agreements between the parties to be bound by it. In the language of English Law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as usage. The distinction so drawn, however, between the terms customs and usage, which in popular speech are synonymous, is by no means universally observed even by lawyers. In any talk of custom, therefore, it is always carefully to be noticed whether the matter referred to is legal custom or conventional custom—custom *stricto sensu* or usage. Legal custom itself is of two kinds, being either local custom prevalent or having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all over the country—*Salmond's Jurisprudence*, p 211. The word custom in this section includes private or local custom. *Collector of Goralhpur v Palal dhari*, 12A. 1 (16).

**Conventional custom or usage.** A usage or a conventional custom is, as has been indicated, an established practice which is legally binding not because of any legal authority independently possessed by it but because it has been expressly or impliedly incorporated in a contract between the parties concerned. *Salmond's Jurisprudence* p 211. Usage may be broadly defined as a particular course of dealing or line of conduct which has acquired such notoriety, that where persons enter into contractual relationships, in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary, that is to say that a rule of conduct amounting to a usage, if so generally known in the particular department of business life in which the case occurs, that unless expressly or impliedly excluded it must be considered as forming part of the contract. *Moult v Haliday*, (1893) 1 Q. B. 125, *Halbury* Vol. X p 249. A usage may exist in any trade, occupation, profession or branch of commercial or mercantile life, and between parties bearing certain contractual or even domestic relationship to one another, either generally throughout the kingdom or in a sphere extending beyond the limits of the realm, or within some local area, however small. A usage differs from an immemorial custom in this respect, for the latter must be local. A usage may exist in respect of a very limited class, and may be confined to a very limited area. *Halbury* Vol. X p 250. Law so derived from the conventional custom of merchants is known as the law merchant. "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which Courts of law are bound to know and recognize." *Per Lord Campbell in Brando v Brando*.

**S 13.** F 787 (805) In the first stage, the existence of the usage is a question of fact to be determined by evidence in the particular case in which it arises. The second stage of development is relevant when the Courts take judicial notice of the custom in question, so that it no longer requires to be specially pleaded or proved in the particular case. It has already been sufficiently proved in previous cases, and has received the authority of the precedents established by those earlier cases. *Salmond's Jurisprudence* p 213

**Distinction between custom and usage** Immemorial local customs are clearly distinguishable from particular trade or local usages, although in practice they are frequently confused with them. They lack three of the distinguishing features of custom properly so called. First, they need not have existed from time immemorial. *Vide Dalglish v Yelsuffer*, 23 C 427, *Sariatulla v Pran*, 26 C 184. In the second place, they need not necessarily be confined to a limited locality. In the third place, usages, however extensive if contrary to positive law will not be sanctioned by the Courts, while customs may be inconsistent with the general law of the realm. *Halsbury* vol X p 221. In *Goodwin v Roberts* (1870) L R 10 Exch 337, *Cockburn C J* at p 357 said "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law. To give effect to a usage which involves a debarment or disregard of the law would be obviously contrary to a fundamental principle." "A business usage need not be strictly uniform." *Jaggomohun v Manik Chand*, 7 M I A 263, 282. A firm was let under a written agreement, reserving to the landlord "all mines and minerals, sand, quarries of stone, brick, earth, and gravel pits." A local custom (which, it was suggested had grown up within the last thirty or forty years) allowed tenants of such farms, let with similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry, and to sell them for their own benefit. Held that the custom was reasonable and valid. *Tueler v Linger*, 53 L-J-Ch 941—8 App Cas 508.

**Custom—meaning of, under this section** In *Collector of Goralhpur v Palahdhan*, 12 A 1 (16) F B *Edge C J* said "It might possibly be suggested that a custom, to come within section 13, must be a public custom and not a quasi-public custom such as the custom of an estate or, to take an example from England, the custom of a particular minor. If such a suggestion were well founded then, according to the principles of construction, a right to be within s 13 must be a public right which was not the opinion of the Full Bench of the Calcutta High Court in *Gygy Lal v Fateh Lal* 6 C 171. Although I always have a feeling of diffidence in referring to judgments delivered by me or to which I was a party as authorities, still I may say that my brother *Tyrell* and I have in s 13 (b) in our minds held in *Gur Dayal Mal v J Landu Mal*, 4 W N (1888) 242, that evidence could be given of instances in which a purely local custom was recognised in suits not *inter partes*. If we there correctly interpreted the law, I cannot see why a different rule should be applied when an incorporeal right or a right of ownership is in question. If the Legislature intended that there should be any such distinction I would have expected such distinction to have been made patent in section 13. Section 48 which deals with general custom or right is applicable in deciding on the evidence of usage. *Dalglish v Gussaffer Hassan*, 23 C 427, *Sariatullah v Pran Nath*, 26 C 185. According to *Sir John Woodroffe* the word custom as used in this section is not, however limited to ancient custom but includes all customs and usages. *Woodroffe Esq* 8th Ed 168. "The word 'usage' would include what the people are now or recently were in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists—that would be 'usage' within the meaning of the section." *Dalglish v Gussaffer* 23 C 427 (429) *Sariatullah v Pran Nath*, 26 C 185. In the Indian Evidence Act we find mention of three kinds of customs: (1) private, (2) general (*vide* s 48) and (3) public (*Vide* s 32 clause 4).

**Private Custom—usage of a single family** In *Ray Kishen v Barry* 1 C 186=19 W R 8 P C, their Lordships of the Privy Council said "That Lordships cannot find any principle or authority, for holding that in point

of law a manner of de-cent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well established discontinuance must be held to destroy them. From the above judgment it is clear that a family custom is also recognised in India. See also *Basant Rao v. Montappa*, 1 B H C App 42, *Tirachand v. Reeb Ram*, 3 M H C 58, *Madhav Rao v. Ballurishna*, 4 B H C A C J 113, *Neelkrishna v. Beerehunder*, 12 M I A 523, *Gunesh v. Mohepur*, 6 M I A 164, *Durga v. Raghu*, 18 C W N 55. Family custom although foreign to the spirit of English law is recognised in India. *Amrit v. Gauri*, 6 B L R 238.

**Family custom—how proved.** If a party rely upon the especial custom of a family, such custom must be proved to be ancient and continuous. *Rama Lalshmi v. Sua Natha*, 14 M I A 570=17 W R 552. Custom must be certain invariable and ancient. *Maung Tha v. Main*, U B R (1892—1896) Vol II 327. The series of acts by which a custom is to be established must be plural, uniform and constant. *Superumddhuaga v. Garwad* 15 A 147=17 I A 238. Evidence of acts of a single family repugnant or antagonistic to the general law will not establish a valid custom or usage enforceable in a Court of Justice. *Madhav Rao v. Ballurishna* 4 B H C A C 113. A custom is a rule which in a particular family, has from long usage obtained the force of law which must be ancient, certain and reasonable and being in derogation of the general rule of law, must be construed strictly. *Hurr Proshad v. Sheodyal*, 3 I A 259 (285), *Hira v. Burm*, 17 W R 316, *Debendra v. Pitamber*, 98 Ind Cas 43. Such a custom, must be proved to be ancient and invariable. *Hazari v. Jani*, 3 Ind Cas 6. *Basara v. Linga*, 19 B 428. In the case of a family of comparatively modern origin, evidence of conduct extending over a short period is wholly inadequate to prove a special custom. *Rajya Lakshmi v. Surya Narayan*, 3 M L J 100. A family custom ought to be alleged and proved with distinctness and certainty. *Serumah v. Palathan*, 15 W R 47 P C. It is an acknowledged principle that to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial and continued without interruption. *Tyson v. Smith*, 9 Ad & El 406, *Faydinada v. Appu*, 9 M 44. A solitary instance is not by itself sufficient to establish a custom. *Sarabjit v. Indrajit* 27 A 203. In *Chandika v. Muna*, 24 A. 273=29 I A 70, their Lordships of the Judicial Committee declined to find in favour of an alleged custom upon evidence which consisted of four modern instances. See also *Gopal v. Hunmunt*, 3 B 273, *Durga Charn v. Raghu Nath*, 18 C W N 55 (58). A family custom must be established by clear and unambiguous evidence. *Abdul v. Sona*, 45 C 450=27 C L J 240, see also *Lal Gayendra v. Lal Mathura*, 20 C W N 876, *Nogendra v. Raghu*, W R (1864) 20.

**General Custom.** The word general custom is used in section 48 of the Evidence Act. The term "general custom" in that section probably includes 'public custom.' *Whitely Stokes*, Vol II p 884. According to English law the term includes the custom of bunker's lien and other customs of the law merchant. *Brandao v. Barnett*, 3 C B 519 530 cited with approval in *London Chartered Bank of Australia v. Mitr*, 4 A C 413 422. This term also includes the customs of gravel kind and borough-english. (*Clement v. Seudamore* 1703 2 Ld Raym 1021-1026) i. e. such as have an extended local application. *Wills Ev 2nd Ed* 20. According to Mr Justice Woodroffe the expression "general custom" is defined to include customs common to any considerable class of persons and includes (a) local custom, (b) caste or class custom and (c) trade custom or usage. *Woodroffe's Evidence 8th Ed* p 169. If we are to take the analogy from 'public rights' and "general rights" we must say that general customs are those in which some class of the community has a common interest, as for example, the one which are based on the customs of manors (*Doe v. Sisson* 12 E.R. 62 *Crease v. Barrett* 1 C M & R. 919) parishes (*Berry v. Banner*, Pea. 156, *Lians v. Merthyr Tydfil* 1 M D C 1899 1 Ch. 241), or cities (*Lay born v. Crisp*, 4 M & W 320), or which

**S 13** are connected with the boundaries of counties (*Jones v Rees*, 10 A & E 151), hamlets (*Thomas v Jenkins* 6 A & E 525) and manors or the ancient divisions of manors (*Barnes v Mason* 1 M & S 77) *Wills 1st Ed* 222 Public customs are those in which all the subjects of the king are interested *Ibid*

**Local custom** **Requisites of** A local custom is that which is effective as a source of law and legal right directly and *per se* and not merely indirectly through the medium of agreement in the manner already explained In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements laid down by law Local customs are binding on all persons in the local area *Jay v Lomboy*, 1 C 186, *Satyanarain v Satya*, 19 Ind C 18 525-28 C W N 351, *Heera Nath v Birm*, 17 W R 316, *Marquis of Anglesey v Hutherton* 12 L J 15 67 By Ben Reg IV of 1822, s. 76 the custom of a country has procedure of the law of the defendant, and as such by the custom of the Broom District, the mortgagor of wife land is permitted though contrary to Mohammedan law *Abas Ali v Gulam Mahammad* 1 B H C 18 36 As to prescription in village communities, vide *Kummar Digambar v Annar Ahmad* 19 C W N 393, *Mudhab v Pomi*, 7 W R 210 Local custom or usage is termed *desachur* *Field Fr* 7th Ed 763

**Caste or class custom** *Cutch Memons* by virtue of custom can dispose of whole of their property by will *Advocate General v Jimbhar*, 41 B 181 As regards the succession amongst the Muhammadans (*Khopas*), vide *Khopas and Memons*, (Case Perry Or C 110, *Karim v Pradhan* 2 B & C R 216 (279) *In re Hajj Ismail* 6 B 152, *Isahabul v Hajj* 9 B 115 As regards tribal custom, vide 16 B 170 (176) and 21 P L R 1903 As regards customs of religious institutions, vide, 11 A 209, 1 M 235 (P C) = 4 I A, 76

**Requisites of valid custom** Under the English law a valid custom must fulfil the following conditions —

- (a) It must be ancient i.e., it must be in existence beyond the memory of man or it must go back as far as the reign of Richard I. (*Lenkward v Cooper*, 7 C & P 119)
- (b) It must be reasonable
- (c) It must be certain
- (d) It must have been continued
- (e) Perceivable (*Lala v Hina* 2 A 19)
- (f) Compulsory
- (g) Not immoral or unnecessary

**Antiquity** In the words of *Littleton* "No custom is to be allowed, but such custom as hath been used by title of prescription that is to say, from time out of mind" So no usage can be part of law or have the force of custom, that is not immemorial *Millor v Taylor* 4 Bur 2305 In *London Corporation v Cor* L R 2 H L 239 *Wiles J* at p 259 said "A custom originating within time of memory even though existing in fact, is void at law" In *Chapman v Smith*, 2 Ves 505, *Lord Hardwicke*, L C at p 510 said "Local common law, like general common law, is the law of the country as it existed before the time of legal memory which is generally considered time of Richard I Thus, when people allege a custom, they allege that which they call a custom as having been the law of the place before the time of legal memory" See also *Hamberton v Honey* 21 W R (Eng) 603 As to how the time for the commencement of legal memory became fixed, vide *Dalton v Angus* (1881) 6 App Ct 410 (510 811) So what the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force is satisfactory proof of its so long and invariably acted upon in practice, as to show that it has by common consent been submitted to by class or district or country and the course of practice upon which the custom rests must not be left in doubt but be proved with certainty" *Snananga v Motter Ramalinga* 3 M H C 75 (77) affirmed on appeal in 14 M I A 570 see also *Shidhoprav v Narkojrav* 10 B H C 234 *Bhoyan garav v Maloprav* 5 B H A C J 161, *Chinnammal v Faradanagulu* 15 M 307 see also *Doe D Jogomohun v Nimu Dasi* Monumental cases of Hindu Law 596 *Lalu v Hina Singh*, 2 A 51 *Herpershad v Sheo Dyal* 3 I A 259 The word immemorial merely means beyond human memory and custom which

is proved to extend for a hundred years may very well be called immemorial S  
*Majid v Safdari Begam*, 8 Ind C 1033. Antiquity of a custom is all that is needed, no time need be fixed. *Joy v Durga*, 11 W R 348 (349). After the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and it is for this reason that such evidence is allowable as an exception to the general rule. *Raja Rajendra v Kumar Ganganada*, 30 C W N P C. So the essence of a custom is that it should be ancient and invariable. *Raja Rao v The Court of Wards*, 22 M 383 = 3 C W N 415 (P C) = 26 I A 83, see also *Vayulmunda v Appu* 9 M 14 (I B), *Jugmohandas v Mangal Das* 10 B 528. *Hur Prosad v Sheo Dyal*, 26 W R 53 P C, *Mariam v Ibrahim* 28 C L J 386, *Jugamohan v Mauck*, 7 M I A 282 = 4 W R P C 8, *Anant v Gouri* 6 B L R 238, *Durga v Anglunath*, 13 C L J 559, *Bhau v Sunderbai*, 11 B H C R 271.

**Reasonableness** A custom must be reasonable. *Co Litt* 62 (a), *Tamistry Case*, Div Jr 29 (32), *Tyson v Smith*, 9 Ad & El 406. *Broadbent v Willes* Willes 360. *Lala v Hira Singh* 2 A 49. *Nitya Gopal v Priyas* 24 C W N 309, *Bhagi v Kari*, 1 B H C 229, *biapa v Narsi*, 8 B H C 19, *De Souza v Pestonji*, 8 B 108, *Shadi Lal v Muhammad Ishaq*, 33 A 257, *Kuarson v Mannan* 17 A 87, *Raja Varma v Ravi Varma* 1 M 235. *Hurpurshad v Sheo Dyal*, 3 I A 285. So even where a custom is established by evidence, it cannot be treated as a valid custom on the ground of its unreasonableness. *Lutchmeput v Sadaulla*, 9 C 698 (703). A custom is reasonable where no good legal reason can be assigned against it. 1 Bl Com 77. When however, it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times on the party setting up the custom. *Halsbury* Vol. 10 p 224, see *Salisbury v Gladstone*, 9 H L C 692, *Johnson v Clark*, (1908) 1 Ch 303, (311). Similarly an usage in order to become valid must be reasonable. *Hammerton v Honey*, 24 W R 603, *Johnson v Clark*, *ubi supra*. The reasonableness must be considered with reference to its inception. *Merces v Denne*, (1904) 2 Ch 534, *Tamistry Case*, Div Jr 29, *Tyson v Smith* 9 Ad & El 406. *Sheikh v Behari Lal*, 6 Pat L J 11 = 61 Ind C 132. A custom is not unreasonable where it is beneficial to a community but against the interest of a particular person, *Tyson v Smith* *ubi supra*.

**Certainty** A custom must be certain and definite. *Tamistry Case* (1608) Div Jr at p 33, *Tyson v Smith* 9 Ad & El 406. *Taylor v Scott*, Filz G 35, *Blewitt v Tregonning* 3 Ad & El 554. *Merces v Denne*, (1904) 2 Ch 534, *Hurpurshad v Sheo Dyal*, 3 I A 285, *Ranatalhm v Suananya*, 17 W R 553, *Luchman v Albar Khan* 1 A 400, *Raj Kishen v Ramjoy*, 1 C 195 (196), *Ratuwar v Pahlwan*, 33 A 196 (F B), *Lala v Hira Singh* 2 A 48. *Krishna Abdul* 34 C L J 319. *Tekart v Teluct* 20 W R 157, *Bhagawan Das v Balgobind*, 1 Bc R S N (X). In *Broadbent v Willes*, Willes 360, Willes C, J said. That every custom must be certain is laid down as a rule in all the books, which treat of customs. It is said of a custom as by way of definition that *consuetudo ex certa et rationabili causa prius communem legem*, and it must be certain because, if it be not certain, it cannot be proved to have been time out of mind. For how anything can be said to have been time out of mind when it is not certain what it is? There must be some definite limit to the right claimed to exist under an alleged custom—in respect of its nature generally, in respect of the locality where the custom is alleged to exist and in respect of the person alleged to be affected by the custom. *Halsbury* Vol 10 p 227 226.

**Continuity** A custom to be valid must be continued without interruption since time immemorial. *Halsbury* Vol 10 231. *Tamistry Case* Div Jr 32. *Tyson v Smith*, 9 Ad & El 406. *Simpson v Hills* L R 7 B 214, *Abraham v Ibrahim*, 9 M I A 242. *Rama v Apparau*, 12 M 14. *Suananya v Jhulu*, 3 M H C 75, *Bem v Jai Kissen* 7 B L R 152. It should be unaltered uniform and constant. *Jameela v Pagul*, 1 W R 250, *Lala v Hira* 2 A 49. In *Iam*

**S 13** *Kishen v Ramjoy*, 1 C 186, their Lordships of the Privy Council said "It is the essence of family usages that they should be certain, invariable, and continuous and well established discontinuance would be held to destroy them. This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family." See also *Tara Chand v Reeb Ram*, 3 M H C 58, *Madhabarao v Lal Kishna*, 4 B H C A C J 113. In cases of a widely spread local custom, want of continuity would be evidence that it had never had a legal existence. *Mayne's Hindu Law* p 58, see also *per Jessel M R in Hammerton v Honey*, 21 W R 603. There is however, a distinction between an interruption of the right which forms the subject matter of the custom, and an interruption in the possession of that right, or the user and enjoyment of that right. If there be an interruption of the right, no matter for how short a period the right is extinguished and if it were possible to revive it, its revival would involve a new beginning within time of legal memory and thereupon the custom would be void. But as regards interruption of the possession or enjoyment of the right such an interruption may occur and continue for ten or twenty years, without destroying the custom, the effect of such an interruption being merely to render the custom more difficult of proof. *Halsbury Vol A p 232*. In *Mercer v Denne*, (1904) 2 Ch 534 *Farwell J* said "The mere non user during the period that the set flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession." See also *Hamud Fatima v Bhola*, 53 Ind. Cas 869.

**Obligatory** A custom to be valid must be consciously accepted as having the force of law. *Mirabibi v Vellayanna*, 8 M 464. The usage must be shown to be certain and reasonable and so universally acquiesced in that every member in the particular trade knows it or might know it if he took the pains to enquire. *Vollart v Vettincku*, 11 M 450. A custom which is against law ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as binding. *Patel Vandrajan v Patal Mamlal*, 16 B 470. A custom to be valid must be acquiesced in. *Nitya v Provas*, 24 C W N 309.

**Not immoral or unreasonable** A custom deserves to be recognized and enforced by the Courts unless it is injurious to the public interests, or is in conflict with any express law of the ruling power. *Tarachand v Reeb Ram*, 3 M H C 56. *Bhau v Sundrabai*, 11 B H C 249. *Mathura v Esu*, 4 B 54. So a custom should not be immoral or opposed to public policy or unreasonable. *Raja Varma v Rabi Varma*, 1 M 235, *Lakshmi v Sadatula*, 9 C 628, *Lachmeput v Sadaulla*, 9 C 698, *Krishna Swami v Vira Swami*, 10 M 133. *Desou v Pestonji*, 8 B 408. Immoral custom is not recognized as valid. *Ghasi v Umrajan*, 211 149 (P C), *China v Tegarai*, 1 M 168.

**Transaction** Transaction in its ordinary acceptation signifies the conduct or management of any undertaking or business affair, any matter or thing that has been brought partly or wholly to a conclusion. Any act as affecting legal rights or obligations. *Standard Dictionary Worcester* defines it as the act of transacting or conducting any business, negotiation, management, a proceeding. *Webster*, as the doing or performing any business, management of any affair, performance, that which is done, an affair. "A transaction" is the derivation denotes is something which has been concluded between persons by a cross or reciprocal action as it were." *Per Jackson J in Guyu Lal v Fatch Lal*, 6 C 185. "A transaction" in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. *Ibid*, *per Garh C J*. Whatever may be done by one person which affects another's rights and out of which a cause of action may arise, is a transaction. *Scarborough v Smith*, 18 Kan 399, 406. It is a broader term than the contract, for while every contract is a transaction, every transaction is not a contract. *Roberts v Donovan*, 70 Cal 108 113. The term transaction is one of large import, and might, although a somewhat strained use of it, be held to be applicable to proceedings in a suit. *Ranchoddas v Laju*, 10 B 443 (142) but see *Per Jackson J in Guyu Lal v Fatch Lal*, 6 C 171 (142). Whether a judgment is a transaction, vide post.



The word 'transaction' in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons. Written statements filed in suits are not transactions within the meaning of the section. Where in the specified boundaries of an adjacent land the suit land is described as belonging to one of the parties, it is transaction but not a transaction in which the right of the party is asserted, claimed or even recognised and hence not admissible in evidence under section 13. *Sasipalli v Kota Narasayya*, 1914 M W N 779. A private transaction between persons who have no power to bind one whose rights it is sought thereby to affect cannot be admitted as evidence against him under section 13 of the Evidence Act. *Abdul Ali v Rejan Ali*, 21 Ind Cas 618, (*Duarla Nath v Mulunda Pal*, 5 C L J 55 dissented from). A transaction contemplated by section 13 is a genuine and bona fide transaction, but a benami transaction which is not meant to be acted upon is a fictitious transaction and in the eye of law is no transaction at all. Such a transaction cannot be let in as evidence in proof of a right or custom. *Brojendra v Mohun Chandra* 31 C W N 32 (10). In *Subran Sheikh v Uday Mahto*, 1 Pt 375, the learned Judges of the Patna High Court in a suit in which the Plaintiff claimed some land as their *mal* land and the Defendant claimed it as his *jote* an *elamnama* addressed by a third person to an ancestor of the plaintiffs in which the land was described as *mal* land was held admissible both under clause (a) and clause (b) of section 13 on the ground that it was a transaction in which the right was exercised. In this case the authority of the decision in *Abdul Ali v Syed Rejwanli*, 19 C W N 468 was doubted and reliance was placed upon others upon the cases of *Dattari Mahanti v Jagabandhu*, 23 W R 293 and *Vythilinga v Venkata Chala*, 16 M 194 and also upon the decision in *Jones v Williams*, 2 M & W 326. In a later decision of the Calcutta High Court in the case of *Jnanendra Nath v Nesea Dasi*, 39 C L J 526, which was a suit by a landlord against a tenant who claimed a permanent tenure, *Rankin J* held that an assertion in the *lobala* executed by a tenant in favour of his transferee that his right in it was permanent one was admissible under section 13. *Brojendra v Mohun* 31 C W N 32 (10).

Previous transaction in respect of different property is not a transaction within the section. *Radha Krishna v Sarabeswar Nay*, 29 C W N 169=86 Ind Cas 671=A. I. R. 1925 Cal. 681.

**Instances** An instance is that which offers itself as an illustrative case something cited in proof or exemplification, a case occurring, example. *Webster's Dictionary*. Under this section evidence of particular instances where the right or custom was (1) claimed, (2) or recognised (3) or exercised, (4) or in which its exercise was disputed, asserted or departed from, can be given. Section 13 of the Act is of no avail where the transactions were in respect of lands other than the disputed land, as there was not any transaction or particular instance by or in which the right in dispute was claimed, recognised, asserted or denied. *Abdulla v Kuny Behari*, 11 C L J 467=16 C W N 252. The statement of an agent that his principal was a husband was admissible under section 13 of the Evidence Act as establishing an instance in which the legitimacy of the person in question was denied. Held also that a judgment referring to such illegitimacy was also admissible under the same section. *Key Faruk Singh v Baldeo Singh* 3 Luck 161=109 Ind Cas 31=A. I. R. 1925 Oudh 233. When a custom has been established in times showing that there has been no variation in the custom over important and should be relied upon no matter if such instances relate to transactions which took place after the intervention of the question of custom had been in tituled. *Kishan Singh v Japur*, A. I. L. 1925 Lah 966. Uncontested instances are by no means worthless evidence of the existence of right. *Muhammad Husain v Ghulam Muhammad*, 10 Ind Cas 240=133 P. L. R. 1911. Statements contained in petitions by members of a family recognizing the existence of a custom of *primo geniture* in the family are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights. *Sajimant v Jai Lal* 12 C 6. Instances in the neighbouring subdivisions of a town are relevant on the question of custom in a particular subdivision of a town under section 13 of the Evidence Act, and they may be treated as evidence

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supplementary to the evidence afforded by instances in the sub division. Admission by a vendee in a suit for pre-emption that the custom for pre-emption existed in the locality is an instance of the recognition of a right which is relevant under section 13 of the Evidence Act. *Sant Singh v Jowala Sa Ah*, 88 P L R 1903=42 P R 1903

**Proof of trade custom by particular instances** In evidencing a custom or usage (i.e. the habit of a body of persons) by specific instances, the following general principle is applicable, that is, the instances offered (a) should be sufficiently numerous to indicate a regular course of business, and (b) should occur under conditions substantially similar to that in question. *Wigmore § 379*

**Number of instances** Individual instances offered one at a time are rarely able. *Doe v Mason*, 3 Wills 63. In *Roe v Jeffrey*, 2 M & S 92 *Ellenborough*, L C J said "It is true that one act undisturbed does not make a custom, but it will be evidence of custom." The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom. *Durga v Raghunath*, 18 C W N 50, *Larkman v Akbar* 1 A 440, *Debendra v Pitamber*, 98 Ind C 43=A I R 1937 Cal 43, *Jugmohan Das v Mangal Das*, 10 B 528 (543), *Sarabjit v Indrajit*, 27 A 203, *Chandila v Vinna*, 24A 273=29 I A 70

**Custom should occur substantially under conditions substantially similar to that in question** It is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances. The precedents illustrate all sorts of trade and usage and no detailed generalization seems feasible. *Wigmore § 376*. To prove a custom of London as to the storage of goods in regard to general average a similar custom in other English ports was received. *Milward v Hibbert*, 3 Q B 120, 139. So also to prove a custom of trade between Liverpool and California, after incorporation with the United States, as to discounts on freight, a similar custom as to trade with Mexico after incorporation and as to other ports of British America, etc., was received. *Fallner v Earle*, 3 B & S 360. Similarly in proving usage as to bleaching linen in Nottingham, usage at Loughborough was admitted by reason of the vicinity of the places and the interchange of trade. In *Fleet v Morton* L R 2 Q B D 126=41 L J Q B N S 49 the action was for the price of fruit on a sold note signed by the brokers only, the dispute being whether in that trade brokers were liable on such notes for the default of principals. The custom of trade being held to be involved in the contract, evidence was received with some hesitation, of the custom on the point in the colonial market. *Blackburn J* observed. It seemed to be conceded in the trial that the two trades were so far allied to each other that the same usages would be likely to prevail in both, and I thought that upon the question of the liability of a broker, evidence of his liability in a similar trade ought to be received." So it is enough to point out (1) that no particular circumstance is conclusive either *pro* or *con*, (2) that instances from another trade or another region are not necessarily without probative value, while instances from the same trade and the same locality are not necessarily admissible, and (3) that the question is not whether the offered instance fully proves the custom alleged, but merely whether they are receivable as having probative value. *Wigmore § 379* see also *Noble v Kenneyway*, 2 Doug 510, *M Fadden v Murdock*, 1 Ir C L 218

**Customary rights in land, etc** Custom in India is tradicional law. But a custom cannot be established by a few instances or by instances of recent date. Consequently, it is the duty of the Court, when it has to pronounce upon the question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. *Kalaria v Haja Venkata*, 29 M 24 (28). The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records of private accounts and receipts that the custom has been



**S 13** establishing the unity of custom, the fact was received of the rule of descent in O see also *Champion v. Wilson*, 3 Keb 90, *Somersett v. France*, 1 Str. 651 In *Parpeaux v. Hutchins* 2 Cowp 807 Lord Mansfield C J said, 'Proof of the custom in other parishes is no evidence to affect the parish in question, unless the custom had been proved as a custom of the whole country' In *Roue v. Brenton*, 8 B & C 737, 758, the issue was as to the ownership of copper mines and the rights of a plaintiff who was a "conventionary le-ee" in the copper on his land, there were 17 manors in the duchy and one of the above ten manors renewable every 7 years, existed in each minor Evidence was received as to the terms of the customary right of such a tenant in the other manors Fentenden L C J said 'The same character, whatever that may be, belongs to them all It certainly belongs to all those called 'free conventionaries', in this district Must we not, then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants in one part of the district enquire what are the rights in another?' In the same case *Dugby J* said, 'I am of opinion that the usage which has prevailed in one part, is evidence to explain a grant expressed in similar terms to any other part of the district' Similarly in *Inglescy v. Hatherlton*, 10 M & W 218, *Abinger C B* said 'It should be established clearly and beyond all controversy that the two manors originally formed one minor there prevails throughout those manors a particular species of tenure, called 'tenant right', since in those manors all the tenants hold under the same right if it should happen that in one particular minor no example can be adduced of what it is the custom in any particular case in order to explain the nature, which is not confined to one minor but prevails in great number you may show what is the general usage in respect to that tenure' He also approved *Roue v. Brenton*, *ubi supra* In the same case *Adlerston B* said 'If indeed there be some general connecting link between them—as, for instance, if the custom in question be a particular incident of the general tenure which is common to two minors, then you have a right to show what the custom of one minor is as to the tenure, for the purpose of showing what the custom of the other minor is as to that tenure, but you must begin by showing that there is a general tenure common to both, that fact fails here'

To prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages The essence of a usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him *Prany Mohun v. Jote Kumar*, 11 C W N 83

**Transaction whether includes judgment.** 'A transaction in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons If the parties to a suit were to adjust differences *inter se* the adjustment would be a transaction, and by a somewhat strained use of the word, the proceedings in a suit might also be called transaction, but to say that the decision of a Court of Justice is a transaction appears to me a misapplication of the term Per Garth C J in *Gunju Lal v. Fattah Lal* 6 C 141 at p 186 A transaction, as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were, whereas the judgment of a Court is something imposed by the authority of the tribunal The Court neither creates, claims modifies recognizes asserts nor denies a right or custom It determines for or against Consequently to call the judgment of a Court of Justice as a transaction is nothing more than misuse of language Per *Jackson J* in *ibid* at p 185 In *Neamat Ali v. Gooroo Dass* 22 W R C R 303, where the plaintiff claimed an *istanee* right to land the Court admitted in evidence against the defendant decrees in two suits in which the *istanee* right had been successfully asserted against a former holder of the tenure that was said to have created the right claimed but to which the defendant had not been a party Sir Richard Couchin delivering the judgment of the Court said that he could not think that such judgments were intended to be excluded, and that the expression 'transaction' in section 13 was large enough to include proceedings in suits and that the section did not require the suit to have been between the same parties, but left it to the Court to decide what weight attached to it In *Narany*

*Bikhanbai v Dipa Umed*, 3 B 3, where the plaintiffs sought to recover arrears of a *Clarda Lak*, *Westroff, C J* and *Melville J* adopting the views taken by *Couch C J* of section 13, held that decrees establishing the right in prior suits between the same persons were admissible in evidence 'for the purpose of showing that the right had not only been asserted, but recognized by the tribunals of the Courts on several occasions.' In *Ranchhoddas v Bapu*, 10 B 139 at p 442 *Sargant C J*, said "In the absence therefore, of any qualification such as is to be found in section 48, 'rights and customs' in section 13 must we think be understood as comprehending all rights and customs recognized by law and, therefore, including a right of ownership. As to the term 'transaction,' it is doubtless one of large import, and might although by a somewhat strained use of it, be held to be applicable to proceedings in a suit, but as the result of holding it to be so applicable in section 13 would be to effect a most important departure from the English rule of evidence, which would make judgments, decrees and verdicts of juries only admissible in matters of public interest, it may well be doubted whether such was the intention of the framer of the code." In *Tepu Khau v Rojoni Mohan*, 2 C W N 331, 504, *Banerjee J* said "If the existence of the judgment is not a transaction within the meaning of clause (a) of section 13 it proves that a litigation terminating in the judgment took place, and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of section 13 in which right of possession now claimed by the defendant was claimed. The judgment therefore is in my opinion, relevant under section 13." See also *Mahomed v Husan*, 31 B 143 "It seems to me the true point is, not that the judgments and decrees themselves are 'transactions' but that the suit in which they were made was a transaction, and that to establish that such a transaction took place they are the best evidence." *Per Straight J* in *Collector of Goralhpur v Paladhar* 12 A. 1 (F B) see also *Duchess of Kingston's Case*, 1 Sm L C 760, per *Sir William De Grey*.

"This process of embodying the terms of a final act in a single memorial," says *Prof Wigmore* "may be termed the Integration of the Act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts in their former and in coherent shape, have no longer any legal effect they are replaced by a single embodiment of the act. In other words when a legal act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." *Wigmore* § 2425 "The integration of a transaction is either voluntary or compulsory. In the former instance it may or may not be made, as the party or parties to the act may choose, but when made, the legal consequences already noticed will follow and the document supercedes all other utterances. In the latter instance—compulsory integration—the law insists, independently of the parties' choice that the transaction be embodied in a single document and when this is done, the same legal consequences attach. The instances of compulsory integration are few. At common law the only instances appear to be those of the judicial records, corporate records, and negotiable instruments. The theory of judicial records is that the judgment roll is finally made up embodies in itself alone the entirety of the controversy as adjudicated and thus supercedes the miscellaneous mass of oral and written pleading motions, and orders which have gone to make up the proceedings. *See also* *Buchhurst* 2 M & S 566, 567. What are the transactions which in legal theory form part of the record? Obviously many things are said and done, and many documents used not only out of Court but in Court, which do not in strictness form a part of the proceedings in the controversy and hence do not need to appear in the record,—hence may be established without regard to the contents of the record. This involves the whole theory of trials and appeals." From the above observation of *Prof Wigmore*, one of the greatest authority on the Law of Evidence, it is abundantly clear that a judgment or decree is but an integration of various transactions. When such transactions are relevant under section 13, a judgment or decree is also admissible under this section. As regards the probative value of such judgments and decrees, *vide infra*

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**Judgment whether relevant under this section** Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue. *Step Intro 161* There are two kinds of judgments namely judgments *in rem* and judgments *in personam*. The former kinds of judgments are always relevant (*Vide s 41*). Judgments *in personam* bind only parties and privies to facts in issue (*Vide, Notes under s 40*). So a judgment which operates as *res judicata* is relevant in a subsequent suit (*Vide s 40*). So also judgments, orders or decrees are relevant if they relate to matters of public nature relevant to the enquiry (*Vide s 42*). Now the question is whether judgments, which are not judgments *in rem*, nor operate as *res judicata* nor are judgments which relate to matters of public nature relevant to the enquiry, are admissible in evidence under this section. Such a judgment is proof of its own existence and of its legal consequences not simply *inter partes*, but against all the world, but not of the truth of the fact on which it is based. Such judgments are also relevant under section 43 of the Evidence Act if the existence of such judgment is a fact in issue or is relevant under some other sections (*Vide section 43*). Otherwise such judgments when tendered against strangers are sometimes said to be excluded as opinion evidence (*R v Fontana* *Morean* 11 Q. B. D. 1028), sometimes as hearsay (*Steph art 14*), but more commonly on the ground expressed in the maxim *res inter alios acta* or *judicata alteri nocere non debet* (it being considered unjust that a man should be affected, and still more that he should be bound by proceedings in which he could not make defence cross examine or appeal). So a judgment or decree not *inter partes* is not admissible in evidence under section 43 unless as a fact in issue or as a relevant fact under other sections of the Evidence Act. *Hendia v Rameswar*, 87 Ind. Cas. 849=6 P. L. T. 634=4 Pat. 510=A. I. R. 1925 Pat. 625 see also *Kashi Nath v Jagat Kishore* 20 C. W. N. 693=23 C. L. J. 583=35 Ind. Cas. 298, *Hiva v A Hills* 11 C. L. R. 530. Ordinarily a statement of opinion made by the Judge in a previous judgment not *inter partes* is no evidence in a subsequent case. *Harnath v Mohanlal* A. I. R. 1929 Lah. 123=10 L. L. J. 519. Under section 13 a judgment is relevant if its existence is a transaction and a clause (a) or its existence be considered an instance under clause (b). *Tepu Khan v Rojoni*, 2 C. W. N. 501. 504. On this point there is some conflict of opinion and it is better to treat the decisions of different tribunals under separate headings.

**English Cases** Verdicts judgments and settlements in actions of trespass to hereditaments [*Rogers v Allen* 1 Camp. 309 *Naill v Devonshire* 8 App. Cas. 135, *Blandy Jenkins v Dunraven* (1899) 2 Ch. 121] convictions for the non repairs of public ways (*R v Brightside Bierlow* 13 Q. B. 933) and verdicts and judgments for the recovery of pre-scriptive tolls (*City of London v Clarke* 181, *Laybourn v Crisp* 4 M. & W. 320) are admissible as relevant facts when the right to the land, the way, or the toll respectively is in question. *Will. Et. 61*

**Calcutta Cases**—A judgment in a former suit brought by other parties against the same defendants where they raised the same contention as they do now though not conclusive evidence against them is admissible as evidence for what it is worth. *Lala Ranglal v Deonarayan*, 6 B. L. R. 69=14 W. R. 21. So such a judgment is admissible as evidence in a subsequent suit. *Deorjee v Norendra* 6 W. R. 232. In questions involving the determination of a right to an *Odhiar* and the rule of succession to the office previous judgments and decrees involving in fact in which the right and custom was used fully are treated as admissible under section 13 of the Evidence Act. *Akoot v Dheer Chunder* 20 W. R. 315. Proceedings in suits in which a former belief of the tenure of the person who was said to have created the *stamee* right was a party in transactions within the meaning of section 13, and as such are admissible in a suit to establish an *stamee* right. *Neamat v Gorge Das* 14 W. R. 265. *For Couch C. J.* A judgment settling out the terms of a compromise in the form of a deed is relevant under section 13. *Boopchand v Hurk* 23 W. R. 162. A decision in a suit to which the plaintiff was not a party, but which was held to be not conclusively binding upon him.

*Omer Dutt v. Colonel* 21 W R 170, See also *Amunda v. Thaloor*, 2 Hay 472 *Dutari v. Jugo* 23 W R 293, *Soorjo v. Bishumbhor*, 23 W R 311 *Gutta v. Gunce*, 22 W R 157, *Annunda v. Gunce* 25 W R 80 This question again arose in 1880 in *Guggu Lall v. Latch Lall*, 6 C 171 which was a suit to recover possession of certain property, the ultimate determination of which suit in favour of the plaintiff depended on the admission in evidence of a certain judgment in a former suit, to which the plaintiff of that suit was no party, but in which the defendant was the plaintiff. The question as to whether that previous judgment should have been admitted in evidence was referred by *Garth C J* and *Mitter J* to a Full Bench in the following terms: 'It has been decided by this Court in several cases, three of which are reported in 23 W R pages 162, 293 and 311, that decrees in suits between third parties are admissible in evidence under section 13 of the Evidence Act, whilst in other cases in this Court such evidence has been constantly rejected. The question, therefore, referred to the Full Bench is whether, under s 13 or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in the suit was legally admissible?' The majority of the Full Bench, consisting of *Garth C J*, *Jackson*, *Pontefex* and *Morris JJ* answered the question in the negative. According to them a former judgment, which is not a judgment in rem nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata* or as proof of the particular point which it decides unless between the same parties or those claiming under them. But *Mitter J* dissented from the view taken by the majority of the Full Bench. In delivering his well considered judgment he observed at page 175: 'It is clear that the judgment mentioned in the order of reference is not relevant under ss 40 to 42. Therefore the question that we have to determine is, whether or not it is relevant under some other provisions of the Evidence Act, so as to bring it within the proviso of section 43. I am of opinion that it is relevant both under ss 11 and 13.' Then quoting section 13 he said, 'The existence of a right to some immoveable property is in question in this case. That right was asserted and recognised in a previous proceeding of a Court of Justice, and it seems to me that it would not be unwarrantably straining the language of the section in question to say that that proceeding was a transaction within the meaning of section 13 because the word 'transaction' in its largest sense means 'that which is done'. If the words 'transaction' and 'right' be not construed in this way judgments, decrees, and orders which were before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England, are considered, when not pleaded as estoppel cogent evidence, would be excluded. Take for example the following illustration—A brings a suit against B for enhancement of rent. B sets up a *mulurrari patta* in defence. A Court of competent jurisdiction finds the *patta* to be genuine and dismisses the suit. After the lapse of several years B sells his right to C, and A then evicts the latter forcibly. Thereupon C brings a suit against A to recover possession of the land covered by the *mulurrari patta*. A denies the *mulurrari* right, and alleges that B was a tenant at will. Before the Evidence Act was passed the former judgment would have been conclusive evidence of B's *mulurrari* right, see *Soorjomonee Dayce v. Suddanund Mohapatter*, 12 B L R 304 and *Krishna Behari v. Brojesuari* 2 I A 283=1 C 144. According to the law of evidence as at present administered in England, it would equally be considered conclusive and if not conclusive at least is cogent evidence in the subsequent suit. Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant unless it be relevant either under s 11 or s 13. It is not relevant under s 40 because its existence does not by law prevent the Court from taking cognizance of the second suit. Under these circumstances I apprehend it would not be admissible under section 40 of the Evidence Act, because its existence would and could not at that stage of the case prevent the Court from holding a trial of the issue regarding B's *mulurrari* title. The judgment in question then at least in some cases not being admissible under section 40 and it being evident that it is not admissible under ss 41 and 42, it would be excluded altogether, unless its existence be relevant under some

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other provision of the Act. But if we construe the words 'transaction' and 'right' in section 13 in their largest sense, it would be relevant under that section. Is it at all reasonable to suppose that a mere assertion of a right by a person setting it up (whether that right is corporeal or incorporeal, it is quite immaterial for the purpose of this argument) would be admissible as evidence and not the recognition of it by a Court of Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature. For these reasons I am of opinion that the judgment mentioned in the order of reference is relevant under s 13 of the Evidence Act."

However the decision of the majority of the Full Bench in *Gujju Lal v Fateh Lal* was followed in *Hiralal v Hills*, 11 C L R 528 (530) *Ramnarain v Ramcoomar* 11 C 562 *Mohendra v Rosomoy* 12 C 207 and affirmed in *Suendra Nath v Brojendra Nath* 13 C 352 (F B). Again the case of *Suendra Nath v Brojendra Nath* was followed by *Banerjee and Rampin JJ in Gobind Chunder v Srigobind*, 24 C 330, see also *R v Udit Prasad*, 8 C 993. In referring the case of *Suendra Nath v Brojo Nath*, 13 C 352 (F B) for the decision of the Full Bench, *McDonnell and Ghose JJ* said "The appellants have contended before us that the said judgment is no evidence whatever under the Evidence Act and that the result of the Full Bench decision in the case of *Gujju Lal v Fateh Lal*, *ubi supra* is to the same effect. It is argued and it seems to us that this argument is well founded that what the said Full Bench practically decided was that except in the case of judgment in rem, and judgment relating to matters of public nature a judgment in order to be evidence must be such as would operate by way of estoppel or *res judicata*. A recent Full Bench of this Court in the case of *Brojo Behari Mitter v Kedar Nath Mozumdar* 12 C 580 (F B), has ruled in a case where the parties were not arrayed as plaintiff and defendant in a previous suit, but as co-defendants, that the judgment in that suit is not *res judicata*. But the question was not therein raised whether the said judgment, though not *res judicata* was evidence or not. If the result of the Full Bench decision in the case of *Gujju Lal* be as the appellants contend, then certainly the judgment adduced in this case should not have been received and acted upon as evidence. But then it appears that the authority of the said Full Bench case has been shaken by the subsequent Privy Council decision in the case of *Rum Bahadur v Lochi Koer*, 11 C 301 and by the decision of this Court in the case of *Peari Mohun Mulherji v Drobomoyi Daba*, 11 C 745 and in the case of *Hiralal v Hills* 11 C L R 528. In the case before the Privy Council, although the Judicial Committee held that the previous judgment between the parties was not *res judicata*, they still treated such judgment as evidence in the case. In the case of *Peari Mohun v Drobomoyi*, a judgment although not *inter partes* was held to be admissible as evidence as showing the nature of the possession of the defendant, and in the last mentioned case, *ubi supra*, the decree used as evidence for the purpose of showing that rent was successfully claimed for the land which was in the subsequent suit alleged to be *takht*. It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts and we therefore think it necessary to refer the following question to a Full Bench. Whether under the circumstances stated, the judgment in the previous case is evidence or not? But as the majority of the Full Bench consisting of *Sir C. Petharam C. J.*, *Justice O'Keefe*, *Macpherson JJ* said "Apart from *res judicata* the question whether the decree referred to was admissible in evidence is we think concluded by the two Full Bench cases *Gujju Lal v Fateh Lal supra* and *Brojo Behari Mitter v Kedar Nath Mozumdar* 12 C 580 (F B). The Full Bench neither decided the question nor tried to distinguish the cases referred to in the order of reference. *Mitter J* however dissenting from the view taken by the Full Bench. In *Gujju Lal v Fateh Lal*, 6 C 171 the suit was between A and B and the question was whether C or D was the heir of H. If C was the heir of H then A was entitled to succeed otherwise not. The same question had been raised in a former suit brought by X against A and decided against A and their former judgment was admitted in evidence in the suit between A and B, and dealt with by the C."



below as conclusive evidence against A upon the point so decided. The majority of the Full Bench decided that the former judgment was not admissible as evidence in the suit between A and B, either as a transaction under section 13, or as a fact under section 11.

This question again arose in a suit for rent in which the amount of land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21½ inches and not one of 18 inches as claimed by the plaintiff Zamindar. Certain decrees obtained by the Zamindar against other tenants in the same pergunah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pergunah was one of 18 inches. In that case such decrees were admissible in evidence under the provisions of s 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed. Of course such decrees and judgments are clearly admissible under s 42 of the Evidence Act as being judgments and decrees which relate to matters of a public nature relevant to the enquiry, i.e. the measurement of the *hath* in the pergunah. But the Court admitted the judgments under s 13 of the Evidence Act. *Jamunulla v Romoni Kant* 15 C 233.

In *Jauallah Sherah v Inu Khan*, 23 C 693 it was held that a decree for possession made by a Court under s 9 of the Specific Relief Act (I of 1877) in a suit beyond the pecuniary limits of that Court's jurisdiction although not *res judicata*, is some evidence of dispossession by the defendant in a subsequent suit against the same defendants to recover mesne profits. In delivering the judgment the Court observed: 'It was argued for the respondent, on the authority of the Court observed: *Gujju Lal v Futeh Lal*, 6 C 171 (I B), *Brojo Behari v Kedar Nath*, 12 C 580, and *Surendra Nath v Brojo Nath* 13 C 352 (F B) that the decree, if not conclusive evidence is not evidence at all, but the decrees which it was sought to put in evidence in those cases were not *inter partes*. In *Madhusudan Shaha Mundal v Brae*, 16 C 300, the Full Court held that an *ex parte* decree for arrears of rent did not operate so as to render the question of the rate of rent *res judicata* but the question whether it was evidence at all did not arise. The case of *Ram Bahadur v Lucho Koer*, 11 C 301 P C shews that a judgment, although not conclusive evidence, may be some evidence of the matter decided. There the survivor of two brothers, claiming in the whole estate by survivorship, brought a suit in the Court of the Subordinate Judge against the widow of the deceased brother, who claimed her husband's share as her separate estate and the question was whether the brothers were joint or separate in estate. The decision of a Munsif in a rent suit between the same parties was put in to show that the brothers were separate. The Judicial Committee held that the judgment was not conclusive on the matters, but it was still treated as evidence to which some weight was attached.' The law was in this state when the question again came before a Full Bench of the Calcutta High Court in *Iepu Khan v Hojoni Mohun*, 25 C 322 = 2 C W N 501. In that case the question was whether a judgment in a previous suit by a co-sharer of the plaintiff for the recovery of the possession of two thirds is admissible in evidence in the plaintiff's suit against the same defendants for the recovery of possession of the remaining one third share in the property. Mr Justice Banerjee in referring to the case to the Full Bench observed: 'If the cases of *Gujju Lal v Futeh Lal* 6 C 171 (I B) and *Surendra Nath v Brojo Nath* 13 C 352 (I B) upon the authority of which the lower Appellate Court has held the judgments tendered in evidence for the defendants to be inadmissible are good law, the first ground urged before us must fail. But if those cases have in effect been overruled by the decisions of the Privy Council in *Ram Rangan v Ram Narain* 22 C 333 = 22 I A 60 and *Blutto Kumar v Kesho Prosad*, 21 I A 10 = 1 C W N 265 then the question arises whether the judgments referred to are admissible in evidence. In the two cases relied upon by the lower Appellate Court, namely *Gujju Lal v Futeh Lal*, 6 C 171 and *Surendra Nath v Brojo Nath*, 13 C 352 it was held by this Court that a former judgment which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided unless between the same parties or those claiming under them. But in the case of *Ram Rangan Chakrabarti v Ram Narain*

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*Singh*, 22 C 533=22 I A 60, it was held by the Privy Council that a judgment passed in a suit to which the plaintiff was no party was admissible against the plaintiff as evidence showing the rent paid, and in *Bhutto Kumoor v Kesho Pershad*, 24 I A. 10=1 C W N 265, their Lordships of the Privy Council, speaking of judgment in former suit against one of the defendants *Bacha Tewari*, observe this decision is not conclusive against *Bacha Tewari* as the suit was not between the same parties as the present suit, but their Lordships agree with the subordinate Judge that it was admissible as evidence against him. These two decisions of the Privy Council must be taken to have in effect overruled the cases relied upon by the lower Appellate Court. That being so the question arises whether apart from those cases, the judgment referred to in the argument was admissible in evidence against the plaintiff respondent. I am inclined to think that this question ought to be answered in the affirmative, and that the existence of the judgments under consideration or at any rate the existence of one of them is relevant under sections 11 and 13 of the Evidence Act. First as to the relevancy of the judgment in suit no 742 of 1887 under section 11. The existence of the judgment that is, the circumstance that a particular judgment was passed, is clearly a fact within the meaning assigned to the term in section 13. Next as to relevancy of the judgment in suit no 742 of 1887, under section 13. If the existence of the judgment is not a transaction within the meaning of clause (a) of section 13, it proves that a litigation terminating in the judgment took place, and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of section 13, in which the right of possession now claimed by the defendants was claimed. It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used in the section. The judgment therefore is, in my opinion relevant under section 13. If such judgments were not relevant under either of the two sections 11 and 13, they could not be admissible in evidence as the Privy Council have held them to be in the two cases referred to above. The strongest argument against the admissibility of such judgments in evidence is, to use the language of a well known writer of the Law of Evidence (see *Taylor on Evidence* 9th edition section 1682) that no man ought to be bound by proceedings to which he was a stranger and over the conduct of which he could therefore have exercised no control. But in the first place the judgments in question are sought to be used, not as binding and conclusive evidence but only as evidence for what they are worth the weight to be attached to the evidence being left to the Court to determine. And in the second place the reason stated above though it is a good reason for excluding from consideration as against a stranger, the evidence afforded by a judgment so far as it is the opinion of a Court upon materials in the placing of which before the Court the stranger could have had no control, does not appear to hold equally good where what is sought to be taken into consideration is the evidence afforded by the existence of the judgment as to a litigation relating to the right in question and the way in which that litigation terminated. For such collateral purposes judgments are admissible in evidence against strangers under the English Law. See *Davies v Laundres* 6 M & G 474. *Maclean C J* (with whom *Macpherson J*, *Trevelyan J*, *Banerjee J* and *Jenkins J* concurred) in delivering the judgment of the Full Bench said. In my opinion the judgments in question are not admissible in evidence in this suit, because, now that the matter has been fully and before us it appears that the subject matter of the present suit is not identical with the subject matter in the previous suits in which those judgments were delivered. In the previous suit the subject matter was to recover a two thirds share of the property in question, but in the present case it is a suit by a different plaintiff to recover the remaining one third share. The subject matter therefore, of the two suits is not identical, the title to the one third share may be, and apparently is, different from that of the other shares. In this view the judgments which were sought to be admitted as evidence in this case were irrelevant and therefore not admissible as evidence. But in the two cases decided by the Full Bench in this Court viz. in the case of *Guyy Lal v Fattah Lal*, 6 C 171 and a later case of *Surendra Nath Pal*

*v Broja Nath Pal* have been referred to, I feel bound to express my opinion that having regard to the recent observations of the Privy Council in the case of *Ram Ranjan v Ram Narain* 22 C 533=22 I A 60 and in the more recent case of *Blitto Kumwar v Kesho Prasad*, 24 I A 10=1 C W N 265, the Full Bench decisions referred to must be regarded as materially qualified, because it is clear from the decisions in the Privy Council that under certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. Of course the observations of the Full Bench as regards the effect of the two Privy Council cases referred to above on the two previous Full Bench cases are mere *obiter dicta*.

In *Abinash Chandra Chatterjee v Paresb Nath Ghosh*, 9 C W N 402 the Court agreed with the view taken by the Full Bench in *Tepu Khan v Rojoni Mohun*, 25 C 522=2 C W N 501, but in the same case *Geidt J* took a quite contrary view. In *Kashi Nath v Jagat Kishore*, 20 C W N 643 at p 644 the Court consisting of *Mookerjee* and *Roe JJ* observed "In our opinion the judgment of the Judicial Committee in a suit not *inter partes* could not be used for the purpose for which it was used by the defendant in the Court below. It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact or as a relevant fact, or possibly as a transaction, (*Ram Ranjan v Ramnarain*, 22 C 533, *Blitto v Kesho Prasad* 24 I A 24=1 C W N 265, *Dinomoni v Brojo Mohun*, 29 I A 24=6 C W N 386 *Tepu Khan v Rojoni Mohun*, 25 C 522=2 C W N 501, *Malcomson v O'Dea* 10 H L C 593 and *Bristow v, Cormican*, 3 App Cas 611) the recitals in the judgment cannot be used as evidence in a litigation between the parties. The principle is that all judgments are conclusive of their existence, as distinguished from their truth, judgments as public transactions, of a solemn nature, are presumed to be faithfully recorded. Every judgment is therefore conclusive evidence for or against all persons whether parties, privies, or strangers of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered, in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. We hold accordingly that the judgment of the Judicial Committee could not be used in proof of the facts stated therein and the first ground must prevail' *Abinash Chandra v Paresb Nath*, 9 C W N 402. See also *Harjit v Basanta*, 12 C W N 739=9 C L J 597. Again in *Baidya Nath v Alep Jan*, 70 Ind Cas 194=1923 A I R Cal 240=36 C L J 9 at p 14, *Mr Justice Mookerjee* observed "In this connection we cannot overlook that although the judgment in the suit by *Karimannessa* against *Abdul Kader*, is admissible in evidence under section 13 of the Evidence Act the findings contained therein cannot be treated as part of the evidence in this case. As was explained in *Kashi Nath v Jagat Keshore*, 23 C L J 583=20 C W N 643, and *Tripura v Rolam*, 42 M L J 324 it is not the correctness of the previous decision but the fact that there had been a decision, that is established by the production of the judgment. This is clear from the decisions of the Judicial Committee in *Ram Ranjan v Ram Narain*, 22 I A 60=22 C 533, *Blitto Koer v Kesho Prasad*, 24 I A 10=19 A 277, *Dinomoni v Brojo Mohun*, 29 I A 24=29 C 187, *Rampirokash v Anand*, 43 I A 73=43 C 707=24 C L J 116, and *Natal Law Co v Good* L R 2 P C 121 and of the House of Lords in *Malcomson v O'Dea* 10 H L C 593 and *Bristow v Cormican* 3 App Case 611. This fundamental distinction was not fully appreciated in the Court below, and references were made to the findings in the judgment in the previous suit as if they were a kind of inconclusive *res adjudicata* while the essence of the matter is that it was not the correctness but the fact of the decision which is relevant. If we carefully read the judgment of the majority of the Full Bench in *Gygy Lal v Futeh Lal*, 6 C 171 (F B), we will see that there the majority laid down that a previous judgment not *inter partes* is not admissible in a subsequent suit either under section 11 or section 13 of the Evidence Act but such judgment under certain circumstances may be admissible under section 43 of the Evidence Act. The cases so contemplated by s 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon any opponent by reason of the adjudication which it contains,

**S. 13.** (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections.) But the cases referred to in s 43 are such, I conceive, as the section itself illustrates, viz, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sues B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been guilty of the forgery or not. This I conceive would be one of the many cases alluded to in s 43. *Per Garth C J in Guye Lal v. Patch Lal*, 6 C 171 (192). So the interpretation of this case given by the referring Judges to the Full Bench in *Surendra Nath v. Bhajanath*, 13 C 312 (1913) to the effect that the case decided that except in case of judgment in rem, and judgments relating to matters of public nature, a judgment in order to be evidence must be such as would operate by way of estoppel or res judicata is not correct.

A decree that has not been set aside by competent Court and which was obtained in the suit in which the plaintiffs and defendants of subsequent suit were defendants but which decree cannot operate as res judicata can be used as a piece of evidence with regard to the matter dealt with by it and it will be evidence under section 13. *Kuan Chandra Roy v. Jagannath Baul*, A. I. R. 1923 Cal 41. In a suit for recovery of possession of certain lands as misar brahmavter the plaintiffs relied upon a recital in a judgment in a claim case, which was inter partes to prove their title, held that the recital in the claim case was not evidence. *Satendra Kumar v. Krishna Kumari*, 36 Ind. Cas. 882. Judgments not inter partes, pronounced by a competent Court and containing a declaration that the right in dispute had been asserted and recognised in a Court of law are admissible in evidence under s 13 of the Evidence Act. *Muhammad Ehsa v. Ganga Dyal*, 40 Ind. Cas. 838. Where the question was whether proceedings in lunacy held under Act XXXIV of 1850 are admissible in evidence in a subsequent suit to show that the defendant was a lunatic at a particular time it was held that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were had, were admissible in evidence. *Padmabati v. Bonomali*, 24 C. W. N. 378=58 Ind. Cas. 566. A partition decree between the ancestors of the plaintiff and the defendants nos 1, 2 and 3 and also a judgment and decree in a suit between the predecessor of the defendants nos 1, 2 and 3 as defendant, are admissible in evidence on general principles as well as under section 13 of the Evidence Act. *Parbati v. Dignati*, 61 Ind. Cas. 465. In a suit in ejectment judgments obtained by the plaintiff as a third person who set up the title of the defendant, are admissible in evidence as showing an assertion of title. *Mohori Ali Sarai v. Mafizuddin Sarai*, 65 Ind. Cas. 699. But findings arrived at in a judgment in a prior suit not inter partes should not be used against a person in a subsequent suit. *Satish Chandra v. Joyram Roy*, 65 Ind. Cas. 525. A judgment in a prior suit relating to a different party but between the same parties is admissible in evidence whether or not it constitutes res judicata. *Sasi Mulhi v. Saraswati Sen Gupta*, 65 Ind. Cas. 527. Where a judgment is admitted in evidence to prove that there was litigation which terminated in a certain way all the recitals in the judgment do not form part of the evidence. *Abdul Latif v. Abdul Haq*, 28 C. W. N. 62. The statements of the plaintiff's age in a decree to which the defendants or their predecessors are parties are not conclusive and binding against them. *Nibratan Mitter v. Abdul Gafur*, 32 C. L. J. 75. The judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for certain purposes in the subsequent suit. The legal effect of the judgment as between the parties to the previous suit has to be determined from the judgment itself and when determined, it becomes not conclusive as between the parties to the subsequent suit but a fact to be weighed in the balance like any other fact. *Gopi Sundari v. Kherod Gounda*, 28 C. W. N. 942=82 Ind. Cas. 99=A. I. R. 1913, Cal. 191, see also *Rai Jung Bahadur v. Rai Gudur*, 1 C. W. N. 537. Where in a suit for possession of property, the judgment in prior proceedings under s 114, Cr. Pro Code, between the same parties is adduced in evidence the judgment is admissible for the purpose of showing that the present parties were parties to those

proceedings and that a particular party was maintained in possession as a result of the proceedings *Hasim Ali v. Abjah Khan* 40 C L J 30=82 Ind Cts 392=A I R 1924 Ctl 1016. In a suit for settling a fair and equitable rent by X against his tenant, the latter pleaded that his landlord was Y. Thereupon X produced a judgment he had obtained against Y which decided that title was in X. *Held*, it was a very strong piece of evidence against the tenant as to who was the landlord. *Purna Chandra v. Ramesh Chandra*, 87 Ind Cts 753=A I R 1925 Ctl 1218. Where judgments not *inter partes* were filed to show that similar grants, were resumed by the grantor or his heirs on the death of the grantee. *Held*, they are admissible in evidence under the provisions of section 13 of the Evidence Act. *Syed Mahammad v. Maharaja Nam Narain* 7 C L J 90. Proceedings in and documents filed in a previous suit are relevant evidence against a person not a party to that suit. *Madan Chandra v. Kirtnam Biswas*, 23 C L J 678. Orders for the appointment and discharge of guardian of A, a minor, cannot be received in evidence to prove the date of birth of A from the recitals contained therein. *Hora Kumar Dey v. Jogendra Krishna Roy*, 38 C L J 186. Where the question is whether a maintenance grant is alienable or not, previous judgments as regards the alienability of such grants are admissible in evidence as instances in which the right to alienate a portion of the subject of the grant was claimed, and its exercise disputed and disallowed. *Bhaya Dugay v. Pande Fatch*, 3 C L J 521.

A judgment in a case under s 9 of the Specific Relief Act does not come either under s 41 or under s 42 of the Evidence Act and it is relevant only under ss 13, 40 and 43 of the Act, that is to say, as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree in order either to found a further claim or to determine whether cognizance should or should not be taken of a suit or whether a trial should or should not be held. The use to which a decree passed in such a suit may be put in a subsequent suit between the parties is only to show that a right to possession was asserted and it was denied and a suit was instituted and was either decreed or dismissed. *Chhudeel v. Sayad*, 85 Ind Cts 979, see also *Radha Churn v. Zamuroonissa* 11 W R 83 *Jauila v. Inu*, 23 C 693.

For cases on this point which were decided before the Indian Evidence Act, vide *Kanhya Lall v. Radha Charan*, 7 W R 338 (per Sir Barnes Peacock C J) *Jogendra Deb Roy v. Fanindra Deb Roy*, 14 M I A 376, *Mohamed Ali v. Shams Ali*, 8 W R 422.

**Decree of a co sharer landlord in a rent suit.** There is some conflict of opinion in the Calcutta High Court as to whether a decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another co sharer landlord. In the recent case of *Kanta Mohan v. Gopi Nath*, A I R 1928 Cal 355 Mr Justice Mulla held that such a previous judgment is admissible in evidence under section 13 in subsequent suit. In delivering the judgment he observed 'The whole controversy before me centred round the question whether the *ex parte* decree obtained by a co sharer landlord was admissible in evidence or not. The learned Subordinate Judge has held as I have said before, that it was inadmissible, and for this he relied on the Full Bench case of *Surendra Nath Pal v. Brojo Nath Pal* 13 C 352 which had followed the Full Bench decision in *Guyju Lal v. Fatch Lal*, 6 C 171=6 C L R 439. But in another Full Bench in *Teppu Khan v. Razam Mohan Das* 25C 522=2C W N 501, their lordships observed that the *dictum* in the case of *Guyju Lal v. Fatch Lal* and *Surendra Nath v. Brojo Nath*, referred to above have been materially qualified by the observations of their Lordships of the Judicial Committee in *Ram Ranjan Chakravarty v. Ram Narain Singh*, 22 C 533=22 I A 60. In 1923 Ctl case it was held that a previous decree obtained by a co sharer landlord would be admissible in evidence in a subsequent litigation if the subject matter of the two suits be identical, otherwise not. The learned Vakil for the respondents contended that the subject matter in the suit from which this appeal arises was not identical with but different from that in the previous suit in which the *ex parte* decree was obtained by a co-sharer landlord, and in support of this contention he cited the case of *Abdul Ali v. Ray Chandra Das*, 10 C W N 1034. The facts of the case in *Abdul Ali v. Ray Chandra Das*, were very much similar to

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the facts in the present case. But their Lordships when they held that the previous decree obtained by a co-sharer landlord was not admissible in evidence as to the rate of rent in a suit brought by another co-sharer landlord on the ground that the subject matters of the two suits were different, gave no reasons why they considered that the subject matters in the two suits were not identical. It is difficult to understand how it can be said that the subject matters in the two suits were different. The amounts claimed were no doubt different and the claimants were not the same. But the real dispute in the two suits was as to what the amount of rent was. Their lordships of the Judicial Committee in *Ram Rangan Chakravarty v Ram Naram Singh* 22 C 533 at p. 542, held that the judgment in a previous suit would be evidence for the purpose of showing what the amount of the rent was. It is to be observed also that in a case that was decided in this Court subsequent to the decision in *Abdul Ali v Rajchandra Das*, 10 C W N 1084 namely in the case of *Byom Kesh Chakravarty v Jagadishwar Ray*, 22 C W N 304 = 40 Ind Cas 442, it was held that a decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another co-sharer landlord. On a consideration, therefore, of the authorities on the point and specially of the observations of their lordships of the Judicial Committee in *Ram Rangan Chakravarty v Ram Naram Singh*, I am of opinion that the learned subordinate Judge was wrong in law when he held that the decree in previous suit was inadmissible in evidence. In my opinion the decree was admissible and that being so the case must go back to the lower appellate Court to have the appeal reheard. It should be noted in this connection that in this case as well as in the case reported in 22 C W N 304 the co-sharer landlord plaintiff relied on the previous decree of his co-sharer landlord against the tenant defendant who was also a party to the previous suit. But in *Kanto Mohun Mukherjee v Jadab Chandra Khara* A I R 1928 Cal 353, which was decided by another Bench of the Calcutta High Court on the previous day and in which it appears that plaintiffs appellants were the same as in the case reported in 1928 A I R Cal 355, it was held that a decree obtained by a co-sharer landlord in a previous suit was not admissible in evidence as to rate of rent in a subsequent suit for rent brought by another co-sharer landlord. But in that case the distinguishing feature was that the tenants respondents wanted to use the previous decrees obtained by the plaintiffs co-sharer landlords against the plaintiff. In delivering the judgment Mitter J said 'On the merits it has been argued by the learned advocate for the appellant that the lower appellate Court has committed an error in law in deciding the appeal on inadmissible evidence. It is said that Exs. A, C and D are decrees which were obtained by plaintiff's co-sharers against the defendants, and as the plaintiff, who represents the estate of the late Babu Munik Lal Seal was not a party to the said suit the decrees were not *inter partes* and consequently are not admissible in evidence. Reliance has been placed in support of this contention on two decisions of this Court in the case of *Abdul Ali v Raj Chandra Das* 10 C W N 1084 and *Prem Chand Mandal v Official Trustee of Bengal* 27 C W N 56 of the notes portion. The first two decisions support the appellants' case. The last decision which takes the contrary view, was an *ex parte* decision in an appeal in which the respondents were not represented. The learned advocate for the respondents argued that having regard to the decision of the Judicial Committee in the case of *Ram Rangan Chakravarty v Ram Naram Singh*, 22 C 233 = 22 I A 60 such decrees by co-sharer landlords were admitted, and acted upon by the learned Additional District Judge in this case could be treated as evidence. However weak the value of such evidence might be. But the distinction between *Ram Rangan Chakravarty v Ram Naram Singh* and the present case lies in the fact that the observations of the Judicial Committee were limited to cases where the subject matter of the previous judgment was identical with the subject matter of the suit in which the judgments were sought to be offered as evidence and their lordships held that under s. 13 Evidence Act such judgments could be treated as evidence of a transaction within the meaning of that section. Here the suit by the co-sharer was in respect of his own share of the rent in the previous suit to which the present plaintiffs were not parties. Consequently the decrees A, C and D did not refer to the same subject matter to which the present suit relates. That was a distinction which was not

in the Full Bench case in *Tepu Khan v Rajani Mohan Das*, 25 C 522=2 C W N 501 (F B) and the majority of the Full Bench held that, where the subject matter of the previous judgments was not identical with the subject matter of the suit in which such judgments were sought to be introduced is evidence, the earlier judgments could not be held admissible."

In *Abdul Ali v Rajchandra*, 10 C W N 1084 although the plaintiff landlord wanted to use the decree of his co-sharer landlord against the same tenant defendant, it was disallowed by the High Court on the ground 'that if such decrees for rent were obtained by a co-sharer or co-sharers for his or their share of the rent, they are neither conclusive between the Plaintiff and the *rayat* Defendant, nor are they admissible in evidence between them, the subject matter of the two suits being different and the Plaintiff not being a party to the previous suit.' In *Prem Chand v Official Assignee*, 27 C W N 56 N, where also such evidence was held inadmissible, the tenant defendant relied on the decree obtained against him by the co-sharer landlord of the Plaintiff in which the plaintiff was a *pro forma* Defendant but which decree was obtained more than a year after the decision of the suit in question.

*Ex parte* decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of those decrees. *Anulul Chandra v Kamala Kantu Roy*, 67 Ind C 15 757. A decree obtained by two annas co-sharer for enhancement of rent of his share is admissible in evidence in a subsequent suit for enhancement of rent by other co-sharers. *Sarat Sundari Dabia v Anand Mohan*, 5 C 273=4 C L R 448.

**Bombay cases.** The first Bombay case in which this point arose was the case of *Naranyi v Dipa Umred* 3 B 3. In that case *Westoff C J* said at p. 5 "Under the law as it stood before the Indian Evidence Act (I of 1872) came into force those decrees were conclusive, inasmuch as the right to the *Chirda Hal* was established by them as the foundation on which the arrears claimed in the suits in which those decrees were made, were recovered by the plaintiffs in the suits—*Soorjomonee Dayee v Sudanand Mohapatra*, 12 B L R. 304 P C. *Krishna Behari Roy v Brojeswari Choudhurnee*, 2 I A 283. If not conclusive since the Evidence Act (I of 1872) came into force, those decisions are, at least, admissible in evidence under section 13 of that enactment for the purpose of showing that the right has been not only asserted by the claimants, but recognised by the tribunals of the country on several occasions. *Acamut Ali v Gooro Das*, 22 W R 365. *Guthu Koiburto v Bhudul Koiburto*, 22 W R 365. As pointed out by *Sir R Couch C J* in the former of the two Calcutta cases, to which we have now referred, the words contained in s. 43—'Unless the existence of the judgment is relevant under some other provisions of the Act'—introduce another section of the Act, namely, s. 13, besides those sections (10, 11, 12 and 13) which specially deal with judgments, orders and decrees. Referring to s. 13 he said 'The word *transaction* is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not is conclusive, but as of such weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. Of course the value of it will be very different where it was given in a suit to which the person against whom it is used was not a party and had no opportunity of contesting the matter, and where he was party to the suit and had opportunity of producing any evidence he might think fit. Unless the Indian Evidence Act has excluded judgments and decrees which had previously been considered as very good evidence and which are indeed in many cases almost, if not quite, conclusive it is clear that the decisions referred to were admissible in this case etc.' But in a subsequent case, i.e. in *Ramchodas v Jaju*, 10 B 159 *Sargent C J* dissented from the view taken by *Westoff C J* in 3 B 3. Then the learned Judge adopted the view taken by majority of the Full Bench in *Gujju Lal v Fath Lal* 6 C 171 (1 B).

In *Lakshman Gobind v Harit Gopal* 24 B 91 at p. 93, *Jamade J* in trying to reconcile these conflicting decisions said "The real question at issue was the one viz the *bona fide* character of the partition deed of 1885. Though the decision in the former suit will not stop the respondents from contesting the

S 13 claim is being *res judicata* till the record and the judgment in that case, showing the conduct of the parties and the admissions, would be admissible in evidence under section 13. The interpretation placed upon the words 'right' and transaction in *Gopu Lal v. Latch Mal* 6 C 171 seems not to have been accepted by the Privy Council and its correctness is questioned in the Full Bench of the Allahabad High Court in the *Collector of Gorakhpur v. Palalidhari*, 12 A 1 (I B) in so far as the exclusion of such judgments from being received is evidence under any section is concerned. Except where they are judgments not in rem or where they relate to public matters, judgments *inter partes* have been always held not to be *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of position or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence and may even lift the burden of proof—*Namut Ali v. Gooro Dass*, 22 W R 36. In a subsequent case it was said 'The judgments thus rejected were not *inter partes* but were in suits brought by other creditors against the same defendants in which the existence of the partnership claimed in this suit was asserted with success. The admissibility of such judgments would, apart from authority be a question of some difficulty, but it appears to me that the present case can not be fairly distinguished from that of *Lalshman Gound Shet v. Anant Gopal* 2 Bom L R 386=21 B 591 recently heard and decided by Parry and Ranade JJ who dealt most exhaustively with this question.' Per Jenkins C J in *Gowindji Thacker v. Chhotu Lal Velsi* 2 Bom L R 651 'Admitting that to be so I think it right to point out that for a judgment to be admissible it is not in all cases necessary that it should be either a judgment *inter partes* or a judgment in rem as will appear from the observations of the Privy Council in the cases of *Rim Ranjan Chakravarti v. Lami Narain Singha*, 23 C 333 and *Bhutto Kunwar v. Kesho Prasad* 21 I A 10=19 A 277 (P C) and the remarks thereon in *Tepu Khan v. Rajani Mohun Das* 25 C 572. Speaking generally it may be said in this connection that though a judgment not *inter partes* may not be proof of facts there are stated it is admissible for the purpose of explaining the character in which possession of the estate has been enjoyed and matters of that class.' Per Jenkins C J in *Ganesh Dharmadhar v. Dhundray* 5 Bom L R 230. The Plaintiff a Mahomedan brought a suit against his brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale deed, passed to the plaintiff by his deceased father. Subsequent to the sale to the plaintiff certain mortgagees of the father brought a suit on the mortgage against the plaintiff his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage. In the suit brought by the plaintiff for the recovery of the house on the strength of the sale deed the defendants relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim, but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bona fide*. On second appeal by the plaintiff a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage Russell C J said 'We have had addressed to us very lengthy arguments upon the question of whether that judgment is admissible at all or not and in my opinion it is impossible to hold that the judgment in that case comes within either the word transaction' in section 13 or 'particular instances' in that section. But although this is so the proceedings in that suit would come within the words particular instances in which the right was claimed for I think that we are bound by the decision of Sir Charles Sargant in *Ranchhodas Krishnadas v. Bapu Narhan*, 10 B 439 (442) where he says that rights and customs in section 13 must be understood as comprehending all rights and customs recognized by law, and therefore, including a right of ownership.' Further for my part I cannot distinguish the present case from the case of *Lalshman v. Anant supra* which was followed in *Gowindji v. Chottalal supra*, and see also the case of *Dharmadhar v. Dhundray* 5 Bom L R 230, a decision of the Chief Justice and Mr Justice Batty. It appears to me therefore that proceedings in the suit of 1886 should be admitted as relevant evidence in the



present suit for it must be remembered that the present plaintiff and the defendants, either by themselves or their predecessors, were parties to that suit of 1886. In the same case *Beman J* observed 'The question is whether, that judgment not being *inter partes* is admissible and if so, what is its precise probative value? I should add that the plaintiff alleges that the sale was made to him by his father who was the judgment debtor in the suit of 1886. The relevancy of judgments of Courts of Justice is regulated by sections 40-43, Indian Evidence Act. Section 40 merely enacts that the existence of any judgment, order or decree which by the provisions of section 13 Civil Procedure Code, constitutes *res judicata* is a relevant fact. Section 41, without attempting any precise or exhaustive definition aims at and probably does let in all judgments *in rem* proper. Section 42 provides that judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry. Section 43 declares all judgments, orders or decrees, other than those specified in sections 40-41, 42 to be irrelevant unless the existence of the judgment is itself a fact in issue, or is relevant under some other section of the Act. It is not contended that the fact of the judgment is itself a fact in issue, but it is contended that the existence of the judgment is relevant under some other provision of the Act. In order to bring it in defendant has recourse to section 13 which says that, 'where the question is as to the existence of any right or custom the following facts are relevant (a) any transaction, etc., (b) particular instances, etc.' It is hardly necessary to say that there is a formidable array of authority for the general proposition that judgments not *inter partes* are admissible under this section and it would be as tedious as unprofitable to examine the numerous leading cases in order to extract if possible, a definite and consistent principle from them. In order to set a clear view of all that is involved in the materials available for argument on this recurring point, I should like here to approach the facts of the case we have to deal with, as though the case were for a moment *res integra* and then apply the law disencumbered of authority to it. Here is a plaintiff suing on a deed of sale which a defendant alleges to be void for fraud and want of consideration. The issue to be tried between the parties is 'whether as appearing on the face of the registered instrument the plaintiff paid consideration?' The burden of proving that he did not, is of course on the defendant. The defendant adduces no evidence but refers the Court to a judgment twenty years old between the plaintiff of the one part and another person of the other in which an issue was raised touching the validity of this sale, and the Court came to the conclusion that it was void for want of consideration or fraud on the creditor and so forth. Upon this the first question is whether the judgment falls within the definitions of judgments which are expressly admissible and the answer is that it does not. The next question is whether it falls within the concluding part of section 43, whether in other words its existence is a fact in issue or relevant under some other provision of the Act. It certainly is not a fact in issue, but it is contended that it is relevant under Section 13. To satisfy the requirements of that section the question must be as to the existence of a right or custom. The existence of the judgment must be relevant as a transaction by which the right was claimed, modified, etc. or as a particular instance in which the right was claimed, etc., etc. I think that, were there no case law on the subject no one would hesitate for a moment upon being asked to bring a judgment of that kind in evidence to prove that a sale deed was void, to reply that neither the language nor the object of section 13 served the purpose. What class of cases the section was intended to meet is its plain purpose is possible not only from its language but from the illustrations. And those are cases in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating, recognizing it or being inconsistent with its existence leaving it, after all that has been given in evidence, fair matter for judicial consideration, as to whether the Court should or should not decree it. I confess I do not find it easy to understand how that language can without absurdity be applied to such a case as this. Let us substitute it for the illustration 'The question is whether a sale-deed is fraudulent particular instances in which the Court had previously held

**S 13** that the same sale deed was fraudulent although not between the same parties, and particular instances in which the vendee had declared that his deed was genuine, but other persons had denied that it was, are relevant facts' A right which is created by and inseparably bound up in a document does not admit of proof or disproof by particular instances of assertion and denial, and is therefore plainly and essentially distinguishable from all the rights which are denoted in section 13. The deed is the only proof as it is the sole foundation of the right, that has to be proved, nothing else, any attack upon its genuineness if made good, is fatal once and for all to the right founded on it, and if such an attack had really been made in another suit *inter alia* and had proved successful it is plain that allowing the judgment in that suit to go in, would, if the judgment were really evidence of what it purports to be, instantly decide the matter. The Court would have to accept or reject the judgment. If it accepted it, as in ninety nine cases out of every hundred it probably would, there would be nothing left to adjudicate upon. The single successful denial of the right, must have killed it for ever. The rights contemplated by section 13 are plainly conceived as admitting of proof by cumulative instances and transactions and not by a single and decisive and final way namely the terms of a document. The only question being whether a registered sale deed was genuine or fraudulent it is inconceivable that the language of section 13 can reasonably and logically be fitted to the case that was the view taken of the meaning and intention of the words 'right' and 'custom' in section 13 by a majority of the Calcutta Full Bench. But it has since been disented from and at present it must be conceded that the balance of authority favours the extension of the term 'right' to include any and every right known to the law. Against that opinion, might well be advanced the section itself. Although in every case the Courts have been most particular to disclaim the doctrine of *res judicata* in respect of judgments so admitted, the effect of admitting them has been to conclude the point to prove which they are admitted. That is to say that while the Courts have in theory declared consistently that these judgments are not *res judicata*, and are not even conclusive of the points to which they are directed, they practically, as judgments *proprio vigore* and incapable of any rebuttal, do conclude those points. It is indeed extremely difficult to understand what other effect they could have. It is true that in the case of public rights a judgment not *inter partes* while relevant may not be conclusive but it is still conclusive of its own subject matter.

If we are to take the judgment *qua* judgment as relevant to the extent of its subject matter and contents then *cadit questio*, for in that judgment it was held that the sale deed was colourable, fraudulent and void. Saying that while a judgment is relevant it is not conclusive the commonest phrase in all the leading cases, must, I think, mean one of two things either that the judgment is not conclusive of the whole case in part proof of which it is adduced, or that while relevant it is not conclusive of itself. The first proposition is comparatively simple and intelligible, although on a clever scrutiny it will be seen to impair the integrity of the salutary and well established principle of *res judicata*, namely that no man is to be concluded by a judgment in a cause to which he was not a party. But turning to the second proposition it is obvious that the judgment, if its subject-matter is co extensive with the subject-matter of the suit in which it is offered as evidence, must be altogether or not at all *res judicata*. And that I suppose is what is meant by the rather vague phrase 'that while relevant it is not conclusive'. But if it is strictly and accurately speaking admissible, as a judgment it can only be treated as conclusive of its own content. *I.e.* - than that, and what is it? Nothing more of course than the mere opinion of a person, whether a Judge or not does not matter as soon as you strip it of its special attributes as a judgment, who is not before the Court to be cross examined upon the grounds of that opinion. And that never has been deemed good evidence. There is I believe, no logical escape from this dilemma. Leaving the cases which have occasioned the immediately preceding remarks, and returning to the statute, it becomes, I think fairly plain, that adopting the most comprehensive view and allowing to 'right' the implied meaning judgments brought in under section 43 and section 13 must be either 'transactions' or 'instances'. All the best authorities, I think agree that a

judgment *qua* judgment and in respect to its contents, certainly is not such a 'transaction' or 'instance', but it may be the simplest and most convenient proof of the transaction namely the litigation or the instance, namely the assertion by the plaintiff and the denial by the defendant of the right. So limited, there would be no great objection or difficulty in the way of admitting the judgment. Its probative effect would then be no more than this: to establish that at the time it was given, there had been a transaction between the parties to it in which the right in question had been asserted or denied or so forth. It being conceded as I think on a correct reading of the best authorities it must be conceded that if judgments of this kind are admissible at all under sections 43 and 13 they are admissible only as the simplest proof of a transaction or an instance within the meaning of the latter section it follows of course that the proof cannot be taken beyond the thing to be proved and the thing to be proved is no more than that there was an assertion or a denial, not the grounds upon which a Judge held that the assertion or the denial was good or bad in law. But the inveterate habit of the Courts and advocates seems to be to confound the proper with the improper use of a judgment so admitted in evidence. And for a very good reason. Restricted to its proper use, by reason of the defect of the principle under which it is brought in under section 13 the judgment cannot of course be of the slightest value to the party relying on it. I am most strongly of opinion that a party who has been allowed to put in a previous judgment not *inter partes* for the purposes of section 13 cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata*. That is the distinction which I have set myself to bring out clearly and I hope simply and intelligibly. *Muhamad v Hasan*, 31 B 143. In a suit for damages for malicious prosecution the judgment of the criminal Court acquitting the plaintiff is relevant only as showing that he was declared innocent by that Court. The Civil Court is not to use it as a record of the facts found or as establishing the plaintiffs' claim for damages. *Gulab Chand v Chuni Lal*, 9 Bom L R 1134, see also *Rai Rang Bahadur v Rai Gudur* 1 C W N 537. If the matter which is in dispute under s 117 of the Criminal Procedure Code has actually been adjudicated upon by a civil Court then a magistrate has no jurisdiction to enquire into a claim which is entirely contrary to that Court's decree. That judgment although not *inter partes* is a relevant fact under section 42 of the Evidence Act and under section 13 is also a very important piece of evidence. *In re Anya Sudhya*, A I R 1927 Bom 651=29 Bom L R 715=102 Ind. Cis 546.

**Allahabad cases.** In the Allahabad High Court the question was fully discussed in the case of the *Collector of Gorakhpur v Palak Dhan Singh*, 12 A 1 (F B). The facts of the case are as follows. P brought a suit against K a Hindu widow, to establish his right of inheritance in certain villages which had belonged to K's husband, and to have it declared that her husband died childless and that K had falsely put forward a child of unknown parentage as her husband's son. K was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance and by the High Court on appeal. After K's death P brought a suit against D whom the Collector as manager of the court of wards had accepted as the minor son of K, and against the Collector as such manager for possession of the same villages as in the former suit. Held by the Full Bench that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit but (*Brodhurst J*, dissenting on this point) that they were admissible in evidence in the present suit. In delivering his judgment *Edge C J* said 'As to s 13 I entirely agree with the majority of the Full Bench of the Calcutta High Court in *Gujra Lal v Futeh Lal*, 6 C 171, and with *Sir Arthur Collins C J* and *Mulhu Sami Iyyar J* in *Ramji Sami v Appaiah*, 12 M 9, that a judgment as to whether a certain person was or was not the heir to another is neither a transaction nor a fact within the meaning of s 13. I think, however as did *Su Charles Sargent C J* and *Mr Justice Nanabhai Hirvadas* in *Ilan Chhoddos v Bapu*, 10 B 139, that the majority of the Full Bench of the Calcutta High Court in *Gujra Lal v Futeh Lal*, 6 C 171, put too narrow a construction on the word 'right' in s. 13 and that 'right' there includes not only incorporeal rights but a

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right of ownership There are no words in s 13 which could not be applied to a right of ownership, but it is difficult to see what could, within the meaning of s 13, clause (a), be a 'transaction by which the right' of a man to have it declared that he is the son of another man out of a particular woman or that he is not some other man, could be said to be 'created, or modified' whatever the meaning of the word 'right' in clause (a) of section 13, the meaning of the word 'right' in clause (b) must according to the principles of construction be the same. In my opinion a previous litigation, although not between the same parties, may be a particular instance within the meaning of s 13 (b) in which the right or custom in question in the subsequent litigation 'was claimed, recognised or exercised, or in which its existence was disputed, asserted or departed from'. The right which was not only asserted but disputed in the suit between the present plaintiff and *Pankuar*, in which the judgment of the 7th December, 1874, was given, was the alleged right of ownership of the then and present plaintiff in the property now in suit. Whether or not that right then existed depended on the question whether *Pankuar* had not a son then living by *Hanuman Singh*. She said, she had, and that his name was Dalip Narain Singh. It appears to me that the proper evidence of that particular instance is the record in that suit, and not the judgment alone of the 7th December 1874, and that the record in that case may be admitted in evidence under s 13 (b) quite independently of s 43 as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed.

It could not have been the intention of the Legislature in framing s 13 that a party to a suit could not give evidence of particular instances in which a custom for example, was exercised or recognised, unless he showed that the other party to the suit had recognised or had exercised or had had exercised against him that custom or that such party could not give in evidence the record of a suit in which such custom had been claimed and recognised without showing that the former suit was *inter partes*.

For the reasons already stated I am of opinion that the record of the previous suit in which the judgment of this Court of the 7th December, 1874, was delivered but not the judgment alone, is admissible under s 13 (b) for the purposes and to the extent already indicated. *Tyrell J* concurred with the *Chief Justice*. In the same case *Straight J* said 'It seems to me the true point is, not that the judgments and decrees themselves are the transaction but that the suit in which they were made was a transaction, and that to establish that such a transaction took place they are the best evidence. *Garth C J* remarks (in 6 C 171) by a somewhat strained use of the word the proceedings in a suit might also be called transactions'. Yet it is worthy of notice that *Sir William De Grey C J* in the commencement of the written opinion of himself and the Judges in the well known *Duchess of Kingston's Case*, 1 Smith—L C 760, uses the word as if it were a natural and proper expression in connection with such a matter thus—'what has been said in the bar is certainly true is a general principle that a transaction between two parties in judicial proceedings ought not to be binding on a third. In my opinion the suit of 1873 between the plaintiff, and *Mussammat Pan Kuar* was a 'transaction' in which the right of the defendant is the living son of *Hanuman Singh* was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction. I should also have no difficulty if it were necessary to do so, in holding, that the defendant is entitled to put forward the suit of 1873 as an 'instance' in which the right of which I have spoken was claimed and recognised.

As I have remarked before, the question is not as to the existence of the judgments and decrees of 1874 is a fact in law or a relevant fact under some other provision of the Evidence Act, but whether there was a 'transaction' or 'instance', in which the right of the defendant was asserted and recognised of which transaction or instance they are the best evidence. In the same case *Mahmood J* also observed. 'For the reasons stated by *Mr Justice Mitter* in his dissentient judgment in the Full Bench case of *Gajya Lal v Latch Lal* 6 C 171 I hold that the law of the land before the passing of the Statute (I of 1872) was that a judgment such as that of *Mr Justice Turner* and my brother *Brodhurst* of 1871 would be admitted in evidence. Before this case, in *Shadal Khan v Amnullah Khan*, 1 A. 93 at p 96, *Duthoit J* and "The

law as regards the admissibility in evidence of former judgments has been recently discussed by the Calcutta High Court in *Gujju Lal v Fulleh Lall*, 6 C 171 and in the conclusion of that judgment we fully concur." Where a party set up a particular right, judgments not *inter partes* in previous cases in which a similar right was asserted are admissible in evidence under s 13 of the Evidence Act. *Kallu Misir v Bhagnath Singh*, 2 U P L R 81=60 Ind C 142. In a suit for foreclosure, one of the defendants contended that he was a minor at the date of executing the mortgage and so not competent to enter into a contract. In support of his statements he produced certain judgments in proof of the defendant's minority under section 13, clause (b). *Held* that the judgments were not admissible, the cases in which they had been passed not being instances in which any right asserted by the defendant was recognised or exercised or in which its exercise was asserted, disputed or departed from. *Gayadin v Musammal Dulari*, 6 A L J 693=2 Ind C 839. Judgments not *inter partes* though not conclusive as *res judicata*, are admissible in evidence under s 13 to show the conduct of parties or particular instances made by the parties or their predecessors in title or to identify property or to show how it had been previously dealt with. *Gobinula Krishna v Abdul Qayyum* 25 A 546=A W N 1903, 137. The author of a book was proceeded against by the Government for creating class hatred and the books themselves were forfeited. The author applied to the High Court under section 99 of the Criminal Procedure Code to set aside that order. It was dismissed. The judgment was sought to be relied on in a prosecution launched against the same person under s 153 A Penal Code. *Held* that the judgment was admissible in evidence. *Kali Charan v Emperor* 25 A L J 846=104 Ind C 225=28 Cr L J 785=A I R 1927 All 654.

**Madras Cases.** In *Subramanyam v Parmaswaran*, 11 M 116 123 the Madras High Court concurred with the majority of the Full Bench of the Calcutta High Court. So also in *Ramaswami v Apparu*, 12 M 9 where a suit was brought by the trustee of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, and where judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple, were held relevant under s 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted, the Court observed. It is contended that such judgments not being transactions or 'facts', they are not admissible under s 13 of the Evidence Act, and that they do not relate to a matter of a public nature within the meaning of s 42 of the same Act. We concur with the majority of the learned Judges who decided, in *Gujju Lal v Fulleh Lall*, that a judgment of the character there under consideration, viz, as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in s 13 of the Evidence Act and that the judgment referred to in that case could not be given in evidence, but the judgments filed in this case are not of the character under consideration in that case, the question for determination in the previous suits was whether payments then claimed, and which are in contest in the present suits, were claimable as of right and in one case whether they are so claimable from a particular class of persons, viz Christians, and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of particular instances in which the right or custom was claimed and in which its exercise was disputed, asserted, or departed from, and was further adjudicated upon and that the right was a right of the character dealt with under s 13 of the Evidence Act. The case for the appellant is—that there is evidence in support of it in the case before us as to at least six of such villages—that from those who hold lands in a large number of villages in the vicinity of the temple (see *Exhibit F*) the payment claimed is demanded as of right and—that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in their villages, and this being so we are further of opinion that the decisions in the former suits are decisions which relate to 'matters of a public nature within the meaning of s 42 of the

**S 13.** same Act The question for determination before us is not dissimilar in principle from that reported in *Narayan Bhalabai v Dipa Umel*, 3B 3. The right now claimed appears to us to be as much a right of the character indicated in s 13 of the Evidence Act as the right to a fishery, and the judgment so far to support the finding of the District Judge as to the payments claimed having been customarily made. The assumption that the appellants based their claim upon an alleged custom only appears to us to be unwarranted. The allegations in the plaint appear perfectly compatible with the case that the appellants base their claim upon a right, the origin of the right is not clearly defined, but from evidence of custom, in the sense of payments extending over a long series of years the existence of a right may, in connection with appellant's suits for the reasons stated afford good grounds for "second appeal." In a subsequent *Madras* case to establish the plaintiff's title to certain land, he put in evidence (1) a conveyance in favour of his father (2) a sale certificate issued to his father's vendor (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title (4) a judgment obtained by his father in which the title was recognised. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings. Held that all the documents were relevant but not conclusive. *Venkatasami v Venkatesh*, 15 M 12. In *Krishnasami Ayyangar v Rajagopal Ayyangar*, 18 M 73 at p 77 the Court observed: "From exhibits L, L1, L2, L3 and L5 it is seen that the adoption of *Varadaiyangan* by *Ammalaiyangan* was stated by the latter's brother *Krishnaiyangan* in suits brought by him in 1838, 1841 and 1843 to recover moneys due to *Ammalaiyangan* then (deceased). He explained that the suits were brought by him as *Varadaiyangan*, the adopted son of *Ammalaiyangan*, was under his protection. It has been objected on behalf of appellants that these copies of judgments are inadmissible as evidence and in support of this objection we are referred to *Suba manayan Paramasaran* 11 M 116. Copies of judgments and decrees were there held to be inadmissible with reference to the decision of the majority of Judges of the Calcutta High Court in *Gujju Lal v Fatteh Lal* 6 C 171. As pointed out by this Court in *Byathama v Arulla*, 15 M 19 (23) the sole object for which it was sought to use the former judgment in *Gujju Lal v Fatteh Lal* 6 C 171 was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used. Cf. *Prabhaty Dass v Purna Chunder Singh* 9 C 586 and *Phana v Kondan* 15 M 378. Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act. A judgment is relevant under section 13 of the Indian Evidence Act only as an instance of an assertion of a right against third parties. The remarks in the judgment cannot be treated as evidence. They are the mere opinion of a person who is not before the Court to be cross-examined upon the ground of that opinion and hence are not good evidence. *Kamulani v Kumara Rao* 10 M L T 330- (1911) 2 M W N 337=12 Ind Cas 423. A judgment holding a person to be a minor does not determine any right pertaining to an individual and is inadmissible in evidence under section 13 (b) of the Evidence Act. *Venkata Rangappa v Subbaraya Goundan* 33 Ind Cas 112. But judgment *not* *inter partes* will be admissible under section 13 of the Evidence Act as authority in instances of a local custom or usage being recognised. *Sundaram Iyer v Theetharappa* 10 Ind Cas 159. Section 43 says that judgments, orders or decrees other than those mentioned in sections 40, 41 and 42, are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provision of the Act (e.g. section 13). *Secretary of State for India v Ahmed Badha Sahib* 67 Ind Cas 971=44 M 778=41 M L J 223=11 L W 128=1921 M W N 576 (F B). The fact that the uncle of a man sued in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of the

proof than it is now, is evidence against the existence of the right of that line to claim as heirs of the deceased within the meaning of s 13 of the Evidence Act. *Secretary of State v Subraya Karantha*, 18 M L J 504=2 L W 1175=(1915) M W N 962. In *Natesu Gramani v Venkatarama Reddi*, 30 M 510, the question was whether water in *poram bole* lands belonging to *murasdars* can be said to be *Sucar* water and taxed as such. "Very little evidence was tendered on either side. The zamindar called the *Karnam* who said that the *poram bole*s were the property of the zamindar but did not speak to any act done in assertion of his ownership. The defendants on the other hand relied on a judgment of the District Munsif of *Chungleput* in original suits Nos 468 to 473 of 1895, suits between zamindars and some *murasdars* to recover possession of certain *poramboles* in the village, in which it was held that the waste lands in this village are the property of the *murasdars*. We think this judgment was evidence against the zamindar in the present suit under section 13 of the Indian Evidence Act."

**Odh cases** The question for decision was whether the appellant was the legitimate daughter of one K and R. The respondent contended that R was not the legally married wife of K and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance. Held that the compromise and the decree passed in the other case were relevant facts under section 13 of the Evidence Act. *Parbati v Maharaj Singh* 10 Ind Cis 188. The judgment passed in a previous suit, although not relating to the parties to the subsequent suit is never the less admissible in evidence under section 13 of the Evidence Act to show the fact that the judgment was passed, and, therefore, it is necessary evidence of the following facts, who the parties to the previous suit were, what the land in dispute was and who was declared entitled to return possession. For this purpose, and to this extent, it is admissible in evidence for or against every one when the fact of possession at its date has to be ascertained. *Ghulam v Mohammad*, 65 Ind Cis 398=8 O L J 609. Where the issue is as to the title and ownership of certain property a judgment in a pre-emption suit obtained by the defendant against a third person on the strength of a deed of gift alleged to be the source of the defendant's title is admissible in evidence as an instance in which defendant's right under the gift was asserted and enforced. *Anyumanunissa v Ishu Ali* 66 Ind Cis 222=1922 Oudh 171. When the question is whether a certain person is a legitimately born son applicable for mutation with regard to revenue paying properties would be admissible under ss 13 and 50 of Evidence Act, as assertions of his right is a legitimate son. So also a judgment relating to a transaction in which he set up a claim as legitimate son would be relevant under s 13. *Galstani v Musa Abd*, 10 O L J 263=73 Ind Cis 428=9 O & A L R 282=A I R 1924 Oudh 19. Judgment in a previous case in which a member of the family had brought a similar suit for possession and obtained a decree was held admissible and relevant on the question of the plaintiff's title to the property. *Indrapal Singh v Thakur Din*, 10 O L J 146=78 Ind Cis 895=27 O C 77=A I R 1924 Oudh 266. The record of a judicial decision is admissible as evidence of an instance under section 13 of the evidence Act, namely as a transaction by which the custom in question was claimed and recognised notwithstanding the fact that the custom set up was admitted and the suit was contested on another ground. *Rampal Singh v Bopraj Singh*, 3 O W N 73. Judgments relating to a particular right, although not *inter partes* but dealing with the same question are clearly admissible under s 13 of the Evidence Act. *Hari Kishan v Raghurao Dayal*, 3 O W N 645=97 Ind Cis 873=A I R 1926 Oudh 578. Judgment in a previous suit is admissible in evidence under section 13 to establish the illegitimacy of a certain person. *Jay Fatch v Baldeo Singh*, A I R 1928 Oudh 233=5 O W N 143. The respondents brought a suit against the appellants for possession of some lands in a village on the allegation that they had acquired title to the land in suit as well as the other land of the village by adverse possession. They filed a judgment in a suit brought by their father for a declaration of his title to the lands of that village, the title being based upon mortgage, all to have become irredeemable. The decision was that he was entitled to

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and the rest of the claim was dismissed. In the course of that judgment the Court recorded an opinion that the plaintiff was proved to be in possession of the whole land now in suit but dismissed the claim except as to 22 *bighas* on the ground that the plaintiff though in possession had not proved title. The judgment was *inter partes*. Held that the question of possession of the land with regard to which the suit was dismissed was not *res judicata*. A bare expression of opinion in a judgment upon a question of possession not given effect to by the decree is not a recognition of a right within the meaning of section 13 of the Evidence Act and is not admissible in proof of possession either at the date of the judgment or at any other time. *Karuna v. Gobind*, 7 Ind Cis 12.

**Patna Cases** Judgments not between parties to the suit pronounced by a Court of competent jurisdiction, containing a declaration that the right in dispute has been asserted and recognized in a Court of law are admissible in evidence under the provisions of section 13 of the Evidence Act. *Muhammad Elna v. Ganga Dayal* 40 Ind Cis 838. A decision in a case under s 103 and judgment in a case under s 107 B T Act, regarding certain other tenants in the same village are relevant in the case under s 13 of the Evidence Act. *Maharun Jani Khan v. Saudagar Ram* 1920 Pat 177 = 1 P L T 221 = 56 Ind Cis 417. A final decree is to some extent evidence under s 13 of the Evidence Act as to the land lord having recognised the holding as being in the possession of the tenant and it is not conclusive against third parties and does not stand on the same footing as the delivery of possession given by a Civil Court or a decree awarding possession by a Civil Court. *Nand Kishore v. Bikan Singh*, 3 Pat L T 570 = (1920) P 57 = 65 Ind Cis 850 = 23 Cr L J 200. But a previous judgment of the same Court not *inter partes*, though not binding as *res judicata* and determined on the facts there provided, is still an authority which is entitled to respect, the question raised being the same. *Elizabeth May v. Bhupendra Nath*, A I R 1920 Pat 304.

**Lahore Cases** A judgment in a suit holding that the property attached to the office of *granthi* is *inalienable* and *inalienable* is admissible in a subsequent suit for the purpose of showing that at the time it was given the right of the *granthi* to alienate was called in question. *Indar Singh v. Fateh Singh*, 1 Lah 540 = 114 P W R 1920 = 59 Ind Cas 734. Plaintiff in the present suit instituted in 1874 had sued the defendant in 1872 for alienating a piece of land alleged to belong to the *godh* of a *Dhermsala* to which plaintiff claimed to be apparent successor. A decree having been then made in favour of the plaintiff he again sued the same defendant for making another alienation of a portion of the same land. It was held that the previous judgment of 1872 was a fact and a relevant fact (Indian Evidence Act s 13) on the issue between the parties whether the land belonged to the *godh* or not. *Lachman Gir v. Lahori Singh*, 70 P R 1875. A judgment finding that a particular person was not of sound mind based on the letter of a medical man is not admissible, either under s 13 or section 43 of the Evidence Act, in a subsequent suit to prove that the person whose mental condition is in question was not of a sound mind where the previous suit was not between the same parties and no formal deposition on oath of the medical men was recorded. *Sher Mahammad v. Futeh* 6 P R 1902.

**Nagpur Cases** A Judgment though not *inter partes* may be admissible as evidence of title. *Yeshevant v. Daulat* 89 Ind Cis 663. Under section 13 judgments not *inter partes* pronounced by a Court of competent jurisdiction in a suit in which the right in dispute had been asserted and either recognised or denied are admissible. *Ramdhani v. Punshottam*, 88 Ind Cas 699. Judgments *inter partes* can be admitted in order to prove the conduct of the parties to show particular instances of the existence of rights or admissions made by parties in case of how the property was dealt with previously as relevant evidence under the provision of section 11 or 13. They cannot be wholly excluded from consideration because in so far as they explain the nature of possession or the light on the motives or conduct of parties or reproduce the admissions made by the parties or their ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light. Judgments have very high evidentiary value and may even lift the burden of proof. *Gopal v. Sitaram*, 97 Ind Cis 691 = 9 N L J 215.



**Privy Council Cases** Concerning the effect of previous judgment their Lordships of the Judicial Committee of the Privy Council decided cases on appeal from India both before the passing of the Indian Evidence Act, and after the passing of the Indian Evidence Act. Such a question arose in 1871, i.e. just before the passing of the Indian Evidence Act, in the case of *Jogendra Deb Roy v Punindra Deb Roy*, 11 M I A 367. In that case a *Raja* of an impenetrable *Raj* died, leaving children by various wives and concubines. A suit for possession of the *Raj* was brought by one of the widows on behalf of an infant, to set aside a summary award, under Act No XIX of 1811 giving possession and for possession of the *Raj*. This suit involved issues of legitimacy, and the validity of a particular form of marriage of one of the members of the family. The *Sudder Dewany Adalat* decreed in favour of the plaintiff. Another suit was afterwards brought by a member of the family, who was not a party to the former suit against the party in possession which raised substantially the same issue of the spurious nature of marriage of which the plaintiff was the issue. The defendant pleaded that the decree of the *Sudder Court* is a bar to the suit. *Held*, that the suit raised a different issue, and, (acting upon *Kanhya Lall v Radha Charan*, 7 W R 38) that the decree in a former suit was not a judgment *in rem*, but a judgment *inter partes*.

A zemindar claimed the proprietary right and possession of *manuās* within the limits of his zemindari, against tenants, who by themselves and their predecessors in title, had held the land from before the Decennial Settlement in Bengal, an unvaried rent having been paid to the Zemindar. The first defendant alleged a grant to his ancestor of a *mulwari* tenure by a *ghatwal* then holding land within the zemindari the other defendants alleged title as *dar malwauandars* under the first. Part of the evidence for the defence consisted of judgments among which was one of the year 1817, and another of 1843, to which the zemindar's predecessors had not been parties. These had been given in suits brought by the successor of the *ghatwal* which had been resisted by the fixity of tenure. *Held*, that they could be received as evidence of long anterior possession at a rent, and of the title, on which the defendants now relied, having been openly asserted long ago. Taken with other evidence, they established possession by the defendants at a uniform rent paid to the Zemindar, thus leading to the inference that the tenure had been, and still was of a permanent character. *Ram Ranjan v Ram Narain*, 22 C 533=22 I A 60. In delivering the judgment Lord Shaw said: The Judge of first instance states with reference to these decrees I am of opinion that the documents produced by the defendants may be accepted as evidence in this case, as showing ancient possession, and that the title on which the defendants now rely was openly asserted as early as 1195, B S, corresponding to 1788 A D and at subsequent dates, irrespective of the findings come to in those decrees. The orders passed in these decrees themselves would not be evidence against plaintiff's title but they may be accepted to show ancient possession and to show that the title was asserted rightly or wrongly many years ago. The Judges of the High Court say 'As regards the admissibility of the judgments to which exception has been taken we observe that the lower Appellate Court has only used those judgments as evidence that there was litigation between the parties thereto at the dates to which they relate. It uses those judgments to show that at those dates the so-called *ghatwal* was suing the so-called *mulwauandar* respecting *manuās* and that in those suits the parties asserted the same rights which they now assert. To this extent, we think that the judgments were admissible in evidence, even though the zemindar was no party to them.' It must be observed that by the judgment of 1817 a decree for rent of the *manuās* now in question was given at the rate of Rs 35 per annum, against the predecessors of respondents. Their Lordships are of opinion that, although the predecessors of the *Raj* were party to that litigation, it was competent to use the judgment as evidence showing the rent paid for the possession it and prior to that date now nearly 80 years ago. Taken with the other evidence in the case, the respondents have their established possession at a uniform rent for so long a period as to lead to the inference that the tenure was and is of a permanent nature.

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The next case is that of *Bhutto Kunwar v Kesho Persad* 1 C W N 260 = 24 I A 10. The facts of the case are as follows — *Bhutto Kunwar* is the widow of *Bacha Tewari*. On the death in November 1842 of one *Bhowani Pershad Tewari* the owner of the property in suit *Ram Kuar* and *Dharma Kuar* the widows of his brother *Debi Pershad* and one *Ram Kissan Misra* son of his niece, obtained possession of the property left by him. Some time afterwards a dispute arose between them and *Bacha* is to the right of heirship to *Bhowani*, and an agreement dated 4th January 1850 was thereupon entered into by all the parties to the effect that *Ram Kissan* and *Bacha Tewari* were to be proprietors and to hold possession in equal shares. *Ram Kissan* died on the 22nd January 1874 without issue and his widow *Mitho* succeeded him. She died on the 15th September 1884 and *Kesho Pershad* the respondent thereupon became the lawful heir to *Ram Kissan's* estate. On the 24th March 1880 *Kesho Pershad* brought a suit against *Bacha Tewari* and *Raja Ajit Singh* a purchaser from him to recover possession of certain property, on the ground that he, *Kesho Pershad* is heir of *Ram Kissan* is entitled to joint possession of the properties in question with the defendant *Bacha Tewari*. *Bacha Tewari* in his defence set up a will of *Bhowani* dated the 7th August 1847, by which his properties were left in trust for charitable purposes and contended that the agreement of 1850 recognised this will and constituted *Ram Kissan* a trustee for certain trust created by the will and that *Kesho Pershad* was estopped by a Judgment of the High Court dated 27th February 1878 from averring that the property was *Ram Kissan's* own. The Judgment was in a suit by *Bacha Tewari* and *Mitho Kuar* (widow of *Ram Kissan*) and others to have a mortgage made by her declared invalid. *Bacha Tewari* in that suit contended that under the agreement of 1850 *Ram Kissan* and he were declared proprietors in equal half share, the estate being kept joint and that *Mitho* had exceeded her right in mortgaging the property. The subordinate Judge held that *Bacha* was entitled to a half share only of the properties in dispute and gave a decree accordingly. On appeal the High Court decreed the appeal on the ground that the agreement recognized that *Bhowani's* will vested the properties in *Ram Kissan* and *Bacha* as trustees and that it therefore *Mitho* was not competent to charge the estate. Again in 1890 a suit was instituted by the managers of the *Chate Bhandar* against one, *Bal Gound* and *Bacha Tewari* for declaration of right by removal of unlawful possession. In that suit it was alleged that *Bacha Tewari* had mortgaged the property then in dispute to *Bal Gound*. The Judge held that the estate was not bequeathed for charitable purposes and that *Bhowani's* will was revoked. Both these questions were in this suit. The two important questions in the present suit were whether the respondents were estopped by the High Court decree of 1878 and whether the judgment in the suit of 1890 was admissible in evidence as against the Appellant. *Sir Luckland Couch* said: "In 1880 a suit was instituted by two persons who are described in the plaint as managers of the *Chate Bhandar* of the late *Bhowani Pershad Tewari* which is described in the Judgment of the Judge of *Jaunpur* as a claim for a declaration of right by removal of unlawful possession of debts by annulment of a miscellaneous order of the Subordinate Judge. It appears that on the 14th September 1877 *Bacha Tewari* had made a mortgage of the property now in dispute to *Lal Gound* who had obtained a decree upon it and had the property put up for sale in execution of the decree. The first and second of the issues in this suit were: 1—Was the property in dispute bequeathed for public charitable purposes? 2—Was the will which made the estate in his life time? Upon these the Judge found that the estate was not bequeathed for charitable purposes and that the will was revoked. The plaintiffs appealed to the High Court at *Allahabad* and the Divisional Bench of two Judges by whom the appeal was heard differed in opinion it was held by a Full Bench consisting of the Chief Justice and two Judges the majority of whom affirmed the judgment of the lower Court and dismissed the appeal. The decision is not conclusive as against *Bacha Tewari* as the suit was not between the same parties as the present suit but the Lordships agree with the Subordinate Judge that it was admissible as evidence against him."

Orders for possession under Act XXV of 1861, s 318, Act X of 1872 s 530 and Act X of 1882, s 115 relating to 'disputes to immovable property' are merely police orders made to prevent breaches of the peace and decide no question of title. Such orders are admissible in evidence on general principles as well as under the Evidence Act (I of 1872) s 13 to show the fact that such orders were made. This necessarily makes them evidence of the following facts appearing on the orders themselves, viz who the parties to the dispute were, what the land in dispute was and who was declared entitled to return possession. For this purpose and to this extent such orders are admissible in evidence for and against any one, when the fact of possession at the date of the order has to be ascertained. *Dinoman Choudhuran v Brojo Mohan*, 29 C 187=29 I A 21, see also *Hosain v Iqbal*, 10 C L J 30=82 Ind Cis 395, *Baroda v Manmatha*, 11 Ind Cis 156.

Where in a previous suit by H, a co sharer of the plaintiff against the defendant to which the plaintiff was no party H had recovered a decree for possession of H's share. Subsequently a partition of the property was made by deed between H, defendant and plaintiff to work out the decree but without expressly referring to it. Held that the decree was not conclusive in plaintiff's suit to recover his share from the defendant and might, had it stood alone, be rejected as evidence but followed by the partition became material. *Kumar Naresb Narayan Rao v The Secretary of State for India* 28 C W N 453=30 C 416=77 Ind Cis 1013. But the Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where parties are not the same. *Per Sir John Wallis in Kumar Gopala Raman v Mal Singh*, A I R 1929 P C, 99 (103).

**Previous judgments to prove customs**—Judicial decisions recognizing the existence of a disputed custom among the Juns of one place are very relevant as evidence of the existence of the same custom among the Juns of another place, but the evidence that the usage has application to the particular case cannot be dispensed with. *Gatappa v Eramma* A I R 1927 Mad 228=51 M L J 757=99 Ind Cis 303. A judgment *inter partes*, relating to a right or custom, is proof of an instance or transaction in which the custom has been recognized, or departed from, or which is inconsistent with its existence. Such judgments are however pieces of evidence capable of rebuttal. *Abdul Hussein v Libi Sona Dea*, 4 S L R 88=8 Ind Cis 897, *Kundoo v Dhar* 20 W R 345.

**Recitals in documents**—A recital in a deed or other instrument is in some cases evidence against the parties who make it. But it is no more evidence as against other persons than 'any other statement would be'. *Per Garth C J in Brojeswar v Budhanuddi*, 6 C 268. The Judicial Committee in the case of *Ganja Chandra Dhur Biswas v Jugul Kishore Charya* 44 C 186=21 C W N 225 (P C) observed as follows, "Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them." Where a document is admitted in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked. In the case of *Dwarika Nath Balshi v Mulunda Lal Choudhury* 5 C L J 55 which was a case in which a deed of sale and a mortgage deed though not *inter partes* containing recitals that a particular land belongs to a particular *houla*, were sought to be admitted in a suit in which the question was whether the land belonged to that *houla* or not so far as can be made out of the facts from the report of the case they were documents executed by trustees in favour of one of the Defendants whose share the Plaintiff's father had purchased at an execution sale. *Rampuri J* purporting to rely upon the cases of *Dattar Mahanti v Jagabandhu Mahanti* 23 W R 293 and *Vythilinga v Venkata Chala*, 16 M 194, held that they were admissible under section 11 (b) and section 13 of the Evidence Act and observed that they may be very weak evidence or even of no weight at all, but they could not be rejected as inadmissible. *Geidt J* held that they were admissible as transactions by which the right to hold the land as part of the *houla* was recognised. This

**S 13.** decision, however, was treated as *obiter* in a later case of the Calcutta High Court, namely, that of *Abdul Ali v Syed Rejanali*, 19 C W N 468 in which the cases of *Dattari Mahanti v Jagabandhu Mahanti*, *ubi supra*, and *Gythylinga v Venkata Chala*, *ubi supra*, were distinguished and it was thus observed "We know of no authority for saying that a private transaction between persons who have no power to bind a person whose right is sought thereby to affect can be admitted as evidence against him and the obvious dangers that might arise from such a proceeding make us very unwilling to hold that a transaction is one that comes under section 13 unless we are obliged to." The authority of the decision in the case of *Duarka Nath v Mukunda Lal* 5 C L J 55 has been doubted in *Saroj Kumar Achary v Umed Ali* 35 C W N 1022=35 C L J 19 and *Pramatha Nath v Krishna Chandra*, 28 C W N 1092=84 Ind C 120, though the latter two cases are clearly distinguishable from that case. The question whether recitals of boundaries of other lands in documents between third parties (such as there are in *Saroj Kumar Achary v Umed Ali*, 25 C W N 1022 and *Pramatha Nath v Krishna Chandra*, 28 C W N 1092) are admissible in evidence under section 11 or section 13 of the Evidence Act was considered in the case of *Abdulla v Kunja Behary Lal*, 16 C W N 252=14 C L J 467 and was answered in the negative *Brojendra v Mohan* 31 C W N 32 *Ur Justice Moorjee*, who in the case of *Bisheswar Dayal v Harbans Sahay*, 6 C L J 69 had apparently held that a document of this nature was admissible in evidence under the provisions of section 11 and 13 of the Indian Evidence Act, altered his view in the decision in *Abdulla v Kunja Behary Lal*, 16 C W N 252=14 C L J 467, where he held that a document of this nature was not admissible in evidence under the provision of sections 11 and 13 of the Indian Evidence Act, thus differing from the view previously expressed *Pramatha v Krishna*, 28 C W N 1092. The same view was taken in *Choom Lal v Almadhab Bani*, 41 C L J 374=86 Ind C 734, where the Court observed "It is argued that these documents are not admissible in evidence and the Courts below were not competent to take them as evidence in the case, and for this purpose reliance has been placed upon the cases of *Saroj Kumar Achary Chowdhury v Umed Ali Houldar*, 35 C L J 19, and *Abdullah v Kunja Behary Lal* 14 C L J 467. There was at one time a conflict of opinion upon the admissibility of documents between strangers where one of the parties to the suit was mentioned as owner of the boundary land, but recent decisions have finally settled the point. At one time it was attempted to make such documents admissible in evidence under section 11 clause (2) of the Evidence Act. In some cases the admissibility of such documents was made to rest on section 13 and in some other cases on section 3 clause (3) of the Evidence Act. It is not necessary to go in details into all the decisions. We are of opinion that a document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the documents is not admissible in evidence." See also *Brojo Mohan v Gaya Prosad*, 30 C W N 761 *Damodar v Jadunath* 91 Ind C 449, *Kumuda v Dilsook*, 45 C L J 138, *Abdul Karim v Chhalla*, 91 Ind C 688 (c) *Halim Ali v Anril*, 108 Ind C 264, *Abdul Ghani v Faqur Mahammad*, A I R 1929 Lah 78=111 Ind C 261, *Lajpat Rai v Fakhimad*, A I R 1927 Lah 448=8 Lah 631, *Sarat Chandra v Saralabala* 105 Ind C 61. The case of *Inrit Chamar v Sudhari Pandey* 15 C L J 7=17 C W N 103, which laid down the recital of boundaries in the lease was admissible against a person not a party took the contrary view. There have been later decisions which have not accepted this later view and the trend of the recent decision is not to admit evidence which have been offered in the case and the reception of which evidence is objected either under section 13 of the Indian Evidence Act or under any other section of the Act. *Per Mitter J* in *Kumuda Kumari v Dilsook* 105 C L J 138=101 Ind C 512 see also *Hadha Nath Banerjee v Jadu Nath Singh* 7 W R 441, *Hadha Krishna Maruani v Sarbeswar Nag* 29 C W N 469. The view that such a statement made by a person cannot be made admissible in evidence against a stranger is supported by the principle of the decision of the *Lordships of Judicial Committee in Shrinivas Bawa v Meherbai*, 49 I A 6=41 B 300=21 C W N 538=25 C L J 311 (P C). But a different view was taken

by *Chamner J in Natwar v Alhu* 18 Ind Cas 752=11 A. L. J 139 where he said 'The latest decision on the question is that in *Abdullah v Kunj Behari Lal*, 14 C L J 467 in which it was held that a deed of this kind was admissible as evidence of the title to the adjoining plot referred to there in. It was held that the document was admissible under section 32 clause (3). Several cases are cited in support of this view. I am not prepared to differ from this decision and it appears to me that the document may also be admissible under section 13 if as is now generally held, the word 'right' in section 13 is not confined to an incorporeal right'. See also *Farzand Ali v Zafar Ali* 46 Ind Cas 119 where *Dwarkanath Bishu v Mulunda Lal Chowdhury* 5 C L J 55 was followed and *Chirag Ali Prodhama v Mohini Mohan Burdhan* 19 Ind Cas 615 was not followed.

An effort is made in *Sheikh Ketabuddin v Nafer Chandra Patta* 44 C L J 582, to reconcile the conflicting decisions where at page 583 Justice B B Ghosh said 'The question of admissibility of such documents may be considered in three aspects. The first is, where the executant of a document is called as a witness and he gives his evidence and in support of that he produces a document executed by him. In such a case it is conceded that the document would be admissible under section 157 of the Evidence Act as corroborative of the evidence given by the witness on the witness box. In the present case this has happened with regard to exhibit 6 and there is no question that this was rightly admitted in evidence. The second aspect of the question arises where the executants are alive and do not give their evidence in the case. In such cases there is a strong body of opinion that such documents are not admissible either under section 11 or 13 of the Evidence Act. This has not been done in the present case. The third case is where the executants are dead whether any such documents are admissible under section 32 of the Evidence Act or not. That such documents are admissible under section 32 of the Evidence Act, has been held in long line of cases in different High Courts in India. There is no question that under the English law a statement in such documents would be admissible. It is unnecessary to cite any English case other than the leading case of *Higham v Ridgway*, 10 East 109. Whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases the earliest of which is *Leclanund Singh v Mussamut Lal hputee* 22 W R 231. This case was elaborately discussed and followed in the case of *Ningaya v Bhaimappa* 23 B 63 which was again followed in the Bombay High Court in the case of *Haji Bibi v H H Sultan Mahomed Shah*, 11 Bom L R 409 and in our Court in the case of *Abdullah v Kunj Behari Lal*, 16 C W N 252=14 C L J 467. These cases were followed in Allahabad in the case of *Natwar v Alhu*, 11 A L J 139 and all the the cases were subsequently followed in this Court in *Imrit Chamar v Sirdhar* 15 C L J 9=17 C W N 108 and in the case of *Ambai Ali v Lutfe Ali* 45 C 159=25 C L J 619. "See also *Abdul Rahim v Jonabai* A I R 1923 Cal 299 *Promotha v Bijoy* A I R 1927 Cal 231, but see *Promatha v Krishna* 28 C W N 1092 *Kumud Kumari v Dilsook*, 45 C L J 138, *Ghulam v Kalam* A I R 1923 Lah 428=10 Lah L J 370 *Frambal v Ganesh* A I R 1923 Nag 22.

In *Kiran Chandra Roy v Srinath Chakravarti*, 31 C W N 135, the plaintiffs sued for assessment of fair rent for lands appertaining to their Zamin in the possession of the defendants which were entered in the record of rights as *brahmottar* liable to assessment with rent. The defendants relied on three documents, the first of which showed the dealing of the property by defendants of the original grantee as rent free *brahmottar* land and the second was the title deed on which the defendant's claim was based as purchasers at an execution sale and the third showed that delivery of possession under the purchase was taken. As regards these documents the Court observed.

It is difficult to see on what grounds their admissibility as evidence can be questioned. The first document is a piece of evidence which shows the dealing of the property by the descendants of the original grantee as rent free *brahmottar* land, and the other two documents are connected with the title of the defendants. One of them is in fact the title deed upon which the defendant's claim was based as purchasers at an execution sale. The other document shows that delivery of possession under that purchase was taken."

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A statement contained in an order for delivery of possession as to the rent payable in respect of the land is not admissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. *Chandra Mohan v Shailb Elm* 87 Ind Cas 512 Defendant mortgaged the rent land to the plaintiff in 1899. The mortgage deed stated the rent in respect of that holding payable to the superior landlord as Rs 18. In 1904 the mortgage debt was paid off and the plaintiff purchased the superior interest and claimed rent at the rate Rs 24, although there was no proof of such enhancement. *Held*, that the mortgage deed was admissible in evidence as it was a transaction by which the right of the defendant to the land was ascertained and for the definition of that right the amount of the rent had to be stated. *Abdul Munshi v Yalub Bihudar* A I R 1928 Cal 703 Where the question is whether a certain person is a legitimately born son applications for mutation with regard to revenue paying properties would be admissible under s 13 and s 10, Evidence Act as assertions of his right as a legitimate son. *Galstam v Mirza Abd*, 73 Ind Cas 428 = A I R 1924 Oudh 19 Assertions of title by a person dealing with property to which he lays claim are admissible in evidence under section 13 of the Evidence Act though such assertions in recent documents or after dispute have little evidentiary value. *Nallasna v Raman Bibi*, 10 Ind Cas 389 = 1921 M W N 560 = 14 L W 327 Where a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, but the recitals are not evidence especially if they are mere assertions by a person who is alive and who might have been brought before the Court as a witness. *Nehar Beva v Hader Baksh*, 68 Ind Cas 282 A deed of mortgage containing an assertion of title as owner by the mortgagor is relevant under section 13 of the Evidence Act as evidence of the title asserted. *Nallasna Mudahar v Raman Bibi*, (1921) M W N 560 = 14 L W 327 In a suit for declaration of title and possession of a mango garden it was found that the garden appertained originally to a Taluk which was amicably partitioned into three shares and that the garden fell to the share of plaintiff's vendor. In order to prove his vendor's title and exclusive possession of the garden, plaintiff produced certain documents dealing with garden in question. *Held* that the documents were title deeds and contained an assertion of title to and possession of, the property in dispute on behalf the predecessor in title of the plaintiff against the defendant and should be admitted in evidence. *Nityakali v Sarat Chandra* 51 Ind Cas 806 Documents containing recitals that a particular plot of land belongs to a particular well are admissible in evidence either under section 11(b) or section 13 of the Evidence Act, although they are not parties to the suit. *Fazand Ali v Zafar Ali* 46 Ind Cas 119 Where some of the landlords have sold a holding in execution of a rent decree and have advertised it for sale as a *mokurari* holding they are estopped from afterwards pleading that the holding is not *mokurari*. But the estoppel would not affect the landlords who were not parties to the rent suit though the entry in the sale certificate would be strong evidence against them under section 13 of the Evidence Act. *Khurode v Jani*, 20 Ind Cas 753 Plaintiffs instituted a suit for possession based on a lease to them from the *shrotramdars* of a village. The defendants contended that *shrotramdars* were entitled only to the *mokuram* on the lands but not the lands themselves. Of the documents relied on by the plaintiff some had been executed by tenants in the same village other than the defendants and they went to show that they were merely *punaludis*. These documents, though not conclusive against the defendants, were held to be relevant as relevant evidence under s 13 of the Evidence Act, as showing the tenure on which the village was held. *Tythinga v Venkata*, 16 M 191 Where some of the landlords sold a holding in execution and advertised it for sale as a *mokurari* holding, they are estopped from pleading afterwards that the holding was not permanent. But the estoppel would not affect the landlords who were not parties to the rent suit, though the entry in the sale certificate would be strong evidence against them under s 13 of the Evidence Act. *Khurod Chandra v Janali Das* 17 C W N 664

**Riwaj nam—entries in—Whether proof of custom.** An entry in a *riwaj nam* even though unsupported by instances constitutes a strong piece of evidence.

in support of an alleged custom and it lies upon the party impugning it to rebut the value of this evidence *Saule Khan v Amirunnissa*, 45 Ind Cis 966=109 P W R 1918=94 P R 1913 *Ita Muhammad Khan v Juam*, 26 Ind Cis 492=34 P R 1915=2 P W R 1915=33 P L R 1915 *Ranjha v Jinnuaddi*, 24 Ind Cis 942=104 P R 1914=221 P L R 1914=122 P W R 1914, *Dasamudi v Chauda Singh* 13 Ind Cis 421=45 P R 1912=85 P W R 1912=71 P L R 1912 The *ruwaj-i-am* is a public record of custom prepared by a public officer in the discharge of the duties and under Government rules and it is clearly admissible evidence to prove the facts entered in it subject to be rebutted, and the statements in it may be accepted even if unsupported by instances *Vaishno Dutt v Rameshri* 28 L W 908=29 P L R 654=A. I. R 1928 P C 294=55 M L J 746 (P C) *Ruwaj-i-am* applies to urban house property *Wasakha v Gutti*, 112 Ind Cis 8=A. I. R 1928 Lah 762 The initial presumption must in every case be made in favour of the correctness of the entry in the *ruwaj-i-am*, even though the custom pleaded is not in consonance with the general agricultural custom of the province *Naub Singh v Sham Kuar*, 111 Ind Cis 842 An entry in a *ruwaj-i-am* recording a special custom is *prima facie* proof of that custom and the onus is shifted on the other side to rebut it *Labb Singh v Mt Mango*, 8 Lah 281=100 Ind Cis 924=A. I. R 1927 Lah 241 A *ruwaj-i-am* whether supported or unsupported by instances is a piece of evidence which, if unrebutted, is sufficient to decide the case *Jugal Das v Josoda Bai*, 103 Ind Cis 170

**Wajib ul arz—entries in—evidentiary value of** A *wajib ul-arz* is a village statement of custom as distinct from the district statement of custom which is called *Ruwaj-i-am* *Zaman Khan v Abdul Rahim* 109 Ind Cis 59 Entries in a *wajib ul-arz* relating to questions of customs are not agreements between the members of the proprietary body but they are presumptive evidence of the existence of the rules of custom embodied therein It is for the person to rebut an entry in it *Zaman v Abdul*, 109 Ind Cis 59 The entry in a *wajib ul-arz* as regards the existence of a custom is certainly admissible in evidence though the value of such evidence may vary with the circumstances *Narpat v Muhammad* 3 Luck 478=5 O W N 252=112 Ind Cis 10=A. I. R 1928 Oudh 265 Entries in *wajib ul-arz* must be deemed to have been made by the settlement officer in the discharge of his official duties and therefore furnish strong evidence of the authenticity of the facts stated therein *Hanifar Puntap v Bisheshwar Bal Sh*, 3 Luck 326=5 O W N 299=109 Ind Cis 422=A. I. R 1928 Oudh 307, *Wasiq Ali v Athar Ali* 110 Ind Cis 4=A. I. R 1928 Oudh 409 Although an entry in the *wajib ul-arz* is a strong *prima facie* evidence of custom it is by no means conclusive particularly as to ryots and other occupiers of houses who are not parties thereto *Syed Fajamul v Banuani* 23 A. L. J 932=88 Ind Cis 752=A. I. R 1926 All 43 An entry as to a custom recorded in a *wajib ul-arz* must be the authenticity of which nothing is shown is of great importance *Chaudhry Abdul v Mt Tahira Bano* 12 O L J 167=2 O W N 357=89 Ind Cis 51=A. I. R 1926 Oudh 377 A *wajib ul-arz* being part of a Revenue record is of greater authority than a *ruwaj-i-am* which is of general application and is not drawn up in respect of individual villages *Gurbal Sh v Partapat* 2 Lah 316=(1922) Lah 234=66 Ind Cis 133 In a suit for pre-emption, the plaintiff in proof of the custom produced an extract from the *wajib ul-arz* of 1872 which was headed *Dustur-i-haq-i-shafa* and provided that a co-sharer who wished to sell his share had the right to do so, but that he should offer it (1) to his own brother, (2) to his more distant relatives, and (3) to other co-sharers in the *thal* and village a sale deed, two decrees of 1893 and one decree of 1898, while the defendants produced the *wajib ul-arz* of 1853, the preamble of which ran thus 'we record the following conditions in the *wajib ul-arz* to act according to those conditions until the next settlement comes into force and which in paragraph 6 headed 'mention of the transfer of rights by sale, mortgage or gift,' provided that each co-sharer was entitled to transfer his share, but that he should offer it to his co-sharers in certain order, and the *wajib ul-arz* of the present settlement was silent upon the right of pre-emption, held that, upon a proper

**S 13** construction, the *uajb ularx* was *prima facie* evidence of the existence of custom. Held also that the sale deed produced by the plaintiff was no evidence of custom there being no mention in it either of custom or contract, and the two decrees of 1893, standing by themselves, were no evidence of custom and not admissible under s 13 of the Evidence Act. *Mukht v Han Sahai*, 8 A L J 770 = 9 Ind Cns 810

**Draft record of right** The draft record of right cannot be used as evidence of the presumption of the correctness of the entry made therein but the draft record is admissible for the purpose of showing what was the entry made in the earlier proceedings before the publiction. *Hardeo v Kapil*, 103 Ind Cns 117 = A I R 1928 Pat 353

**Road Cess papers** An entry in a road cess return in which a former proprietor of an estate admitted the existence of a *lal haaj*, although not binding on the auction—purchaser of the estate at a revenue sale, is evidence under section 13 of the Evidence Act. *Manmohun v Adwaita*, 19 Ind Cns 519. Under sections 9 and 11 of the Indian Evidence Act, the absence of the name of the predecessor of the plaintiff from the list of tenants in a road cess return not filed by either party to the suit is admissible in evidence against the plaintiff. *Imrit v Subdhar*, 17 C W N 108 = 15 C L J 7, see also *Sagar Mull v Manraj*, 1 C W N 100, *Ram Pershad v Lal Hyati*, 33 C 247 = 7 C W N 162

**Batwara paper** A *batwara khasra* is not a record within the meaning of section 35 of the Evidence Act and an entry made therein of the name of a tenant in possession is not admissible to prove the fact of his tenancy. There is nothing however to prevent a tenant from putting the *batwara khasra* in evidence under section 13 of the Evidence Act to show the past history of the land before the creation of the tenancy in his favour if that can in any way lend support to its creation. *Sadhu Saran v Imbika Lal*, 68 Ind Cns 676. A *batwara khasra* not brought into existence in pursuance of a partition effected under the Partition of Estates Act, 1876 by a Collector is a document of title admissible in evidence under section 13 of the Evidence Act. *Ayodhya Prasad v Kamal Narayan*, 35 Ind Cns 191. See also *Shail Jalni v Duro*, 2 Ind Cns 367, *Sri Lal v Jugat* 38 Ind Cns 205. A *batwara* signed by the Partition Dy. Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of section 35 Evidence Act. It would also be evidence against the proprietors under ss 18 and 13 of the Evidence Act because they were made in their presence. The *batwara khasra* prepared by an Amm and not signed by any gazetted officer cannot be held to be public document under s 35 though on proper proof it may be evidence either under section 15 or section 13. *Ramsarup v Ramnaram*, A I R 1929 Pat 32 = 7 Pat 14.

**Maps and Chittas etc** Chittas made by Government for its own private use in connection with resumption proceedings are nothing more than documents prepared for the information of the collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. They are admissible in evidence under s 83 nor under section 13 where it is not known whether they were acted on for the purpose of the resumption proceedings or if in fact no action was placed upon them by Government for the purpose of resumption proceedings. *Upendra Nath v Laddha Gobinda* 98 Ind Cns 85 = A I R 1927 Cal 111. Under section 13 Zamindar's papers prepared in the course of his management of the Zamindari are admissible in evidence in disputes between him and persons claiming title to land to which such papers pertain. *Sulu Houladar v Hep* 101 Ind Cns 101 = A I R 1927 Cal 576. Chittas prepared by Government are admissible in evidence though their value all depend on the circumstances of each case. *Sarati Chandra v Sarati Labi* 103 Ind Cns 61. Chittas prepared by Zamindars in the absence of the tenants are admissible in evidence in rent suits but their evidentiary value will depend on the circumstances of each case. *Abu Hif* 88 Ind Cns 515 = A I R 1925 Cal 1101. A map prepared by a private party long before the institution of a suit for declaration of title is admissible in evidence under section 13 of the Evidence Act and it is held that it was a transaction by which a right was recognised or asserted.



*Blusan v Nauab of Murshudabad*, 49 Ind Cns 951 *Chittas* prepared by Government for the purpose of re-suming surplus lands required for the purpose of a road way in the possession of persons without title are admissible in evidence as part and as explanatory of the resumption proceedings which were regularly taken *William Graham v Phanindra Nath Mitra*, 19 C W N 1038 = 31 Ind Cns 41 In a suit by the plaintiff to recover possession of certain lands on the allegation that the same were included in a sub lease granted to them by the lessors of D, the defence being that the lands in suit were confined within the lease granted by C to the defendants prior to the lease of the plaintiff's lessors, *Held*, that the proceedings of a rent suit by C against the plaintiff's lessors including the judgment and decree and the Amin's maps, report and field book filed in that suit were admissible in evidence although the defendants were not parties to that suit. *Madan Chandra Pal v Kartam Biswas*, 34 Ind Cns 163 Private *chittas* however old are not admissible in evidence under section 13 of the Evidence Act *Nasir Joardar v Pratima Sundari*, 41 Ind Cns 726 An entry in a thak map and its explanatory field book are evidence under section 13 of the Evidence Act, both against proprietors as well as against tenants because they could not have been compiled at all unless the possession of the person holding the plots shown in them had been arrested *Daulat Rai v Khul Lal* 22 Ind Cns 645 *Jogendra v Secretary of State*, 30 C 291 = 7 C W N 193 P C, *Nobendra Kishore v Kazi Lutful Haq* 2 Ind Cns 513 *Lpendra v Charman Calcutta Corporation*, 16 C W N 116, *Junmejoy v Duanla* 5 C 287 = 4 C L R 574

**Possession—ancient instrument** As the possession and enjoyment of disputed property are always indirect evidence of right by reason of the obvious and natural presumption, when the right in other respects doubtful, that such possession and enjoyment so acquiesced in had a lawful origin, so, acts of open delivery of possession or written instruments by which the possession and enjoyment correspond are also presumptive evidence of right, for these are in fact, no mere recitals of a fact but are of themselves acts of dominion and ownership. Hence, when such instruments are so ancient that their connection with acts of enjoyment and dominion cannot be proved by testimony of living witnesses they are nevertheless admissible as the best and most proximate evidence to explain the origin and nature of such possession and enjoyment, where they can by other evidence be sufficiently connected with those facts *Starkes Evidence*, Vol I p 67 The existence of a document of ownership of land (a deed lease or license) may be evidence that the maker of the document had possession of the land at the time of making it. This doctrine, now well settled in English law, is applicable in proof of title by adverse possession in prior generations, where no evidence has survived except the documents themselves which embodied acts of claim of ownership *Clarkson v Woodhouse* 5 F R 112, *Rogers v Allen*, 1 Cump 309, *Doe v Ashew*, 10 Est 520, *Coombs v Coetler*, M & W 393 In *Malcomson v O Dea*, 10 H L C 393, 614 *Hills* 1 and

Ancient documents purporting on the face of them to show exercise of ownership such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in them clues acts of ownership and proof of possession, this rule is sometimes limited with the qualification, provided that possession is proved to have followed similar documents or that there is some proof of actual enjoyment in accordance with the title to which the documents relate *Wignmore* § 157 Similarly in *Bristow v Cornican* L R 3 App C 611, 653 668 *Cairns* L C and Old leases have always been considered to be admissible as being evidence of facts of ownership [The circumstances of giving and taking them] are real transactions between man and man not intelligible except on the footing of title, or at least an honest belief in title. In the same case *Lord Blackburn* said "It is much as after long time all the witnesses who could prove such possession are dead the law permits ancient document either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessors do not pay rent unless they are in possession, so that the ancient payment of rent

**S. 13** adds weight to the ancient indenture" In *Doe v Eslava*, 11 Aln 1023, 1039, Collier C J said 'Ancient documents, it is said are allowed to support ancient possession, though these documents are not proved to be part of any res gestæ. They are admitted in such cases as forming part of every legal transfer of title and possession by act of parties. Care is first taken to ascertain their genuineness, and this is shown *prima facie* by proof that the documents come from the proper custody or otherwise accounting for it."

Hence it seems 'says Mr Stirling 'that to support any presumption or inference from such an instrument first, its antiquity is essential secondly that it should have been found in the place or repository in which it was and genuine deed or writing of that kind would have been deposited, thirdly that it should be free from all suspicion which may rebut the presumption raised in its favour fourthly in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it Upon such a connection the force, it not the admissibility, of such evidence essentially depends. Declarations are, as has been seen evidence as explanatory of the act which they accompany, and where long continued enjoyment, and user of a right has been proved extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment and explanatory of it, may under the same principle, be fully admitted as affording a presumption that it was a genuine instrument which has been used and acted on. And where proof of the actual execution and use of such instruments would have been evidence, then when such proof is absolutely excluded by lapse of time, the production of the deed coupled with such circumstances as give it credit, appears to be the next best evidence which the case admits of and when accompanied with proof of actual enjoyment, affords a strong presumption as to the existence of the right according to that deed." *Stirling v Evans* pp 67, 68

### ILLUSTRATIVE CASES

#### Admissible

In a dispute relating to the boundary of a holding between the plaintiff and the Municipal Corporation of Calcutta, a map prepared in 1872 under the direction of the Government, acting not in its sovereign capacity but as the landlord of this and neighbouring holdings was admissible in evidence under section 13 of the Evidence Act. *Uppendia Nath Ghosh v Chairman of Calcutta Corporation*, 16 C W N 116

A *Kobala* which recites that a holding was a dwelling house is admissible in evidence under section 13 of the Evidence Act, although it is not *inter partes*. *Manmohan v Rageswar*, 55 C 375=32 C W N 184=107 Ind C 81=5 A F R 1928 Cal 315

The fact that in another contested suit a party has failed to prove the relationship of his line with the deceased is evidence as to the existence of the right of that line as heirs of the deceased and is relevant under section 13 of the Evidence Act. *Secretary of State v Subrdya Karantha* 18 M I 1 504=2 L W 1175=(1915) M W N 962

A *Kobala* admitting the right of the plaintiff to an element is relevant and is such admissible under S 13 of

#### Inadmissible

Statements made in conveyance or mortgage that property is limited by certain boundaries are not admissible against person not party to the deed either under section 11 or under section 13 of the Evidence Act. *Abdullah v Kunya Behari*, 12 Ind C 119=14 C L J 167=16 C W N 212

A will which has not been admitted to probate, cannot, in the absence of proof by one of the attesting witnesses that the documents had been executed in record in accordance with the Statute be admissible in evidence under the provisions of ss 13 cl (1) and 32 cl (1) of the Evidence Act. *Moheswar Pundit v Sundar Naram* 22 C L J 111=13 Ind C 342

In a suit for possession of certain lands as plaintiff's *nishtar brohmattar* on behalf of the plaintiff the *nishtar* purchaser in title was produced showing the recital of the *brohmattar* title. Held that the recital of *brohmattar* title in the will was admissible under s 32 (1) of the Evidence Act read with section 13 of the Evidence Act. *Salindra Kumar v Arachur* 36 Ind C 1=882

Section 13 of the Evidence Act is of no avail where the transaction

*Admissible*

the Evidence Act. *Gurish Chandra v Kunja Behary*, 26 Ind Cis 781

Where the defendants are the purchaser of a tenure and the plaintiff claims in under tenure within the defendant's tenure, a petition for execution of a rent decree in which no mention is made of the under tenure is admissible in evidence under section 13 *Jogesh Chunder v Rohun Kumar Roy* 21 C L J 65

Where in a suit for partition between the various male members of a certain family, the widow of a deceased coparcener puts in a written statement to the effect that a particular plot of land belonged to her husband such statement is clearly admissible evidence under s 13 *Rangaswami v Vaidyalinga Mudaliar*, 33 Ind Cis 446

In a suit to establish the existence of a family custom, a deed containing a recital of the custom as alleged in the plaint and a covenant to do nothing, contrary to it, was tendered in evidence by the plaintiffs. The deed had been executed before suit by the present plaintiffs and by another plaintiff who died after the institution of the suit. *Held* that the deed was admissible in evidence on the plaintiff's behalf though they could themselves be called as witness *Hurronath v Nittanund*, 10 B L R 263

*Inadmissible*

were in respect of lands other than the disputed land, as there was not any transaction or particular instance by or in which the right in dispute was claimed, recognised asserted or denied *Abdullah v Kunj Behary Lal*, 14 C L R 467

Certified copies of judgments and decrees which a party seeks to make use of not as constituting matters in dispute *res judicata* but as containing summaries of statements made by parties concerned in the management of the plaintiff properties and as evidence of conduct, are inadmissible in evidence. *Subramanyan v Puram suaram*, 11 M 116 When the question is whether the tenant held lands under *naldi* or *bhaoli* system of rent and the court based its decision on a statement contained in *hebanama* executed by the deceased grandfather of the tenant, *held* that the *hebanama* was not admissible in evidence under s 32 (7) read with s 13 (a) of the Evidence Act *Bansi Singh v Mu Amr Ali*, 11 C W N 703

Recitals of the claims contained in possessory orders passed under section 145 of the Criminal Pro Code, whether *inter partes* or not are not admissible in evidence to prove title under section 13 of the Evidence Act *Ram Sunder v Haribala*, 37 Ind Cis 911

#### 14 Facts showing the existence of any state of mind, such

Facts showing existence of state of mind, or of body, or bodily feeling, as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant

\* *Explanation 1*—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question

\* *Explanation 2*—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact

*Illustrations*

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article

\* These *Explanations* were substituted for the original *Explanations* to s 14, by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891) s 1 (1)

† See the Code of Criminal Procedure, 1898 (Act 5 of 1898), s 311

S-14.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen

(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant

(c) A sues B for damage done by a dog of B's which B knew to be ferocious

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant

(d) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B

The fact of previous publications by A respecting B, showing ill will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent suffered loss

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent, by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor

A's defence is that B's contract was with C

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property, which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found

The fact that public notice of the loss of the property had been given in the place where A was is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found

The fact that A knew, or had reason to believe that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent the fact of A's having previously shot at B may be proved

(j) A is charged with sending threatening letters to B—Threatening letters previously sent by A to B may be proved, as showing the intention of the letters

(k) The question is, whether A has been guilty of cruelty towards B, his wife

Expressions of their feelings towards each other shortly before or after the alleged cruelty are relevant facts

(l) The question is whether A's death was caused by poison

Statements made by A during his illness as to his symptoms are relevant facts

(m) The question is, what was the state of A's health at the time an assurance on his life was effected

Statements made by A as to the state of his health at or near the time in question are relevant facts

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant

(o) A is tried for the murder of B by intentionally shooting him dead

The fact that A on other occasions shot at B is relevant as showing his intention to shoot B

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant

(p) A is tried for a crime

The fact that he said something indicating an intention to commit that particular crime is relevant

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant

Scope of the section "Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Ed ss 318-322,—that is to say, cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, as for instance of slander or false imprisonment, or malicious prosecution where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject-matter of the charge. The illustrations to section 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions." *Per Garth C J in R. v M J Vyapoory Moodahar*, 6 C 645 at p 659. So this section is of assistance, where the existence of a state of mind such as an intention, knowledge, good faith, negligence, rashness, ill will or good will towards a person or the existence of a state of body or bodily feeling was not and could not be in issue in the circumstance of the case. *Emperor v Pachu Das* 24 C W N 501=47 C 671 (F B). In *Baharuddin Mandal v Emperor*, 18 C L J 578, it was ruled that proof cannot be offered of an independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial, in other words, evidence of such collateral offence cannot be received as substantive evidence of the offence on trial, though under section 14 evidence may be given of intention and like matters where the factum of such intention or like matters is relevant. The distinction between cases where intention is and cases where intention is not relevant is illustrated by the decisions in *Emperor v Debendia Prosad* 36 C 573=13 C W N 923 and *Emperor v Abdul Wahid*, which lie on the opposite side of the dividing line. Reference may also be made to the decision of *West J in R. v Parbhudas* 11 B H. C R 90, where he emphasised the admissibility of evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected event though cognate crime. See also *R. v Nur Mahamed* 8 B 223, 225, *R. v Fakirappa*, 15 B 502.

Facts similar to, but no part of the same transaction as the main fact, are not, in general admissible to prove either the occurrence of the main fact or the

**S 14** identity of its author. But evidence of similar facts although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *alunde* on the points has been given, to show the state of mind of the parties with regard to such fact, in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. *Amrita v King Emperor*, 19 C W N 676 (692), see also *Manku v Queen Empress*, 27 C 139, *Gurudhar v Emperor*, 11 Cr L J 430, *Emperor v Debendra Prasad*, 36 C 573. In the last mentioned case it may be noted that the Court properly declined to follow *R v Holt* 8 Cox 41 which is no longer in authority. *R v Smith* 20 Cox 804. The leading case on the subject is *Makin v Att Gen for N S W*, (1894) A C 57 = 63 L J P C 41, where the prisoners were charged with the murder of a child whom they had received from the mother on representation of their desire to adopt it, and whose body was subsequently found buried in their garden. It was held that evidence that several other children had been received by the prisoners on similar representations, and that other bodies of infants had been found buried in gardens of houses occupied by the prisoners, were relevant to the issue. In delivering his judgment Lord Herschell said: "The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." In this connection it is also to be noted that section 15 is an application of the general rule laid down in this section. *R v Debendra Prasad*, 36 C 573. This important section had better be considered by remarks upon the several illustrations *seriatim*. It consists of a collection of the cases in which the strict rule of evidence are somewhat relaxed by the admission of the collateral circumstances where it is necessary to show a particular state of mind. Where a man is on his trial for a specific crime, such as uttering a forged note or coin or receiving an article of stolen property, the issue is whether he is guilty of this specific act. To admit therefore as evidence against him other instances of a similar nature, clearly is to introduce collateral matter. This cannot be with the object of inducing the jury to infer, that because the accused has committed a crime of a similar description on other occasions, he is guilty of the present, but to anticipate the defence that he had no intention or motive to commit the act. The first four illustrations (a) (b) (c) (d) are on the point of knowledge, the fifth (e) as also (i) and (j), of intention, the sixth (f), as also (g) and (h), of good faith, (k) of feeling, (l) (m) of state of body, (n) of negligence, and (o) of knowledge, and (n) (o) and (p) illustrate the explanation. Lord E. 131. When a person is charged with or alleged to have done, some act involving guilty knowledge or intention, or other state of mind, after proof of the physical act, evidence is admissible of his similar acts on other occasions, but only in order to show that such guilty knowledge or intention or state of mind. *R v Gennings*, 18 L J M C 217 = *Cock Cas* 99. See also *R v Rhodes*, (1899) 1 Q. B. 117 where it was held that such evidence was admissible even when such act was subsequent to the transaction, in question if they show a connected or more scheme or system of operation. "The matter may be roughly stated thus: where connected conduct on other occasions is never admissible to prove the act or *res* but is admissible to prove the *mens rea* or other state of mind. The rule applies both to civil and criminal cases. With regard to criminal charges in the case of *R v Lord* (1906) 2 K B 359, *Bray J* summarised the law as follows:—A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under the three heads—(1) where

the prosecution seeks to prove a system or course of conduct, (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, (3) where the prosecution seeks to prove knowledge by the prisoner of some fact." *Coelle Et* 100 With regard to civil cases, *Hales v Kerr*, (1908) 2 K B 601, is instructive. The plaintiff sued a barber in whose shop he alleged he had contracted barber's itch, owing to the defendant's negligence in using dirty materials. Evidence was allowed to be given by two other customers who had contracted such a complaint at the same shop in order to show that the defendant's mode of carrying on the business was dangerous.

This section is wholly inapplicable in a case where the state of mind or feeling of any of the parties is admittedly not a fact in issue or a relevant fact and the guilt or innocence depends on proof of actual facts. *Pritchard v Emperor*, A. I. R., 1928 Lih 382, see also *Golub v Emperor* 86 Ind Cts 970=29 C W N 483=26 Cr L J 906=A. I. R. 1925 Cid 674. When the intention of the accused is a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is admissible as evidence of intention. *Pano M Vaz v Emperor* 83 Ind Cts 889=26 Cr L J 187.

An accused cannot be convicted of an offence with which he is charged simply because he has been guilty of another offence. Therefore when such evidence is offered to prove his commission of the offence on trial evidence of his participation either in act or design in commission or perpetration, in an independent crime cannot be received as substantive evidence of the offence on trial. Evidence however may be given to prove the elements mentioned in section 14 of the Evidence Act, (intention and like matters). *Baharuddin v Emperor*, 18 C L J 578=27 Ind Cts 187=15 Cr L J 43. Where A is charged with assaulting B with intent to ravish evidence that on former occasions A took liberties with B was not admissible. *Ibid*. This section generally deals with evidence of states of mind or body and section 15 provides for the special modes of proving a thing to have been intentional by showing that it formed one of a series of similar occurrences. *Cun Et* 126.

**Principle** Where the question is as to knowledge, intent, motive or any bodily or mental state evidence of other acts done, showing the existence of such knowledge, intent, motive, or bodily or mental state are admissible, even though it involves the proof of other crimes. Evidence admitted under this principle, in its effect, must be carefully confined within the limits for which it is admitted. The commission of one crime has no bearing as tending to prove the commission of another but the commission of a series of crimes of the same nature may have a bearing in showing a guilty knowledge. *McLachlan's Et* §115. In *Reg v Francis* (1874) L R 2 Crown Cts 128, upon indictment of X for obtaining money by false pretences, by representing a ring to be a diamond ring evidence was offered, in order to prove guilty knowledge on X's part that he had shortly before, offered other false articles to other pawn brokers. In admitting the evidence *Lord Coleridge C J* said "It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times dupe of another, but it is less likely he should be so oftener than once and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last and this is amply borne out by authorities." Where the crime charged is receiving stolen goods, the possession of counterfeit money or the like, the knowledge of the accused person becomes one of the material facts in issue and other acts of similar nature are admissible. Thus in *Com v Russel* 156 Mass 196=30 N E 763, *Baker J* said, "The admission of such evidence is necessary, because guilty knowledge is a fact not susceptible of proof by direct evidence and can rarely be shown by explicit admissions, but only by acts and conduct." Similarly in *Reg v Francis*, 43 L J M C 97, *Lord Coleridge C J* said "It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake evidence of the class received must be admissible." See also *R v Bleasdale* 2 C & K. 765, *R v Wogg*, 4 C & P 364, *R v Lloyd* 7 C & P 318 *R v Bholu*, 23 A 124.

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**States of mind, or bodily feeling, how proved.** Facts are either physical or psychological. Physical facts can be perceived by senses whereas the facts which are psychological can only be subject matter of consciousness. These psychological facts are also called internal facts. These are thought and feelings, love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is angry, that he intends to sell an estate, that he knows the meaning of word, that he struck a blow voluntarily and not by accident, each proposition relate to a matter capable of being directly perceived as a noise or a flash of light. The only difference between the two classes of proposition is this. When it is affirmed that a man has a given intention the matter affirmed is one which he, and he only can perceive, when it is affirmed that a man is sitting or standing the matter is one which may be perceived not only by the man himself but by any other person able to see, and favourably situated for the purpose (*Step Intro* 20). Similarly that a man holds certain opinion, has a certain intention acts in good faith, or fraudulently, or uses a particular word in a particular sense or is or was at a specified time conscious of a particular sensation is a fact (*Vide illustration (a) to the definition of Fact in s 3*) "The state of a man's mind is as much a fact as a state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is but if it can be ascertained it is as much a fact as any thing else." *Per Bowen L J in Edington v Fitzmaurice*, 29 Ch D App 483. These facts cannot be perceived by senses. But nevertheless it can be testified by the party himself or can be proved by presumptive evidence. It is the law in *Alabama* in the United States that a person whether a party or not may not testify his own intent however material it may be because he may falsely describe it without possibility of exposure of other witnesses. *Mauch F A-co v Reibelman*, (Ala) 33 So 759. This notion has been everywhere else repudiated, but the repudiation is often put on the ground that such a rule existed when parties are disqualified because a party could not testify to his intent nor to any thing else and that therefore the rule has ceased to exist only by virtue of the removal of that disqualification. Now before the removal, any person other than a competent witness, might testify to his own intent whenever it was material to the cause, and it is an error to suppose that there was any prohibition to such testimony (*Vide Answer of the Judges concerning Foxes Label Act*, 22 How St Tr 296 300, *R v King*, 1 Q B 214 *Greenleaf Ev* 328 (c), *Wigmore* § 581). The propriety of it is therefore by no means due to its removal of parties disqualification, and it is unnecessary to seek for any such justification for its use. When, therefore it is a question as to the intent of an alleged criminal act, or the intent of a transfer by an insolvent or the good faith of a purchaser from an insolvent, or the reliance of a person on false representations or the intent of one having a residence or making a gift, or to any other state of mind, the person as to whom it is predicated may testify to it. *Greenleaf Ev* § 328 (c). It remains to be noted that this sort of testimony, or any other whatever, to the fact of a person's intent or motive, is of course receivable only on the assumption that the intent or motive is a fact permissible to be proved under the substantive law involved in the case. This assumption conditions the admissibility of all evidence and of this sort in particular. Hence if for any reason of substantive law the person's intent or motive is not provable at all it is not provable by such testimony. *Wigmore* § 581. But when a person testifies his own state of mind it deserves very little credit. *Phy Ev* 51 *Whart's* 508.

So far as presumptive or circumstantial evidence is concerned the state of mind of being aware or conscious, having knowledge or belief, etc., may be evidenced either (1) by outward circumstances which would naturally have brought about such knowledge, belief, etc., or (2) by conduct of persons indicating the existence of knowledge, belief etc. *Greenleaf Ev* § 14 p. So far states of mind is evidence by conduct of persons, they fall within the purview of section 8 *supra*. This section is concerned with states of mind as evidenced by outward circumstances. Two other questions arise in this connection, namely (1) whether a person may testify to another's person's intent or state of mind in general, this involves



the principle of the adequacy of the sources of knowledge, (2) whether a person's testimony to another's intent or meaning or state of mind in general excluded by reason of the Opinion Rule. The argument in favour of rejection of such evidence on the first ground is based on the fact that because one person cannot directly see or hear or feel the state of another person's state of mind, hence his testimony is based on conjectural and therefore on inadequate data. "This argument" says *Prof Wigmore* is finical enough, and it proves too much, for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. If they are required and allowed to find such a fact, it is not too much to hear such testimony from a witness who has observed the person exhibiting in his conduct the operation of his mind' *Wigmore* § 661, see also *Insurer of the Judges to the House of Lords, concerning Fox's Libel Act*, 31 Geo III, C 60, 22 How St Tr 300. The law on the subject is thus clearly stated by *Alghnam C J in Delaney v Little*, 4 S & R 303, where he said "It has been argued that the intention of *Charles McCormick*, being confined to his own breast, was not a fact to which the witness could swear. This is a very subtle argument, but I cannot say that I feel the force of it. A man's intentions may be manifested by his words or his actions, and, when known, may be sworn to with as much certainty as any other fact. When a witness undertakes to swear to a thing of that kind, the jury who hear the oath will value it at what it is worth." As regards the second point, i.e., exclusion of such evidence by virtue of Opinion Rule, it must be borne in mind that in ordinary human dealings, the formation and expression of estimates as to another's mental state is constant and necessary. There is no good reason why testimony about it, based on personal observation of the other person's conduct, should not be admissible, so far as the Opinion Rule is concerned, for it is clearly impossible to remember and re-state to the jury all the minute data of conduct and words which have served to convey the impression. Such was the orthodox common law view (vide *Frost's Trial*, 22 How St Tr 484, *Horne Tooke's Trial*, 25 How St Tr 420, *Watson's Trial*, 32 How St Tr 67, *Tundy's Trial* 27 How St Tr 1215, *Earl of Thanet's Trial*, 27 How St Tr 927) *Greeleaf Ev* § 441 H, *Wigmore* § 1963.

So apart from the question whether such evidence is inadmissible by the operation of the Opinion Rule, it is settled that where there is a question whether a person said or did something, the fact that he said or did something of the same sort on different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good faith, malice or other state of mind or of any state of body or bodily feeling the existence of which is in issue or is or is deemed to be relevant to the issue but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner. *Steph Dig Ev* Art 11. The Court can draw its own inference of the existence of the requisite state of mind or bodily feeling where the said bodily or mental state is a material fact in issue or a relevant fact. A statement made by an accused person immediately after the occurrence of the offence is relevant as showing his state of mind, but where that statement is a repetition of what some body else said to the accused the better statement must be proved by direct or indirect evidence of a person who heard it under section 60 of the Evidence Act. *Kakar Singh v Emperor* 81 Ind Cas 717.

**State of mind—Proved by three species of evidential facts.** Three species of evidential facts are available to prove states of mind.

(1) **Conduct** this is the expression in outward behaviour of the quality or condition operating to produce those effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it, nevertheless, the indication is strictly not a concomitant, but a retrospectant one, because the argument is backwards from effect (conduct) to cause (internal condition). Vide *Deputy Legal Remembrancer v Kamana*, 22 C 164 (174), *R v Behance*, 3 W R Cr 23, *R v Rutten* 2 W R Cr 63.

(2) **External facts** (prospectant) pointing forward to the probable coming into existence of the quality, for example, the victim's gold, as pointing for

**S 14** ward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing forward to B's probable receipt of knowledge of it. In using this evidence, we take our stand beforehand and argue that the evidential fact probably give rise to the emotion, knowledge, or intent he proved. The indication is thus prospectant, while that of conduct is retrospectant.

(3) There is also a third sort of fact, having either a prospectant or a retrospectant indication, and not exactly corresponding to either of the preceding sorts, namely, prior or subsequent condition, as showing condition at a given time. Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause mental aberration, (2) circumstances of unsuccessful business domestic troubles, and the like tending to bring on insanity, and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question. So also, to show a husband's desire or motive to get rid of his wife, we may offer (1) his conduct exhibiting such a desire (2) the existence of a paramour, tending to create such a desire and (3) a prior desire, as pointing forward to its continued existence at the time in question. A similar general question presents itself in all evidence of this third sort namely, how far before or after the time in question the survey may extend in considering the fact of prior or subsequent condition. *Wigmore § 190*

**States of mind, knowledge etc.—Importance in civil and criminal cases—** States of mind, knowledge, intention, and the like, are among the most important topics with which judicial enquiries are concerned. In criminal cases they are invariably a main consideration, and in civil cases they are often highly material as for instance, where there is a question of fraud, malicious intention, or negligence. *Cun Ev 120*

**Intention, meaning of** Motive is that which moves or induces a person to act in a certain way. Intention must be distinguished from motive. The mental condition termed 'intention' is manifestation of will power exhibited in action. It determines the nature of an act. Motive is the reason which induces action. It may be dependent on surrounding circumstance, or to causes beyond the control of the actor. Every sane person must have a motive, though it may not be always possible to discover it. So every sane person must have an intention, whether it be relevant or not unless his action is accidental or unintentional. *Donough Cir Ev 102* The distinction between intention and motive is important. A man's motive may be good, but his intention bad. A loaf is stolen. The intention was to steal, and the act therefore criminal, although the motive—to save a starving child—was good. If the motive be bad, it is difficult to conceive that the intention can be good. In a great many instances motive and intention are so closely related, motive being parent of the intention, that it matters little of which we speak. But still it is desirable never to forget that there is a difference, nor in what that difference consists. *Hills Cir Ev 38*

When a man is charged with an offence, he frequently says that he did not intend to commit it, and apparently supposes that the answer, if believed, would be complete. Does he mean that, in doing the act charged against him, he did not intend to commit a crime, or does he mean that he did not intend to do the act which the law declares to be a crime? In the latter case the plea could generally be a good one. In the former case it would always be bad. It would only mean that he had formed a wrong opinion as to the legal aspect of his conduct, or as to the consequences to himself that might flow from it. For instance a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence independent of s 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him and did not believe the gun would carry so far, this if a reasonable belief, would negative the criminal intention necessary under section 299, but would be no answer to a charge under s 304 which involves no intention to injure. If he means that he fired at him, mistaking him for another person whom he had no right to kill, this is a good defence whatever as it is merely a description of the offence defined by s 301. If he means that he fired at him in his house at night, believing him to be a

burglar, this would be a good defence under s 79, as it shows that he has committed no offence. If he means that he fired at him, intending to wound but not intending to kill him, this again would be no defence if the natural result of hitting the man would be to kill him (s 299). To say that he intended to do a particular act, but did not intend that the ordinary consequences should follow from it, is merely to say that he expected that the laws of nature would be suspended in the particular instance for his convenience. *Wigney's Criminal Law* § 9

**Theory of evidencing intent** To prove intent, as a generic notion of criminal volition or wilfulness including the various non innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference the mind applies this rough and instinctive process of reasoning namely that an unusual and abnormal element might perhaps be present in the instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body the immediate inference (i.e., as a probability, perhaps not a certainty) is that B shot at A deliberately, because the chances of an inadvertent shooting on three successive similar occasions are extremely small, or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e. discharge towards the same object, A) excludes the further possibility of such an abnormal cause, and points out the cause as probably a more natural and usual one, i.e. a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes, and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self defence or good faith or innocent mental state and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e. criminal, intent accompanying such an act and the force of each additional instance will vary in each kind of offence according to the probability that the act could be repeated within a limited time and under given circumstances with an innocent intent. *Wigney* § 302. This principle is also recognized by *Colledge C J* in *R v Flawson*, L R 2 C C R 128, where he said 'It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another, but it is less likely he should be so oftener than once and every circumstance which shows a course of acts under a mistake on any one of these occasions strengthens the presumption that he was not on the last.'

It will be seen that the peculiar feature of this process of proof is that the act itself is assumed to be done, either because (as usually) it is conceded or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. This explains what is a marked feature in the rulings of the Courts, namely, a disinclination to insist on any feature of common purpose or general scheme as a necessary requirement for the other acts evidentially used. It is not here necessary to look for a general scheme or to discover a united system in all the acts, the attempt is merely to discover the intent accompanying the act

**S 14** in question, and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful in reducing the possibility that the act in question was done with innocent intent *wigmore* § 302

**Intention, mens rea, criminal knowledge, etc** Guilty knowledge and intention are usually associated with one another in every criminal act. They together constitute the *mens rea* which is supposed to underlie every offence. The doctrine of *mens rea* is a very ancient one. It is said to have originated with Lord Cole who enunciated the maxim *actus non facit reum nisi mens sit rea* (The act itself does not make a man guilty, unless his intention were so). The intent and the act must both concur to constitute the crime) *Donough* Et 101. When the maxim originated criminal law practically dealt with common law offences, none of which were defined. The law gave them certain names, such as treason, murder, burglary, larceny, or rape and left any person who was interested in the matters to find out for himself what these terms meant. To do this he had to resort to the explanations of text writers and the decisions of judges. Then he found that the crime consisted, not merely in doing a particular act such as killing a man or carrying away his purse but in doing the act with a particular knowledge or purpose. This superadded mental state was generalized by the terms *mens rea*, and the assertion that no one was a criminal unless he had the *mens rea*, really came to this that nothing amounted to a crime which did not include all its necessary ingredients. *Steph* Cr L 90 per *Stephen J* in *Cundy v Le Corg*, 13 Q B D 207, *Reg v Tolson*, 23 Q B D at p 187. Of course the mental state which had to be established to make out a crime varied with the crime itself. The maxim that every criminal must have a *mens rea* was generally true, but always valueless. The real question was whether in each case the accused had the particular *mens rea* which proved him to be a criminal. Under the Indian Penal Code such a maxim is wholly out of place. Every offence is defined and the definition states not only what accused must have done but the state of mind with regard to the act when he was doing it. It must have been done, knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended. *Mayne's Criminal Law* § § 8, 9. This is thus stated by *Wright J* in *Sherry v De Rutzen*, L R (1900) 1 Q B 918. "There is a presumption that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act is an essential ingredient in every offence, but that presumption is liable to be displaced either by the word of the Statute creating the offence or by the subject matter with which it deals and both must be considered."

**Intention—Method of proving** The criminal law merely defines the criminal state of mind essential for each respective crime. The idea of criminal intent, then usually implies of deliberateness, knowledge, object, and the like, its absence is often indicated by the ideas of mistake, good faith, reasonable belief, and the like. So far as evidence of it is concerned the evidence of emotion, of knowledge, or of design has a bearing only so far as emotion or knowledge, or design enter by the criminal law as constituents of criminal intent. In other words, there is no special evidence of intent (with the exception to be mentioned) apart from evidence of emotion, of knowledge, or of design. If those elements affect criminal intent (as they usually do) then whatever evidence would serve to prove those elements would be receivable, but no special or peculiar principle of evidence would be involved. *Wigmore* § 242. In illustration (e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill will on the part of A towards B is relevant, as proving a criminal intention to harm B's reputation by the particular publication in question. Here previous ill feeling shows motive of the publication. See also illustration (j). So also where the charge is of breaking and entering into a house with intent to steal, obviously intent there signifies "design or plan," and what ever would otherwise be receivable to show design would also be here receivable—in particular, the conduct throwing light on the design.

of the person's entrance. This is further illustrated by illustration (1). So on a charge of uttering counterfeit notes, knowing them to be spurious, knowledge is an ingredient of the criminal intent, and whatever evidence would be otherwise suitable to show knowledge would here be appropriate. In short, intent as a separate proposition for proof does not commonly exist. Knowledge, emotion, and design are distinct from each other, and have more or less distinct modes of proof. But as intent is constituted of one or more of these as ingredients, it forms no separate title of proof, for each of the ingredients is to be proved in the way proper to itself. *Wigmore* § 242. There is, however, one element in intent which is distinct from any of those above, and may thus have to be shown by different evidence. This is the element of deliberateness or wilfulness,—the negative of inadvertence, accident. (193 Section 15) The accused in a case of forgery and conspiracy had previously given evidence in a Court as to the genuineness of the document. Held that though the statement could not be admitted as confession, the jury if independently satisfied that the documents are not genuine the evidence is to be regarded as having high evidentiary value upon the question of intention whether or not they are in conspiracy. *Ambar Ali v Emperor* A I R 1929 Cal 539.

**Intention—Presumption from act.** Every person is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff, the law will assume that the defendant by publishing it intended to produce the injury which it was calculated to effect. *Have v Wilson*, 9 B & C 643. So it often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire or the rescue of the property or persons within it. So if one was to be found in the night time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it. *State v Tuler* 69 Ia 718=27 N W 485. So in *R v Casement* (Not Tr) Lord Reading C J expressed the view in almost identical terms. He said "A man's intention is to be gathered from his acts. A man must be held to have intended the natural and reasonable consequences of his act. That is one of the fundamental principles of our law, and after all, it is only plain common sense. Where a man does an act which would appear reasonably to involve certain consequences, you are entitled to assume that he intended those consequences." *Donough Cir Ev* 105, see also *Sella Muthu v Palla Muthu*, 35 M 186, *Per Cumming J in Hazrat Gul Khan v The King-Emperor*, 32 C W N 315. But in the same case *Mukherjee J* took a different view. It is not always quite easy to apply the rule of English law that a man must be presumed to intend the natural or probable consequences of his act to the Indian criminal law in view of the distinction that the Indian Penal Code makes between intention and knowledge. *Per Mukherjee J in Ibid*.

The argument is based purely on the doctrine of chance, and it is the mere repetition of instances and not their system or scheme that satisfy the logical demand. Yet, in order to satisfy this demand it is at least necessary that prior acts should be similar. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is in the similarity of the instance. So, where the intent of an erroneous addition in a book keeper's accounts is in issue the erroneous addition of a bill rendered to a former employer ten years before would have significance because it is still within the limits of ordinary casual error that such things should occur at intervals, but several other erroneous additions in the book keeper's own favour in the same year and in the same book of accounts go to exclude the explanation of casual error and leave deliberate intent as the more probable explanation. In short there must be a similarity in the various instances in order to give them probative value,—as indeed the general logical canon requires.

It is this requirement of similarity which leaves so much room for difference of opinion and accounts for the bewildering variances of rulings in the different

**S 14** jurisdictions and even in the same jurisdiction and in the case of the same offence. Some judges incline to treat the judicial test of probative value as identical with the common sense test, and to admit such instances as bear a similarity liberally interpreted by the standard of every day reasoning. Other judges set their faces firmly against every instance which is not in all fours with the offence in issue regardless of the consideration that justice consists quite as much in protecting the public against evil doers as in showing mercy to those whose guilt has been more or less skilfully concealed. It is hopeless to attempt to reconcile the precedents under the various heads, for too much depends on the tendency of the Court in dealing with a flexible principle. *Wigmore* § 302

**Anonymous Intent.** It will be seen that to prove ~~the~~ the strength of foregoing kind of inference does not rest exclusively on a given person's connection with the prior injurious transactions. It is possible to negative accident or inadvertence and to infer deliberate human intent, without forming any conclusion as to the personality of the doer. Thus, if a cellar window is found broken and the pieces falling inside, one morning after a high wind, he may well assume the probability that the force of the wind blew the glass in, but if on the next morning and the next he again finds a window broken in the same way though no high wind prevailed the night before he gives up the hypothesis of the force of the wind as the explanation, and concludes that a deliberate human effort was the highly probable cause of the breaking, although he can form no notion whatever of the personality of the doer. It is thus clear that innocent intent—accident, inadvertence or the like—may be negatived by anonymous instances of the previous occurrence of the same or a similar thing. After assuming or proving the accused's connection with the deed charged, then to negative innocent intent, resort is had to the anonymous instances, and they may have equal force for that purpose, whether they are connected with the defendant or not. This mode of proof is not infrequently resorted to. The only limitation upon this mode of proof is that the defendant's doing of the act in issue must be shown by other evidence at some stage of the trial, and the anonymous instances should not be received until the trial Court is satisfied with the amount of evidence introduced or pleaded for showing that connection. *Wigmore* § 303

**Theory of Evidencing Design or System.** When the very doing of the act charged is still to be proved one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts it is obvious that something more is required than that mere similarity, which suffices for evidencing intent. The object here is not merely to negative an innocent intent at the time of the act charged but to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its term is to evidence (by probability) the doing of the act designed. The added element, then, multiplies not merely a similarity in the results but such a concurrence of circumstances that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. Thus, where the act of passing counterfeit money is conceded, and the intent done is in issue, the fact of two previous utterances in the same month might well tend to negative innocent intent, but where the very act of uttering is in dispute—where the defendant claims that his identity has been mistaken—and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance the fact of two previous utterances may be in itself of trifling, and in adequate significance. In *Indes & Insurance Co L R 1 C P D 91, 100, Lordley M R* said: "I agree, that—"

order to prove that A has committed a fraud on B it is neither sufficient nor even relevant to prove that A committed fraud upon C D and E. Stopping there, I admit that proposition. But let it be shown that the fraud on B is one of a class of other transactions having *common features*, then I disagree altogether with that proposition. The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being a false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shown the plaintiff's case is established.

It will be seen that the difference between requiring similarity, for acts negating innocent intent, and requiring common features indicating common design for acts showing design, is a difference of degree rather than of kind, for to be similar involves having common features, and to have common features is merely to have a high degree of similarity. This is another reason why the precedents are so difficult to reconcile, for the Courts have not always perceived that there are in truth these two distinct purposes and therefore two distinct tests for such evidence. Nevertheless the distinction is a real one. It is to be seen in concrete illustrations, even though in abstract definition it is not easy to formulate. The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for something that will negate innocent intent, and the mere prior occurrence of an act, similar in its gross features—i.e. the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer—may suffice for that purpose. But when the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan is their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test. An occasional error in judicial rulings is to require the higher conditions of the present test where only the preceding test (for intent) is needed. Two necessary limitations are to be observed in the use of this class of evidence of design. (1) Anonymous acts are not available as they are for evidencing intent for the whole purpose of the evidence is to fix a design upon the accused as making it likely that he carried it out, and thus that it was he who did the act charged. (2) The object being to argue to the act charged from a design or plan to do it, the prior acts are received to show that system since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments of it would in effect violate the principle and remain in evidence merely as affecting the accused's character, the trial Court must pass upon the offer before hand, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury, and must, if the offer is sanctioned, require an assurance that it will be forthcoming in its entirety. *Wigmore § 304*

**Knowledge, meaning of.** Knowledge signifies a state of being aware. The notions of knowledge, belief, and consciousness are not precisely identical, but they have a common feature, which is the typical one so far as concerns the modes of evidencing these mental states. That feature is most nearly expressed by the term *consciousness*, i.e. presence in the mind of an impression as to a given fact. Thus a person's knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly, his consciousness of guilt may be inferred from his conduct in fleeing from arrest, his belief in a friend's innocence of embezzlement may be inferred from his conduct in trusting him with money. The respective terms are by usage more usually associated with different relations in which this impression of mind arises, the term belief is used commonly when the impression is thought of as bearing on present or future action, consciousness when thought of as bearing on past action, and knowledge when thought of in connection with the reality of external objects. *Wigmore § 300*

**External circumstances as evidencing knowledge, belief or consciousness.** There are, in a broad analysis, four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given mental impression (i.e. obtained knowledge, formed a belief, or was made conscious)

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- (1) The direct exposure of the fact to his sense of sight, hearing, or the like,
- (2) The express making of a communication to him,
- (3) The reputation in the community on the subject, is leading probably to an express communication,
- (4) The intrinsic quality of the occurrence, is leading either to actual perception by his senses or to express communication.

Throughout all the four modes there run two considerations, affecting some modes more strongly than others (a) the probability that the person received an impression of any fact at all, and (b) the probability that from the particular occurrence he would gain an impression as to the specific fact in question. Doubt may arise upon either of the points, and the various modes above are stronger or weaker in one or the other of these considerations. The four modes may now be examined more in detail.

(1) *Direct exposure of the fact to the senses.* Here there is seldom any doubt as to the element (b) above: the question usually is whether the fact in question was brought within the range of the senses so as probably to be perceived at all. The typical case is the possession of a document. If a deed or a notice was laid on A's desk, the probability (greater or less according to circumstances) is that A read it. But actual possession by A is not necessary: the posting of a placard in a street through which A habitually passes is some evidence that A ultimately came to see and understand its contents. Occasionally the element (b) above is the emphatic one, for example where A is charged with selling liquor to B a minor: the appearance of B is indicating A's knowledge of B's minority or his belief in B's maturity was the fact brought before A, and the question is whether it would probably have informed him as to the further specific fact namely, B's age.

(2) *Express communication.* Little difficulty can arise here. There may be a question as to whether the communication came from a source which the person was fairly bound to consider authentic, but this would be a question of substantive law involving the elements of good faith, constructive notice, or the like. There may also be a question as to the interpretation of the communication,—whether its sense could properly be taken as of one sort or another, but this also is a question of substantive law.

(3) *Reputation.* Here the element (a) is the important one. The probative considerations are that, when a matter is so much talked of in a community that a reputation arises about it, a member of that community, in his ordinary intercourse with others will come to hear it mentioned i.e. by express communication, and the question is whether the probability is that there would be such a general discussion and whether the person is likely to have learned of that discussion. The first part of this inquiry—whether a reputation can arise—depends on the nature of the matter: the second part depends on the situation of the person in question.

(4) *Quality of the occurrence,* in general. Sundry cases here combine the considerations of all the preceding modes as well as of both the elements (a) and (b) above. Thus a former accident to apparatus owned by A may indicate that A learned of the defect in the apparatus either because he probably observed the former accident or because he probably was told of it by his subordinate having charge of the apparatus, or because complaint was probably made to him, and not only is the probability (a) of his having learned of the former accident thus involved but also the probability (b) that the former accident would have revealed to him, by itself the existence of the defect. So, also, a former act of violence by the deceased in order to have any value to show the slayer's ground for apprehension of an attack must (a) not only have been communicated to the slayer, (b) but also must be such as would create a belief in the deceased's probable aggression. *Wigmore* § 245.

**Proof of knowledge from other instances.** Where the doing of the act involved is not disputed a knowledge existing at the time of the act may be in dispute. Thus proof of knowledge becomes absolutely necessary for certain offences—such as uttering of forged or counterfeit paper and the possession of stolen goods, while it is merely an element to be proved in other offences.



such as robbery, rape and homicide. In resorting to former offences or other similar acts to show knowledge, it is sufficient to invoke the general principles of proving knowledge, as already set forth *Wignall* § 301. In *R v Dosset* 2 C & K 307, *Maule J* said "If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered to another person who had died." In *R v Cooper*, 3 Cox Cr 547, which was a case of false charge of indecent conduct towards S with the intent of extorting money, evidence of a previous obtaining of money by such means was offered. *Cresswell J* observed "If a prisoner is proved to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case is it not a fair inference to make to the jury that his object was to obtain money here?" *Sargeant Ballantine* for the accused said in reply "That does not show that he had an intention to obtain money at this particular time. Suppose the charge was breaking into a house with intent to steal, the fact of his having broken into the house before would show that he knew how the offence was to be accomplished but it could not be adduced to show what his intention was on the second occasion, and this shows the difference between proof of knowledge and that of intention." *Cresswell J* "The question is whether on this occasion he did an act with the design of effecting a certain object. One step in the proof would be to show that he would be likely to know that a certain result would follow and if it can be proved out of his own mouth that he was aware that such a result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he attempted to procure abortion, the same medicine might be administered with that intention or without it if it could be shown that he had often given that medicine before and that he knew that abortion had always followed, surely that would be evidence against him. Or if on a charge of wounding a certain instrument had been used by the prisoner with a dangerous result, would not that be admissible to show that he knew the consequences of using it?"

**Intention and Drunkenness** Involuntary drunkenness, by operation of s 85 of the Penal Code, places a man exactly in the same position as if his aberration of intellect arose from any of the usual forms of unsoundness of mind. But voluntary drunkenness is itself no defence. The Penal Code requires it to be assumed that a man voluntarily drunk had the same knowledge as he would have had if he had been intoxicated. (*Vide ss 85 and 86 of the Penal Code, Mayne's Criminal Law* § 200) In *R v Doherty* 16 Cox 306 *Stephen J* in his address to the Jury said "The general rule as to intention is that a man intends the natural consequences of his act. It is almost trivial for me to observe that a man is not excused from crime by reason of his drunkenness. If it were so, you might as well shut up the Criminal Courts because drink is the occasion of a large proportion of the crime which is committed but, although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it, is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

According to section 85 of the Indian Penal Code drunkenness if it is voluntary is no excuse. "So voluntary drunkenness does not, of course, prevent a man's offence, but it is generally taken into account as throwing light on the question of intention." *Per Glover J* in *R v Lamm Sahai* (1861) W R Gap No 24. This section was in accordance with the English law as obtained at that time. In *R v Monkhouse* 1 Cox C C 55 *Coleridge J* said "Drunkenness is ordinarily neither a defence nor excuse for a crime and where it is available as a partial answer to a charge it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable unless the intoxication was such as to prevent him from restraining himself from committing the act in question or to take away from him the power of forming any specific intention. See also *L v Mead* 7 C & P 297 *per Alderson B*, *R v Thomas*, C S P 817, *per Parke B*.

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Therefore, where from a given state of facts the law assumes a particular knowledge, or that knowledge is a matter of inference, intoxication cannot be set up. For instance, if a man shoots another he would not be allowed to say that he was drunk, and did not know that he held a pistol in his hand or that the effect of discharging it would be to cause death. So if he killed another under circumstances which, had he been sober, could have created no alarm in his mind, he would not be allowed to plead that through intoxication he imagined that his life was in danger. But where it is incumbent on the prosecution to make out specific knowledge of a particular fact, and where the circumstances raise no necessary inference of it, the result may be different. For instance, if a man is charged with passing off a counterfeit rupee, knowing it to be such, the knowledge must be made out by the prosecution, and is not necessarily be assumed, though it might be inferred, from the mere fact of passing the coin. Suppose the fact to be established that the man had several good rupees in his pocket but knew also that he had one bad rupee, still it would have to be made out that he knew he was passing the bad rupee, not merely that he had the means of knowing, if he had taken better precautions. It would be clearly inadmissible to show that he was in a hurry to catch a train, and therefore did not examine the coin, and I can see no reason why evidence of his intoxication should not be admissible for the purpose. Hurry is a state of mind voluntarily brought about just as much as drunkenness. *Mayne's Criminal Law* § 290.

In England recently the liability of a person for voluntary intoxications has undergone some change. "The legal aspect of intemperance are very involved. Till recently it was generally held that drink was no excuse for crime. This doctrine must now, however, be modified, and it is held that total deprivation of self control, or at all events delusions induced by excess, as in *delirium tremens*, renders an individual irresponsible for his actions." *Tay Med Jur* 6th Ed p 897, see also *R v Davies*, 14 Cox Cr C 303. *R v Meade* (1909) 1 K B 395 = 78 L J K. B 476, the Court said "It is not expedient to confer upon voluntary drunkenness a wider immunity than the partial immunity it has enjoyed since 1819. The presumption that everyone intends the natural consequences of his act, may be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink that he was incapable of knowing that what he was doing was dangerous."

If this be proved the presumption that he intended to do grievous bodily harm may be rebutted. The language of the Judge at the trial "did not vary from the true rule and it did not imply that short of insanity drunkenness could not reduce murder to manslaughter." *Ibid*. So "deliberate acts neither done by a sober or a drunken man, constitute murder, not manslaughter." *R v Scholey*, 1909 cited in *Roscoe Cr Ev* 1151. It is for the jury whether defendant was so drunk as to be unable to form an intention. *R v Moubrey* 8 Cr A R 98. Nothing but inability to distinguish between right and wrong is a defence to murder. *R v Galbraith*, 8 Cr A R 101 (1912.) *Roscoe Cr Ev* 1151.

In England the law was finally settled by the House of Lords in *R v Beard*, 14 Cr A R 159 (1920). The following rule was laid down in that case—

Immunity, whether produced by intoxication or otherwise, is a defence to a criminal charge.

When a specific intent is a necessary ingredient of the offence charged the jury may take into consideration evidence going to show that the defendant was so intoxicated as to be unable to form such intent.

Evidence of intoxication falling short of such incapacity, though it may establish a more ready tendency to some violent passion (than if defendant were sober), does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts." *Roscoe Cr Ev* 1152.

**Dealer with a Partnership—Knowledge of dissolution.** The modes available for showing notice of a dissolution of partnership as against one who has dealt with its members after dissolution are three in number, namely (1) exposure to observation i.e. publication where the person would be likely to see it (2) express communication and (3) reputation or notoriety. So far as the

first kind of notion is concerned the only question which should be considered in regard to it is whether the newspaper containing the notice of dissolution must be shown to have been subscribed to or taken by the person to be notified, but this question is rarely used as one of admissibility, and is generally treated as one either of constructive notice or of the sufficiency of the evidence on all the facts of the case. In *Gordfrey v Macauley*, Peak. 155, Lord Ellenborough C J said "The Gazette was not (conclusive) evidence of notice any more than any other newspaper, but in all cases, if published in the neighbourhood of a person it ought to be left to the jury whether he had notice of it or not." Similarly in *Leson v Holt*, 1 Stark 186 the same learned judge said "I shall receive evidence of the advertisement in the Gazette, but that unless it were proved that the party was in the habit of reading the Gazette the evidence would be of little avail. The advertisement in the *Times* was not admissible at all without proof that it was taken by the party. The first instance in which such evidence was received was a case where a person inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence because it was probable that the party had seen it since he took in the paper and the advertisement related to his business. See also *Jenkins v Bliard*, 1 Stark. 418, 420, *Munn v Biker* 2 Stark 255, *Rouley v Horne*, 3 Bing 2, *Hart v Alexander* 7 C & P 746, 749, 751, 753. An express communication raises no evidential question. A reputation or notoriety of dissolution serves to evidence knowledge. Because it is based upon probability that the plaintiff would be likely to know a fact of which no one else in the neighbourhood seemed to be ignorant. *Humes v O'Bryan* 74 Ala 81. But here the question tends to become one of constructive notice or ostensible partnership and thus of substantial law. *Wigmore* § 255.

**Prosecution without probable cause** Where in an action for malicious prosecution or defamation or for false arrest the issue arises whether the prosecutor had reasonable grounds and acted in good faith, a bad reputation of a plaintiff is a circumstance bearing on this state of mind, and is admissible. *Vide, Fabrigas v Mostyn* 20 How St Tr 94. *Rodriguez v Tadmire*, 2 Esp 721, *Downing v Litcher*, 2 Mo & Rob 374, *Wigmore* § 258.

**Knowledge—Presumption of—from other sundry facts** The question is whether A at the time of committing an act of bankruptcy, knew that he was insolvent. Letters found in his possession after the act of bankruptcy, but bearing post mark before it, and containing refusals to lend him money are admissible (after the fact of his insolvency has been proved independently) to show his knowledge of the matters referred to but not the truth of the facts. *Vacher v Coels* M & M 353. *Thomas v Corniel*, 4 M & W 267, *Phip Ev* 68. Execution of a document will imply knowledge of its contents. *In re Cooper*, 20 Ch D 611. *Phip Ev* 4th Ed 127. Knowledge of the contents of a document will be implied where it is a party's duty to know. *Halmari's Case*, L R 9 Ch D 329, *Phip Ev* 4th Ed 128. On a question whether a captain of a ship knew the blockade of a port a notification in the gazette to the effect that it was blockaded was held to be relevant. *Harrat v Wise*, 9 B & C 712, *Step Dig* 90. From the attestation of a document by a witness, knowledge of the contents of the document on his part cannot be presumed. *Salamat v Budh* 1 A 306. *Bonga v Jagat*, 44 C 186 (P C). 37 A 300, *Ram Chunder v Haridas* 9 C 463.

A person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abtention from an enquiry or search which he ought to have made, or gross negligence he would have known it, or when information of the fact is given to or obtained by, his agent under the circumstances in the Indian Contract Act, 1872 s 229. *Vide* s 3 of the Transfer of Property Act, IV of 1882, see also s 3 of the Indian Trusts Act II of 1882. This definition correctly codifies the law as to notice which existed before the passing of the Act. *Churaman v Balli* 9 A 599. Constructive notice may be defined to be knowledge which the Court imputes to a person from the circumstances of the case upon a legal presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must exist, though it may not have been

**S 14** formally communicated *Hewitt v Looxmore* 9 Hare 149, *Gour T P* 1st 2nd Ed p 59 According to section 229 of the Contract Act, a notice to an agent is a notice to the principal According to English law this kind of notice is termed imputed notice *Kettlewell v Watson* 21 Ch D 685 (724)

Whatever puts a party on enquiry, amounts in law to notice, provided the enquiry becomes a duty and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding Wherever the facts put a party on enquiry, constructive notice will be imputed to him if he negligently abstains from enquiry for the purpose of avoiding notice But where a party could have learnt the facts by enquiry he is not prejudiced because he did not inquire *Radha v Kalpataru* 17 C L J 209, see also *Ohlson v Hinton*, (1899) 2 Ch 264 *Beruel v Fince* 1905 1 Ch 632, *Agia Bani v Barry*, L R 7 H L 135 If a person is in possession, it may be sufficient to put one dealing with the property, on enquiry as to the nature and extent of his interest *Barnhart v Greenshields*, 9 Moo P C 18 *Manchary v Kongsooo* 6 B H C R 59, *Haleem v Beejoy*, 22 W R 8, *Jugal Kishore v Kartie*, 21 C 116 *Bhukhu v Udit*, 25 A 366, *Kondiba v Nana* 31 A 138

There is some conflict of opinions as to whether registration is sufficient notice According to the Calcutta High Court mere registration does not amount to notice *Bunuri v Ramjee* 7 C W N 11, *Monmaha v Troylloch*, 2 C W N 750 The same view is taken by Sir Arthur Collins and Mr Justice Hindeley of the Madras High Court in *Shan Mann Mull v Madras Building Co*, 15 M 268 According to Bombay and Allahabad High Courts registration is sufficient notice *Dundaya v Chenbasapa*, 9 B 427, *Chintaman v Harichandra* 14 B 506, 16 Ind Cas 102=9 A L J 759 But now the question has been set at rest by the decision of the Privy Council in *Tilakdhar v Khedam pal*, 25 C W N 49=48 C 1 P C So notice according to that case cannot in all cases be imputed from the mere fact of registration of a document Whether registration is or is not notice in itself depends upon the facts and circumstances of each case, upon the degree of care and caution which an ordinarily prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act *Ibid*

**Knowledge—observation, opportunity to observe** It is obviously impossible to speak with accuracy of a witness' knowledge as that which the principles of testimony require When a thing is known to be it is, and that would be the end of inquiry A witness cannot be assumed beforehand, by the law to know things, the most it can assume is that he thinks he knows Accordingly, the rules upon the subject in hand are all concerned, not directly with the witness' knowledge but with the opportunity of observing and his actual observation The practical tests, then and the detailed rules, are in strictness concerned with observation and not with knowledge *Hignore* § 63

**Good faith**—According to the General Clauses Act, (X of 1897) a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not [Rule 3 (20)] Facts apparently collateral may be proved if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue These instances occur most frequently in cases of assignments for the benefit of creditors the good faith of the holder of a bill or note and of vendors and purchasers Thus in an action for fraudulent representations as to the solvency of a person, the general reputation as to the solvency of such person is at the time the representations were made *Ibid* illustration (f) *Sheehy v Bumpstead* 1 Hu L & C 338 Here the gist of the offence is fraud *Ibid* *Freeman*, 2 Smith L C 71 Bonafides may always be given in evidence as a defence, necessarily for where there is bonafides there cannot be any fraudulent intent *Shoebury v Blomt*, 2 M & G 475 *Jewlings v Bill* 1 C B 91 The illustration (f) is based on the case of *Sheehy v Bumpstead* 2 H L 193=32 L J Lx 271 In that case which was in action brought against the defendant for false representation as to the truthworthiness of the plaintiff as part of his case showed that the defendant at about the time of the representation had bought goods from W at 25 per cent under cost price, the plaintiff

defendant is allowed to ask his shopman (when he was called to explain the last mentioned transaction) and four other trade-men of the town where W carried on business "Was W, at the time of the representation as to his character, trust worthy to your belief?" *Coelburn C J* in admitting such evidence said

With regard to the question put to the other witnesses respecting the general reputation of W for trustworthiness as a tradesman, I think it also admissible. It was important to ascertain the state of mind of the defendant at the time he made the representation complained of, and that could only be shown by inference. A plaintiff may not be able to bring home to the defendant, by direct and positive evidence a knowledge of the falsehood of his representation, the plaintiff may, however, prove certain facts which necessarily lead to that inference. Now suppose the plaintiff had called every trade-man in the town to say not only that W was insolvent but that his insolvency was notorious would it not have been fair and obvious remark to the jury that the defendant must have known what was the common knowledge of every other trade-man? On the other hand if, after the plaintiff has established a *prima facie* case against the defendant the latter calls a number of trade-men who have had dealings with W, and they say that at the time the defendant made the representation they believed that W was perfectly solvent, is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of trade-men in the neighbourhood was shared by the defendant and that in making the representation he acted in good faith?"

*Nort Et 136, Woodroffe Et 193* Illustrations (g) and (h) are also examples of good faith. Illustration (g) is based on the case of *Gerish v. Charter* 1 Com B 13. In that case *Maule J* observed "The evidence was material and was properly admitted. It intended to show that the defendant was not seeking to evade payments of goods ordered for his benefit, but that he had actually paid the person with whom done he had contracted. It showed that the defendant conducted himself like a party who was dealing with C as a principal and not as an agent." *Woodroffe Et 193*. And in cases of assignments for the benefit of creditors a deed apparently valid may be attacked for circumstances surrounding the making of it. The good faith which is necessary to support it is then a vital part of the proof, to rebut the presumption of fraud. *Deus v. Cornish* 20 Ark 332. Illustration (h) is based on the leading case, *R. v. Thurborn*, 1 Den Cr C R 387. In that case *Purle B* said "The rule of law on this subject seems to be that if a man find goods that have been actually lost, or are reasonably supposed by law to have been lost and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in other appear only after examination. It would probably be presumed, that the later would examine the chattel, as a honest man ought to do, at the time of taking it and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of *tanquam suum*. The mere taking it up to look at it would not be a taking possession of the chattel." In this connection it must be borne in mind that the definition of 'good faith' as given in the Penal Code runs as follows "Nothing is said to be done or believed in 'good faith', which is done or believed without due care and attention."

In cases of homicide, proof is allowed of threats made by the deceased against the accused and communicated to him for the purpose of showing that he had reasonable ground to fear violence and to show that he acted in self defence. *R. v. Hopkins* 10 Cox Cr 229. In *Allison v. United States* 160 U S 203 Chief Justice Fuller said "Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question

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whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause of apprehension of danger and reason for promptness to repel attack, but they could not have been admitted on a record such as this, if offered by the prosecution as tending to show spite, ill will, or grudge on the part of the person threatened, nor could they being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction. The logical inference was that these threats excited apprehension, and another and inconsistent inference could not be arbitrarily substituted. The same view is taken by *Long C J* in *Thomason v Territory*, 4 N M 150, a New Mexico case where he said "If there is even slight evidence to indicate that the act of killing was done under a present reasonable apprehension to himself of great bodily harm prior threats should not be excluded." Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner towards the deceased when homicide occurred, uncommunicated threats are evidence of the mental attitude of the deceased toward the prisoner. *State v Evans* 33 W Va 417. When the good faith of a party is in issue, the proof is not confined to circumstances from which such good faith may be inferred, but the witness may state directly that he acted in good faith. *Snour v Payne* 114 Mass 520. But a man's own assertion of what he believed or recollection of what he thinks he believed at a certain time, is worth very little without some kind of confirmation from external conditions. *Derry v Peak*, 14 App Cas 337. In each case good faith as defined by the Indian Penal Code should be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. *Bhaurao v Mulji*, 12 B 377 (393), *Emperor v Abdul*, 31 B 293 (298), *Arfan Ali v Emperor*, 44 C 66, *Davey v Corey*, (1901) A C 477.

In a case where an accused is charged with murder, he can assert that he has committed the crime in self defence. In such a case the state of his mind at the time of the killing becomes a material fact. An important element in determining his justification is his belief in an impending attack by the deceased. So reasonable fear of such an attack repels the conclusion of malice. And the character of the deceased for violence has much to do in determining the reasonableness or unreasonableness of the fear under which the accused claims to have acted. So to prove good faith or want of malice evidence can be given that the deceased was a reckless and overbearing bully and was fatally bent on mischief. *Nomoe v State*, 5 Ga 137, *Franklin v State*, 29 Ala 17, *Harbuck v State* 43 Tex 250.

**Negligence whether proved by habit.** Negligence is in one aspect, the not doing of a particular act, but in another and more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have accompanied it. There is no reason why such a habit should not be used as evidential—either a habit of negligent action or a habit of careful action. *Higmore* § 97. In *State v M & L Railroad*, 77 N H 528 (332), the indictment was for negligently running over a person at a crossing. One of the issues was whether the bell had been rung and the whistle sounded. *Servant C J* in receiving the evidence that the same train run by the same engineer and fireman, had some times passed the crossing during the preceding year without those precautions, observed. It would seem to be axiomatic that a man likely to do or not to do a thing or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one, it cannot apply to acts that are done intentionally, wilfully or maliciously, because such acts are done with a specific object in view and they are performed, not by force of habit, but with a definite purpose. But when the question is, did these servants of the road without any intention whatever and through mere negligence or carelessness, omit to give these signals on that occasion, we think the enquiry was properly made.

as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible,—not as evidence of character, nor is evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity and had thus become habitually negligent in that regard." As regards the admissibility of this kind of evidence *Prof Wigmore* says: "The real difficulty here seems to be two. Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not predicating a careless disposition, rather than a genuine habit, and then are we not violating the rule against character in civil cases in employing such evidence? These doubts serve to explain the precedents that exclude such evidence, but the doubts are not well founded and that such evidence is often of probative value and is not attended by the inconveniences of character evidence." *Wigmore* § 97. Such evidence is generally received under the Workmen's Compensation Act, where evidence as to the habits or practice of the deceased or even of his class are admitted both in favour of the applicant and against him or her. *Joy v Phillips Mills & Co*, (1916) 1 K B 849.

If negligence can be inferred from repair of machine, high way or the like after an injury. The fact that the owner just after corporal injury improves the condition of the machine, high way etc is often offered as a piece of evidence which would indicate a belief on his part that the injury was caused by his negligence. But this assumption is not tenable. Injuries are often caused by reason of inevitable accident, and also by reason of contributory negligence of the injured person. To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been capable of causing such an injury, but indicates nothing more and is equally consistent with a belief in injury by mere accident or by contributory negligence, as well as by the owner's negligence. Mere capacity of a place or thing to cause injury is not the fact that constitutes a liability for the owner, it must be a capacity which would have been known to an owner using reasonable diligence and foresight, and capacity to injure persons taking reasonable care in its use. *Wigmore* § 283. In *Hart v A Co*, 21 L T R N S 263 *Bramwell B* said:

"People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." Similarly, in *Beever v Hanson*, 20, L J Notes of cases 132, *Coleridge CJ* said: "Now a perfectly humane man naturally makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against it being put forward as evidence of negligence. A place may be left for a hundred years unfenced when at last some one falls down it, the owner like a sensible and humane man, then puts up a fence, and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

**Ill will, malice, etc.** The term ill will as used in the Act is not the exact equivalent of the term of malice, for malice as used in the English law implies the criminal intention which is presumed to underlie in every criminal offence. In a case of defamation malice is inferred from the defamatory character of the libel. If for any reason this presumption is rebutted it becomes necessary for the person seeking redress to show actual malice. In *Hebditch v McIlwaine*, L R (1894) 2 Q B p 58 *Lord Esher* said: "It is for the defendant to prove that the occasion was privileged. If the defendant does so the burden of showing actual malice is cast upon the plaintiff, but unless the defendant does so the plaintiff is not called upon to prove actual malice." By the ex-





In *Bond v. Douglas*, 7 C & P 627, *Ibinger L C B* admitted evidence of other libels published of the plaintiff on the same subject within a few days after wards as showing the *animus*, see also *Webb v. Smith* 4 Bing N C 379, *Barrell v. Collins*, 1 M & Gr 807. But subsequent libels are not admissible where *animus* is not equivocal. *Stuart v. Lovell* 2 Stark 93 see also *Pearce v. Ombry*, 1 Moo & Rob 455. But where it shows *animus* it is admissible. *Chubley v. Westby*, 6 C & P 136. But evidence of subsequent utterances of the same slander is only admissible, and not of any other actionable words. *Defries v. Davies*, 7 C & P 112. In some cases other slanders to the same effect was rejected on the ground that "the damages in this case may be increased by the words, and yet this record be no evidence in a subsequent action which may be founded upon them." *Symmons v. Blale*, 1 Moo & Rob 477. In *Pearson v. Iemaitie* 5 M & G 700 719, *Findal C J* in admitting repetitions of libel said "This appears to be the correct rule, viz., that either party may with a view to the damages give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter but that if the evidence given for that purpose establishes another cause of action the jury should be cautioned against giving any damages in respect of it and that evidence tending to prove it cannot be excluded simply because it may disclose another and a different cause of action." Similarly in *Simpson v. Robinson* 12 Q B D 511, *Denman L C J* said "Acts although subsequent might indicate the existence of motives at a former time and every other part of his conduct showing the same disposition may equally be laid before the jury,—refusing to make reparation for unjustifiable slander may have that effect." In *Long v. Barret*, 7 Ir L R 439, other libels published in the same newspaper more than six years before, were received to show malice, see also *Barret v. Long* 3 H L C is 395, 401, 407, 411. *Camfield v. Bird*, 3 C and K 56.

In *State v. Humphrey*, 1 Cimp 73 note which was an action for perjury. *Graham B* admitted evidence of another false charge in another form to show malice. In *Hummings v. Garson* L B & C 346, the fact that the defendant, six months after the utterance of libel, charging a breaking and entering had publicly charged the plaintiff with dishonouring bills and had called him a rascal, was offered to show malice, but was rejected.

**Good will.** The term 'good will' is peculiar to the Act, and there is no equivalent for it in the English law, nor is used at all, except in a different sense. The answer to a charge of 'express malice' would probably be the absence of express malice or some sort of defence that implied it. This moreover, seems to be the meaning of the last clause of the illustration. *Donough C L* 123.

**State of body or bodily feeling, etc.** This section also provides for the admission of evidence regarding the state of body when that is in issue or relevant. It would be in issue in all crimes of violence or offences affecting the human body, within the meaning of the Penal Code. It would be relevant in all questions of insanity, legitimacy, life insurance inheritance, and identity of persons. *Donough C L* 127. Illustration (1) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feeling were and (1) and (m) show the same thing in regard to states of body. *Cum L* 131. So whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions for such feeling, made at the time in question, are also original evidence. If they were the natural language of the affection whether of body or mind they furnish satisfactory evidence, and often the only proof of its existence. And the question whether they are real or feigned, is for the jury to determine. *Green L* § 162 (a) cited in *Taylor* § 580. Thus the representations by a sick person of the nature and effects of malady under which he is labouring are receivable as original evidence, whether they may be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter in as much as a physician is far more capable than a man unacquainted with the symptoms of diseases of forming a correct judgment respecting the accuracy of the statement.

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*Areson v Ld Kinnaird*, 6 East 188, *R v Blandey*, 18 How St Tr 113, *Grey v Young* 4 Mc 31, *Gilchrist v Bale* 8 Watts 355 cited in *Taylor* § 500. Illustration (m) is based on *Areson v Kinnaird*, 6 East 188. So also answers of patients to enquiries made by medical men and others are evidence of their state of health provided they are confined to contemporaneous symptoms, and are not in a nature of irritative as to how, or by whom such symptoms were caused. *Gardner Pezage Case*, Le Much, 169, *R v Nicholas* 3 C & K 246, *R v Gloster*, 16 Cox 471, *R v Gutridge*, 9 C & P 471. The real reason for the admission of such evidence is thus given by *Mellish L J*. 'Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were'. *Sugden v St Leonards*, L R 1 P D 154. This use of such statement is often spoken of as admissible under the *res gestae* notion, or as "original" evidence, i.e. not an exception to the Hearsay Rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial and therefore not subject to the Hearsay Rule, e.g. where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice or where running away is taken as indicating fear. But where a distinct assertion in the form of words, predicated a mental state, is offered—as 'I have a pun in my side' or 'I have the intention of going out of town' or 'I do this for such and such a reason,'—this language is not an assertion of the existence of a fact than is an assertion of any other sort of fact in the next phrase of *Bowen L J*. 'The state of a man's mind is as much a fact as the state of digestion,' and therefore such assertions being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay Rule. To admit them, then is to make an exception to the Hearsay Rule. The different kind of facts that may be the subject of such assertions may be roughly grouped as follows: (1) assertions of pain or other physical condition (2) assertions of pain, design, intention (3) assertions of feeling emotion motive reason (4) sundry assertions by a testator. *Greenl Ev* § 162 a *Wigmore* §§ 1714 to 1740. It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay* § 500) but this has been doubted, and it has been concluded to be the *manifested condition* and not the *sickness* itself which is the true *res gestae* to be explained (*Phayer*, 15 Ir L T 141—143). *Phip* Ld 3rd Ed p 51. *M. Cunningham* thinks that statements in illustrations (l) (i) and (m) unaccompanied by any conduct on the part of the person making it (1) can be admitted only so far as it relates to the existence of the mental or physical condition. It cannot be meant that a statement made by a person as to the circumstances in which he came to be poisoned should be admissible to prove the act of poisoning in a case in which the sufferer himself could be called and section 32 (1) would thus be inapplicable—*Cunningham* Ff 49, but see *Palmer's Case*, Not Tr, *Reg v Madeline Smith*, Will 358. *Reg v Maybriel* Not Tr, *Reg v Pichard* Not Tr, *Reg v Lamson*, Not Tr cited in *Donough Cir Ld* pp 127—132.

Such Statements are exceptions to Hearsay Rule. It has already been stated that such statements are not original evidence but are real exceptions to the Hearsay Rule. In this case the Necessity Principle (note notes under § 37) presents itself in a different form, viz. relative value of the statement. It is on the consideration that though the person's testimony on the stand may still be both actually and conveniently practicable yet the probability of their receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small, thus, while there is hardly a necessity in the strict sense there is at least a desirability of resorting also to the hearsay statement. Applied specifically to the present Exception the judicial doctrine has been that there is a further necessity for lack of other better evidence for resorting to a person's own contemporary statements of his mental or physical condition. It is in fact possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design and the

like but in directness amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand, where there is ample opportunity for deliberate misrepresentation and small means of checking it by other evidence or testing it by cross examination are comparatively inferior to statements made at times when no inducement to misrepresentation existed and the probability of trustworthiness was greater. For the use of such statements, then made out of Court and under certain circumstantial guarantees of trustworthiness there is a far necessity in the sense that there is no other equally satisfactory source of evidence either from the same person or elsewhere. It follows that the death insanity or non residence of the declarant is not a condition precedent, and this has not been questioned. *Wignmore* § 1714, see also section 21 clause (2).

In *Aeson v Kinnaird* 6 East 195 which appears as illustration (m) of section 14 *Lord Ellenborough* in admitting such statements observed "A witness has been received to relate that which has always been received from patients to explain—her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence, and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* which I have alluded to. (The case referred to by him was *Thompson v Treanton* Skin 402) So 'the evidence is admitted on the presumption, arising from experience that when a man does in fact his contemporary declarations accords with his real intention, unless there be some reason for misrepresenting such intention' *Upham J in Hadley v Carter*, 8 H N 42 "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony. As independent explanatory or corroborative evidence it is often indispensable to the due administration of justice. Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded" *Per Swayne J in Insurance Co v Mosley*, 8 Wall 397. So "such declarations made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same person." *Per Holmes J in Elmer v Fessenden*, 151 Mass 359.

**State of body** In *Annesley v Anglesea*, 17 St Tr 1139 where the question was whether the claimant was the legitimate son of *Lord and Lady Altham* a vast amount of evidence was gone into on both sides regarding the bodily condition of *Lady Altham* during a certain period. Even medical testimony was adduced to prove that she was shortly before the claimant's birth, in a condition expecting maternity and that she had asserted her belief to that effect. In *Douglas Caun* Not Tr which was a similar case of succession, a question of legitimacy was also raised. The appellant, who claimed to be the heir to a dukedom and vast estates alleged that he was the legitimate son of *Lady Jane Douglas* and her husband *Col Stuart*. It was contended, on the other hand, by the objector that she was a spurious child. Consequently evidence was led as to the bodily condition of *Lady Jane* at various times and places. The three points considered by the *House of Lords* were as *Lord Mansfield* said "The situation of *Lady Jane* before her delivery, at her delivery and after it was over. The three were the points to which the evidence was directed at the trial. In *Reg v Staunton*, Not. Tr., where four prisoners were charged with conspiring to cause the death of a woman of weak intellect by a slow process evidence was admitted regarding her bodily state at

**S 14** various intervals down to the date of her death "The object of his evidence" said *Hawkins J* "is to show that those who were about her and saw her from week to week had an opportunity of seeing the condition to which she was being reduced" *Donough's Cr El* 131 The physical strength of a person may be of probative value to show that he was peculiarly capable or peculiarly incapable of doing the act in question *Goodtitle v Braham*, 4 J R 498

**Owner of vicious animals** "Whoever" says Lord Denman "keeps an animal accustomed to attack and bite mankind, with knowledge that it is accustomed, is *prima facie* liable in action on the case if the suit of any person attacked and injured by the animal, without any averment of negligence or default in securing or taking care of it. The gist of the offence is the keeping the animal after knowledge of its mischievous propensities" *Jenkins v Turner* 1 Ld Raym 110, *R v Huggins*, 2 Ld Raym 1535, *Cox v Burbridge* 13 C B N S 430, *Cole v Waring*, 2 H & C 332, *Gladman v Johnson*, 36 L J C P 153 So where against the owner of an animal a scienter is to be proved (the knowledge of the animal's vicious quality), reputation of the animal is relevant *Jones v Perry*, 2 Esp 482, *Palmer v Coyle*, 107 Mas 136 Particular acts of viciousness are also relevant, for the same reason Vide illustration (c) So previous attempts of a dog to bite was admitted to show the owner's knowledge of its disposition *Worth v Gilling*, L R 2 C P 3, see also *Thomas v Morgan*, 2 C M and R 496, *Judge v Cox*, 1 Starkie 285 *Hudson v Robert*, 6 Ex 697, *May v Bunnett*, 3 Q B 112

**Receiving stolen property—Proof of knowledge** The act of possession is in this class of cases (except rarely) conceded, and the question is as to the criminal intent, as specifically, as to the knowledge recomputing the possession. In what way does the fact of possession of other stolen goods at other times throw light upon this knowledge or this intent? From the point of view of the knowledge principle the argument requires that the former possession be such as is likely to have led to a knowledge or a warning of the stolen character of those goods and that such warning would have naturally warned the defendant also of the stolen character of the goods in question. As to the first element it may be assumed that the receipt of stolen goods is in itself always more or less likely to result in a warning, chiefly because the owner is apt to follow them up and reclaim them but also in part because a purchase not made in the ordinary course of trade has often suspicious features about the vendor's offer. As to the second element the warning thus obtained can affect the subsequent receipt of other goods upon one condition only namely, that there is a similarity in the transactions, i.e. that the same person comes to the defendant post of the second article, or that the second article is of the same lot as the first *Hippon* § 324 In *R v Dunn* 1 Moo Cr C 146 which was a case of receiving stolen goods with guilty knowledge, the fact of having received and pledged, within five months various other goods stolen from the same persons and brought to the defendant by the same person was admitted as an ingredient to make out the guilty knowledge. See also *R v Durr* 6 C and P 177, *A v Hinley* 2 Mo and Rob 524=1 Cox Cr 13 illustration (d). But in *R v Odley* 2 Den Cr C 264 such evidence was held inadmissible. *Alderson B* in delivering the judgment said "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in December and not that he had received such property known to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing, and to admit such evidence in the present case would be to allow a prosecutor in order to make out that a prisoner had received with a guilty knowledge which had been stolen in March to show that the prisoner had in December previously stolen some other property from another place and belonging to other persons". The result of *A v Odley* was a legislative change of the law in 1871 by Stat 34 & 35 Vict C 117 Section 19 of that Act "evidence may be given that there was found in the possession of such person other property stolen within the preceding period of twelve months for the purpose of proving that such person knew the property

for which he is indicted to be stolen." But illustration (a) to this section makes no reservation as to ownership or time, so that it would seem that though the stolen property belonged to other persons than the prosecutor and without reference to the lapse of time since it was stolen evidence of its possession may under the Act, be given against the accused. See also *R v Vaynam* 16 B 414. Its weight in each case must be left to the discretion of the jury. *Nott Et* 132. In England s 19 of Stat. 34 & 35 Vict 112 has been repealed by the Larceny Act, 6 & 7 Geo V c 50. See also *R v Carter*, 15 Cox Cr 448, *R v Dine*, 14 Cox 85. *R v Harwood*, 11 Cox 388, *R v Smith*, (1918) 2 K B 415, *R v Jones* 14 Cox Cr 3.

**Forgery and Counterfeiting** The Chief form of offence connected with forged and other counterfeit documents or money are (1) making the false article (2) possessing it knowingly with intent to utter, (3) knowing utterance of it. In the last two, the defendant's knowledge is always in issue, in the first, it is occasionally in issue, as where the act of writing is conceded but an authority is claimed. The principle here applicable is that a former utterance is likely to have resulted in a questioning of the false article by the person to whom it was presented and thus the attention of the accused would have been called to its suspicious character. The former utterance is thus relevant as showing that the accused thereby probably acquired the knowledge charged. *Vide illustration (b)*, *Wigmore* § 310. In *R v Hylie* 1 B & P N R 92, which was a case for uttering a forged bank bill, the fact of three previous utterings in the preceding month to other persons was admitted. In admitting the evidence *Loid Ellenborough* said "The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such a case the only question would be whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions it would not make the evidence inadmissible." See also *R v Ball* R & R 132, *R v Ball*, 1 Cramp 324, *R v Millard* R & R 245, *R v Phillips*, 1 Lew Cr C 105. *R v Smith*, 4 C & P 411. *R v Forbes* 7 C & P 224, *R v Ball* 7 C & P 429. In *R v Forster* Dears Cr C 456 to prove a guilty uttering on December 12 an uttering of a similar piece on December 11 was shown, see also *R v Goodwin* 10 Cox Cr 554. In *R v Huley* 2 Leach 985, *Thompson J* observed "As to the cases put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove guilty knowledge. Such utterings cannot be punished, until it has become the subject of a distinct and separate charge, but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him this would bring him within the description of a common utterer, but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering to show that he uttered the money with a knowledge of its being bad." Illustration (b) speaks only of possession, but it is only a single illustration of the knowledge spoken of in the section. See also *R v Jarvis* 20 L J M C 30. *Blale v Albion Life Assurance Society* 1 C P D 102, *R v Green* 3 C & K 201. In *Mason's Case*, 10 Cr App 169 which was a case of uttering a forged deed evidence of possession of two other sets of forged deeds a fortnight and five months later was admitted. See also *R v Foster*, 24 L J M C 131. The possession of other forged or counterfeit articles operates in a different way to show knowledge. The mere fact of possession has in itself no force for this purpose though it may be relevant to show intent. But the possession may involve conduct betraying a knowledge of the falsity of the article,—as where counterfeit coins are separately wrapped in paper or counterfeit paper is kept secreted, or tools are also found, and thus the prior knowledge applies equally to the article in question. *Wigmore* § 311.

**Illustration (d)**—This illustration is based on the case of *Gibson v Hunter* 2 H BL 286. H drew a bill on G payable to F (a fictitious person), or order, and indorsed in F's name the plaintiff, a bona fide holder for value, sued G and in order to show that G knew this particular F as fictitious person,

**S 14** offered the fact of the former instance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G aware of the fictitiousness of F's name and it was admitted

**Illustrations (i) and (j)** These two are illustrations of intention. The case in (i) is that of *R v Vole* R and R 551, the case in (j) is that of *R v Robinson*, 2 East P C 1110. These are in principle like illustration (o) *Nort Ex 147*. The difference between (i) and (o) is that (i) is a case of shooting with intent to kill (o) of murder outright. The principle of intent here admits other acts of the defendant tending to negative innocent intent and thus to establish the criminal intent charged (to kill to wound, to resist an assault, and the like). No fixed rule can be formulated as to the similarity which the other act must bear, it may be done to another person, it may not accompany immediately the act charged, and it may occur at a time subsequent. The precedent illustrates these various aspects of the principle *Higmore* § 364. In *R v Vole* R and R 531, the accused was charged with assault with intent to kill. The defence was accident. The fact of the accused having run away after the firing and concealed himself beside the road ahead, and then fired again at the same person, was received to prove intent.

**Explanation I** Illustrations (a), (o) and (p) refer to Explanation I. The rejection of general facts rests on the ground that the collateral matter has been too remote. It indeed there was any connection with the *factum probandum* *Nort Ex 149*. The meaning of this explanation is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under enquiry. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion or as to any particular matter to make it safe to take it as a guide in interpreting his conduct. What is wanted is a fact which will throw light on his motives and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased but only in a vague and indefinite way. But if at the time he is found in possession of a number of other stolen articles this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer because a man was generally dishonest he was dishonest in any single case, but it is not dangerous to infer that a man who is found in possession of 10 articles, which are shown to have been stolen from different people came by each and all in a dishonest manner. *Cum Ex 122*. The principle underlying this explanation is this stated by *Willes J* in *Hollingham v Head*, 4 C B N S. 388, "The question may be put thus. Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger."

"In cl (n) 'says Mr Donough' the first of these illustrations, it is difficult to see why a man's habitual negligence in letting defective carriages go here should be irrelevant in an enquiry as to his negligence in this respect on any particular occasion. Surely the evidence of habit would have some probative value. The same view has been taken by the Bombay High Court in regard to the second illustration, cl (o). It has been observed that on the issue of whether A actually shot B or not the fact that he had previously shot at him would have some probative force. So too would proof of a general malignity of disposition by evidence that 'A was in the habit of shooting at people with intent to murder them yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue or as raising collateral questions which could not be resolved in the case per *West J* in *Reg v Prabhudas*, 11 B H C R 90 at p 92

"It is presumed that if evidence of 'habit' is not admissible as a 'state of mind' under section 14, it might be admissible as 'conduct' under s 8. Habit after all is only previous conduct, which is provided for in section 8"—*Donough Cir Ev 2nd Ed p 133*

The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct of any particular occasion, or as to any particular matter, to make it a safe guide for interpreting his conduct. What is wanted is a fact which will throw light on his motives and state of mind with reference to that particular occasion or matter. It would be dangerous to infer that, because a man was generally dishonest, he was dishonest in a particular case. *Gunnant v Emperor*, 38 Ind Cas 723 = 13 N L R 35

**Whether evidence can be given of habit.** Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough. There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance and in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case. There are two other difficulties that arise in connection with such evidence both of them, however, depending on other exclusionary rules. (1) The idea of habit is sometimes difficult to distinguish from that of character—for example where negligent habit is charged, and if it is interpreted in the latter aspect, it may of course become obnoxious to the rule against the use of party's character in civil and criminal cases (*Rule ss 52, 54*). (2) Assuming the relevancy of a Habit or Custom, the proof of it may often have to be made by marshalling various evidential instances as the basis of an inference to a habit or custom. *Higmore* § 92. It is generally accepted that the character of a person charged with negligent act as throwing light on the probability of his having acted carelessly on the occasion in question is inadmissible. *Per Stephen J in Brown v R Co* L R 22 Q B D 393. The real difficulty in such a case is to determine whether the fact offered is really character (Disposition) or only a Habit i.e. of prudent or negligent methods. The latter in any case should be admitted. Now the question is whether the habit of negligence as in illustration (n) or the habit of care is obnoxious to the Character Rule. Negligence is in one aspect, the not doing of a particular act, but in another or more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have accompanied it. There is no reason why such a habit should not be used as evidential—either a habit of negligent action or a habit of careful action. *Joy v Phillips Mills & Co* (1916) 1 K B 849. The real difficulties here seem to be two. It is possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition rather than a genuine habit and then are we not violating the rule against character in civil cases in employing such evidence? These doubts serve to explain the precedents that exclude such evidence, but the doubts are not well founded, and that such evidence is often of probative value, and is not attended by the inconvenience of character evidence. *Higmore* § 97.

**Explanation II**—Originally there was only one explanation to the section. By s 1 (1) of the Indian Evidence Act Amendment Act, 1891 (3 of 1891), these two explanations were substituted for the one original explanation. Only slight verbal alterations were made in the original explanation and it was numbered as 'Explanation 1.' The Explanation 2 is new. This amendment was thought necessary on account of the decision of the Calcutta High Court in the

**S 14.** case of *Queen Empress v Kartie Chandra Das*, 14 C 71 (F B,) In that case the question referred to the Full Bench was whether in the trial of a person charged with the dishonest possession of stolen property, evidence could be given of a previous conviction of the accused for attempting to receive stolen property, knowing it to be stolen. The Full Bench decided on the 20th July 1887, that under (old) section 54 of the Evidence Act, a previous conviction was in all cases admissible in evidence against an accused person. Section 54 of the Evidence Act as it then stood, ran as follows — 'In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant, but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character in which case it becomes relevant.' *Explanation* — This section does not apply to cases in which the bad character of any person is in itself a fact in issue. By Act III of 1891 the said section has been amended in such a way as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged. The fact that a person has been previously convicted of an offence has of itself little probative force to establish the fact that he has committed another offence and it is not expedient to admit evidence which can only prejudice the accused." *Statement of Object and Reasons of Act III of 1891* The result of this amendment of the law is that the rule as to the relevancy of a previous conviction is to be contained in section 43 of the Act. The existence of the judgment convicting the accused is only relevant if the fact of the conviction is a fact in issue or is relevant under some provisions of the Act. *Explanation 2* has been added to section 14, so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention. *Statement of Object and Reasons of Act III of 1891* As regards the character of the offence under s 400 I P Code, previous convictions of dacoity are relevant under s 14 of the Evidence Act, so convictions previous to the time specified in the charge or to the framing of the charge are relevant under *Explanation 2* of s 14 but convictions subsequent to the time specified in the charge and to the framing of the charge are not so admissible. *Empress v Naba Kumar*, 1 C W N 146. In a trial for an offence under section 4 (a) of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) the evidence that the accused was previously convicted of similar offence is admissible to show guilty knowledge or intention. *Emperor v Aloomiya*, 28 B 129=5 Bom L R 500 per Chandavarkar and Ashton J J (Jacob J dissenting). In *Mandera Parsi v The Empress*, 4 C W N 97=27 C 139, the appellants were convicted under section 401 of the Indian Penal Code of belonging to a gang of persons associated for the purpose of committing thefts. The question was whether evidence of previous convictions of some of the accused of theft was admissible for the purpose of proving association for that purpose and bad character. In rejecting the evidence the Court observed "It is sufficient to add in reference to the case now before us that the character of the accused was not in issue and that in consequence evidence of such character or reputation is not admissible." But this case has been distinguished and doubted in *Banar v The King Emperor*, 15 C W N 461=38 C 403. In delivering the judgment the Court observed "But in cases where the other evidence has established association for purpose of habitually committing theft evidence of previous convictions whether for offences against property or for bad livelihood has, we find, always been admitted not as evidence of character, but as evidence of habit and it would seem that of such evidence, convictions for bad livelihood would be more competent than those for isolated thefts. Such evidence must of course be weighed. A single instance of theft for instance would count for little or nothing. There must be at least two or more cases against the same individual to show habit but the evidence of such convictions is admissible clearly against the weight of authority in this case. We have already cited the case of *Empress v Naba Kumar Pathnaik*, 1 C W N 146. We may proceed to cite four unreported cases that have been laid before us affirming the admissibility of such evidence." See also *Emperor v Tukaram*, 15 Ind. Cas.



811=14 Bom L R 373 So when several persons are charged with belonging to a gang of persons habitually committing dacoity under section 400 of the Indian Penal Code, evidence of the commission by them of offences other than dacoity, being evidence of bad character, is inadmissible under section 14 of the Evidence Act *Emperor v Haji Sher Mahomed*, 46 B 958=75 Ind Cas 67=25 Bom L R 214 The reason for admitting such evidence is thus given by *Flucett J*, in 46 B 958 "Such evidence clearly falls under section 14 of the Indian Evidence Act, as showing a disposition on the part of the accused towards particular conduct alleged against him in the charge, namely, a habit of committing (1) dacoity (2) theft. But if in order to establish a habit of committing dacoity you rely on evidence that the accused had previously committed thefts, you no doubt produce evidence which may show a disposition towards conduct of a similar description to that in question, but not of the exact description in issue. A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity. It is little, if anything more than evidence of bad character which is excluded by section 14 of the Indian Evidence Act." See also *Public Prosecutor v Bonegeri* 2 Ind Cas 307=32 M 179=5 M L T 1001=9 Cr L J 567, *Emperor v Debandia* 36 C 573 584=13 C W N 973, *Emperor v Pachu Das* 47 C 671 692=21 C W N 501 But when a person is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dacoity is relevant and admissible. But if the conviction took place long before the second prosecution no weight can be attached to such evidence for the purpose of proving that the accused has a habit of committing thefts. *Moti Ram v Emperor* 89 Ind Cas 527=A I R 1925 Bom 195 In a prosecution for theft it cannot be assumed as a matter of course that a previous conviction for the same offence is relevant in establishing the guilt of the accused. *Nga Shwe v Queen U B R* (1897—1901) Vol L 144 But such previous conviction may be admissible after conviction for the purpose of affecting the punishment imposed. *Queen Empress v Nga Yan* (U B R 1892—1896) Vol I, 82

**Seditious speeches—Intention** Where certain speeches form the subject matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic delivered within a short period of time any of such speeches or lectures will be admissible under section 14 of the Evidence Act, as evidence to prove the intention of the speaker in respect of the speech which form the subject matter of the charge. *Chidambaram v Emperor*, 32 M 3 This principle is recognised in illustration (c) to section 14 of the Evidence Act and has been acted on in cases of prosecutions for sedition in all the other High Courts in India. Such evidence was held admissible in the case of *Queen Empress v Jogendra Chunder Bose* 19 C 35 (16) and also in the case of *Emperor v Phanindra Nath Mitter* 35 C 915 and as well in the case of *Queen Empress v Bal Gangadhar Tilak* 22 B 112 In charging the jury in the last named case Mr Justice Stracey at p 139 said "You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the government? Or did they intend merely to excite disapprobation of certain government measures?" It was also held admissible in the case of *Queen Empress v Ambalal Prasad* 20 A 75 (31) by a Full Bench of the Allahabad High Court. In delivering the judgment of the Full Bench, Sir John J Lee at page 69 said "The intention of the speaker, writer or publisher may be inferred from the particular speech, article or letter or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. In this connection reference may also be made to the judgment of the majority of the Judges sitting in the Court for the consideration of the crown cases referred in *Har v Baid* (1901) 2 K B 383. So seditious articles published in the same newspaper not forming the subject of the charge on which the prisoner is being tried at the time are admissible to show the intention of the person who printed or pub-

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lished the letter *Emperor v Phanindra*, 35 C 945 But articles not forming the subject of the charge and appearing in other issues of the same paper, are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity *Manmohan Ghose v Emperor*, 38 C 231 In case of sedition the question of intention is one of the fact *Ganesh v Emperor*, 34 B 378=12 Bom L R 21 The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abatement by incitement by means of words, written or spoken, but under the Newspaper (Incitements to Offences) Act no question of the intention of the writer, printer or publisher arises and no formal liability is imputed to any particular person *Gujra Sunder v Emperor*, 36 C 403 So in sedition (including seditious riot and seditious libel) other acts and utterances are receivable under the present section, to evidence seditious intent *R v Hunt* 1 St Tr N S 171, *Redford v Birley* 1 St Tr N S 1071, *R v Obrien*, 7 St Tr N S 1, 75, *R v Barron*, 44 D L R 332 (Canada)

Instance where such evidence were admitted under the English Law In *Earl of Pembroke's Trial* 6 How St Tr 1309 1325 1327, 1331, 1336, which was a case of murder deceased person's complaints of pain and the cause of the wound, made to bystanders and to a doctor, received see also *Canning's Trial*, 19 How St Tr 478, *Arson v Kinnaird*, 6 East 195 But the statement must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused *P v Gloster* 16 Cox Cr 471 (475) So in a case injury to a workman in a field his statement that a wasp stung him was held inadmissible *Anny's v Burton*, (1912) 1 K B 40 In *Gardner Peerage Case*, Le Marchant's Rep 170 174 a woman's statement to a physician attending for childbirth of the date of the conception was excluded In *Spencer Couper's Trial* 13 How St Tr 1163 if statement of the deceased as to being melancholy, ill, and in low spirit was admitted In *Redford v Birley* 1 St Tr N S 1171 1235, 1241 which was case against seditious mob, expressions of alarm by persons in the neighbourhood were admitted to show feelings produced by the gathering In *R v Vincent* 9 C & P 275 complaints to police by persons alarmed at violent chartist meetings were admitted, the persons not being called. But in *Thomson's Case* 7 Cr App 276=(1912) 3 K B 19 which was a case of abortion in March 1912 the woman's statement in February that she intended to do it herself was excluded See also in *R v Wainwright* 13 Cox Cr 171, which was a case of murder of one H L On the last day when H L was seen alive, she made a statement on departing from her house declaring her intention *Coelburn C J* excluded the terms of the statement A reporter's note cites *R v Pool* 1871, before *Bull C J* is involving a similar ruling *Wigmore* § 1726 In the two last mentioned cases the evidence was disallowed on the supposed application of the *res gestae* doctrine As regards the *Thomson's case* *Prof Wigmore* remarks "It is strange that in this day and generation an English Court can be so uninformed upon the principles of the law of Evidence" Vide § *Wigmore* 1726 foot note (4)

In *Willous v Williamson*, Moo & M. 307 which was an action upon a representation that D was solvent, the plaintiff's declarations at the time of a notice "that they had received a favourable account of him and would be unwilling to send them" was received as showing their reason for sending the notice In whether they sent them in reliance on the representations So also in *Skinner v Shen* (1891) 2 Ch 531, 593, which was a case of loss of a contract by defendant's illegal threats of litigation against the plaintiff's patented article letter of a would be customer was admitted to show his reason for not dealing with the plaintiff

In *Ballon v Green* 1 C & P 621, which was a case of necessity to a wife and the defence was her adultery wife's statement was admitted as forming part of the cause of her being so turned out In *Wills v Brerly*, 8 Buz 376 letters of a wife to her husband or others were admitted to show her feelings towards him In *Jones v Thompson*, 6 C & P 115 statement of a wife in criminal conspiracy as to a diary kept by her that she kept it to show to her husband was admitted to evidence her feelings towards her husband But in *Walt v*

*Webster*, 7 C & P 198, letters by a wife, offered to show her happiness with her husband, were not admitted because written after attempted adultery. S

Statements by a testator in a will case are also admissible as assertions of a state of mind. In *Sugden v St Leonards*, L R 1 P D 154, *Mellish L J* said "The declarations which are made before the will are not, I apprehend to be taken as evidence of the will which is subsequently made, they obviously do not prove it, but wherever it is material to prove the state of a person's mind, or what was passing in it and what were his intentions, there you may prove what he said because that is only the means by which you can find out what his intentions were." So also in *Quelch v Quelch*, 3 S W 2 Tr 442, *Wilde J* observed "It is familiar enough practice to receive the unsworn declarations of the testator in evidence for the purpose of arriving at this general intention where his competency is in dispute or where there is any imputation of fraud in the making of his will, for in such cases the state of his mind and affection is in itself a material fact of which such statements are the proper exponents. But where those declarations are vouched to prove the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this respect they become mere hearsay," see also *Keen v Keen*, L R 3 P & D 107, *Wigmore* §§ 1718 1722, 1729, 1730, 1735, 1736.

**Fraudulent intention—proof of** "It is in truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud are to insist upon direct proof in every case the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof, or by any different kind of proof from what is required to establish any other disputed questions of fact or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or the fraud should be presumed against anybody in any case, but what we mean to say is that, in the generality of cases, circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and so satisfy a reasonable mind of the existence of fraud by rusing a counter presumption, there is no reason whatever why we should not act upon it." *Per Miller J* in *Mothoora Pandey v Ram Rachya*, 11 W R 482, 483=3 B L R A C 108. So where the question of the fraudulent or fictitious character of a transaction arises it can only be decided on a consideration of all the circumstances of the case as proved or admitted direct proof of fraud being rarely forthcoming. *Seth Goluldas v Mt Jankee* 9 C P L R 142.

Mere speculation and probability is not sufficient in law to support a finding of fraud. *Raj Narain v Roushni Mull*, 22 W R 124, *Sheikh Imdad Ali v Mt Kootby*, 6 W R P C 24=3 M L A 1. Fraud may be presumed on good grounds. *Kishen v Ramdhan* 6 W R 235. Fraudulent intention can be inferred from secrecy. *Joshua v Alliance Bank of Simla*, 22 C 185.

**Fraudulent transfers to defraud creditors** In cases of transfers in fraud of creditors the act of transfer is conceded. Generally no specific question as to knowledge (except in cases of insolvency) arises and the inquiry is only confined to the intention accompanying the act. Other transfers of property may have some bearing in proving fraudulent intention by negating the probability of good faith. But they must have such a probative value whenever they are made under such circumstances that they cannot be naturally accounted for by the ordinary course of business in which such transfers occur from time to time with good faith. The difficulty is to determine what circumstances are essential to produce this improbability that the transfer was in that ordinary course which involves good faith. In such cases the following circumstances are to be considered (1) The quantity of property conveyed, (2) the persons to whom the transfers are made, (3) the time of other transfers, and (4) the consideration paid. On the whole, while several sorts of circumstances are significant, the

**S 14** weight may vary in each case, and no one of them is essential, except that of time and here no fixed rule can be laid down *Vide Wignore* § 333 The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort—such as the debtor's remaining in possession after the mortgage or sale, the pendency of suits at the time of the sale and other circumstances suggesting their own significance and not raising any difficulty of principle *Wignore* § 335

### ILLUSTRATIVE CASES.

#### Admissible

A writing made some time after the committing of an offence under section 124 I P Code is admissible in evidence under s 14 of the Evidence Act *Emperor v Phillip*, 30 Bom L R 315=108 Ind Cas 30=29 Cr L J 320=A I R 1928 Bom 78

Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft *Motiram v Emperor*, 89 Ind Cas 529=A I R 1925 Bom 195 see also *Bonar v Emperor*, 38 C 408=15 C W N 461 *Emperor v Naba Kumar* 1 C W N 146, *Emperor v Haji Sher Mahomed*, 25 Bom L R 214=75 Ind Cas 67

In a trial for an offence under ss 235 and 243 I P Code of being in possession of counterfeit coins and instruments and materials for counterfeiting coin evidence of the possession by the accused of counterfeit coins and instruments for their manufacture at his house in another district is admissible *Misra Gossain v Emperor*, 61 Ind Cas 647=22 Cr L J 407

On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on her behalf in the arrangements for loans to be made to the complainants out of the money she possessed, and thereby obtaining money from them on one pretext or another in connection with the affair, held that evidence of instances similar but unconnected transactions with other persons during the period covered by the evidence of the complainant is admissible under section 14 of the Evidence Act in order to prove the intention of the accused *Emperor v Yalub Ali*, 15 A I J 241=39 A 273

In a case of cheating it is open to the prosecution to show that the acts

#### Inadmissible

Where the accused is charged under s 409 Penal Code, for embezzling three specific sums *Held*, that evidence of collateral offences in respect of other sums was not admissible *Pritchard v Emperor*, A I R 1928 Lah 382

Where in a particular trial under section 420, I P Code evidence was let in with regard to a previous act of fraud which was alleged to have been committed by the accused person on the witness who spoke to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum *Held*, that the evidence is clearly inadmissible in law and it cannot be brought in with the aid of s 14 or 15 of the Evidence Act *Gokul v Emperor* 29 C W N 483=86 Ind Cas 970=70 Cr L J 906 see also *R v Abul Wahid*, 34 A 94

In a case of murder by administering sweetmeats, the facts that the accused offered sweetmeats to boys and poisoned one of them is not evidence under section 14 of the Evidence Act *Kashiram v Emperor* 73 Ind Cas 262=6 N L J 144

In a prosecution under section 409 of the Penal Code for having knowingly made a false claim in a suit against certain persons, evidence relating to other suits brought by the accused against other persons may be admissible against the accused under sections 14 and 15 of the Evidence Act for the purpose of showing, all well or minus of the accused, and as to the nature of the fraud or a systematic series of fraudulent claims and for the purpose of rebutting the defence that the particular suit was brought in good faith or any suggestion that it was brought under some mistake or misapprehension But evidence relating to other suits instituted by other persons is not admissible against the accused unless the suits and the suit in which they

## Admissible

charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. *Gudhari v Emperor*, 269 P L R 1914.

In cases where the other evidence has established association for purposes of habitually committing theft evidence of previous convictions whether for offences against property or for bad livelihood is admissible, not as evidence of character but as evidence of habit and of such evidence convictions for bad livelihood would be more cogent than those for isolated thefts. *Bonar v Emperor*, 9 Ind Cas 353=15 C W N 461=38 C 403.

## Inadmissible

accused are part of the same transaction or the result of a conspiracy between them. Evidence which goes merely to the character or disposition of the accused as a person likely to have committed the offence is generally inadmissible against the accused. But evidence which is otherwise relevant does not become inadmissible merely because it discloses the commission by the accused of other offences. *Baghunath v Emperor*, 46 Ind Cas 696=22 C W N 494=19 Cr L J 776.

The accused, a licence clerk in a Municipal office, was charged with having cheated three persons by demanding from each two annas in excess of what was legitimate licence fee. On behalf of the prosecution evidence was produced to prove that he had also cheated other persons. Held that the evidence was inadmissible. *Emperor v Abdul Wahid*, 8 A. L. J 1269=12 Ind Cas 987.

Evidence of other atrocities by accused is inadmissible either under section 14 or 15 of the Evidence Act. *Mandi Ghazi v Emperor*, 13 Ind Cas 781=1912 M W N 49=13 Cr L J 125.

In a suit on libel, evidence of instances of acts of the plaintiff more or less closely resembling the particular acts of misconduct imputed to him in the libellous statement is inadmissible. The defendant can justify the libel as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and intentional not accidental, conduct of the plaintiff. *Nadushaw v Pirojshau*, 19 Ind Cas 98=15 Bom L R 130 see also *Queen Empress v Kasi Gonda*, 19 B 51.

In an action for an injunction to restrain the use of a trade mark, if the defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own act. *Munna v Jauala*, 35 C 311.

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**15** When there is a question whether an act was accidental or intentional, \* (or done with a particular knowledge or intention), the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant

Facts bearing on question whether act was accidental or intentional.

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doing the act was concerned, is relevant

### Illustrations

(a) A is accused of burning down his house in order to obtain money for which it is insured

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

**Scope of the section** Section 15 of the Evidence Act is an application of the general rule laid down in section 14 *Emperor v. Debendra*, 36 C 3/3=13 C W N 973=9 C L J 610. It lays down that where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant. It is wrong to say that this section only deals with intention as opposed to accident. The bracketed words were added by s 2 of Act III of 1891 which must not be overlooked in construing section 15. *Per Chaudhury J* (dissenting) *Emperor v. Panchu Das*, 24 C W N 501 at p 525 F B. But in the same case *Moolerjee J* took a different view. At page 516 he observed "There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional. The medical evidence makes it incontestable that the act amounted to deliberate murder. No question consequently arises whether the act was accidental or intentional or was done with a particular knowledge or intention. In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention." *Fletcher J* agreed with *Moolerjee J* in that case. According to *Sanderson C J* of this section has no application where there is no question of an act being accidental or intentional. So evidence of other crimes is admissible if it bears upon the question whether the acts alleged to constitute the offence in the indictment were designed or accidental. *Per Lord Harschell in Mackay v. Attorney-General of New South Wales*, 75 L J K. B. 693= (1906) 2 K. B. 389, also *R. v. Bond*, (1906) 2 K. B. 389. In *Gumwant v. Emperor* 38 Ind Cas 723=13 N L R 35, which was a case under ss 467, 471 and 193 of the Indian Penal Code, in respect of a receipt of Rs 4200 discharging a debt the complainants were allowed in the lower Court to file certain certified copies intended to prove that four different documents, namely (1) a will, (2) a receipt,

\* These words in s 15 were inserted by the Indian Evidence Act Amendment Act, 1891 (3 of 1891), s 2

(3) a deed of larceny, and (4) another receipt, written by the accused K were suspected to be false documents, and were not acted upon by Court. As regards the admissibility of these documents the Court observed "There was no question here whether the writing, attestation or production of the receipt for Rs 4200 was accidental or intentional. Lach was admittedly an intentional act and it seems to me that to judge of the intention and knowledge of the scribe and attesting witness by the opinions of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature. Section 15 must be read as subject to section 14, so far as evidence of knowledge and intention is concerned. So under this section the prosecution cannot use the evidence as to the commission of other acts of a similar nature in proof of the existence of the specific acts which form the subject matter of the charge. But when the existence of the acts has been established by evidence *abundant* and the only question which remains to be decided is whether they were done accidentally or intentionally or with a particular knowledge or intention then and then only could the evidence of other similar acts be let in. *Pritchard v. Empey*, A. I. R. 1928 Lah 382. An illustration of the kind of cases in which such evidence can be admitted is *Gudhari Lal v. Crown*, 12 P. R. 1913 Cr = 269 P. L. R. 1914 = 6 Ind. Cis 964 where the accused had been charged under s. 420 I. P. Code for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled labour for service in Africa and that on payment of certain fees he would be able to engage them for service in that country. The prosecution alleged that the accused had not been given any such authority to recruit and that the whole of his recruiting business was bogus and fraudulent. The accused admitted having received this sum of money but alleged that he had done so honestly and not with any fraudulent intention. To rebut this defence the prosecution was allowed to show that in the course of this recruiting business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind.

In general whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. *Per Mookerjee J* in *Amrita Lal v. Emperor*, 42 C. 77 = 21 C. L. J. 331 = 19 C. W. N. 676. But systematic act mentioned here should not be confused with design or system. (Vide p. 236)

Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge are relevant when the existence of any such state of mind is in issue or relevant and section 15 provides specifically for allowing evidence of similar occurrence in each of which the person doing the act was concerned, whenever there is a question whether the act is done with a particular knowledge or intention. *Per Faucett J* in *Emperor v. Harjwan Singh*, A. I. R. 1926 Bom 231 = 50 B. 174 = 28 Bom. L. R. 115. This section applies to all cases where the question is whether an untruthful statement is accidental or intentional or done with a particular intention, etc. The test to be applied must include every possible defence and must not be confined merely to the actual defence raised by the accused. *Emperor v. Yakub Ali*, 39 Ind. Cis 673 = 15 A. L. J. 241 = 39 A. 273 = 18 Cr. L. J. 529, but see *Rex v. Bond*, 75 L. J. K. B. 693 = (1906) 2 K. B. 38.

The statement of Objects and Reasons of Act III of 1891 by which the words "or done with a particular knowledge or intention," were added will show the purpose for which these words were added. It runs as follows: "In English law for the purpose of proving guilty knowledge evidence of other acts of a nature similar to that charged may be given in cases of uttering false coins or disposing of forged bank notes (*Russell* 233). On the whole evidence of this nature has been confined to cases of coming and forgery, but there is one case *Reg. v. Francis*, 43 L. J. M. C. 97, in which evidence was admitted on a charge of obtaining money on false pretences. In that case *Lord Coleridge, C. J.* and

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'It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake of evidence of the class received must be admissible.' This case probably goes further than any other case, and the amendment which has been proposed of section 13 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test. In *Reg v Ollis* 69 L J Q B 918 *Bruce J* stated the law to be as follows: "A line of cases has established the rule that when in a case no material to establish that an act charged in the indictment and was intentional and not accidental evidence is admissible of similar acts done by the same persons having no bearing upon or connection with the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is sometimes stated I think, inaccurately to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is I believe admissible under the rule I have mentioned on the ground that it leads to negative mistake or accident." In *Reg v Bond*, (1906) 2 K B 389, *Kennedy J* after citing the above passage, proceeds "It is in strict accordance with the principle enunciated by the authorities that evidence of the conduct of the prisoner on other occasions was admitted in cases of arson (*Reg v Gray* 4 F and F 1102) of embezzlement (*Reg v Richardson* 3 F & T 343) of false pretences (*Reg v Francis* 43 L J M C 97, *Reg v Rhodes*, 68 L J Q B 83) of coining (*Reg v Fuller*, Russ and R 308), of forgery (*Reg v Hylie* 1 Bos and P N R 92 at p 94 *Reg v Collough*, 10 L R Ir 241) and obtaining credit by fraud (*Reg v Wyath*, 73 L J K B 15). In all these cases it was necessary to negative accident or mistake, in all of them the multiplication of similar acts having some connection in their circumstances to the act which was the subject-matter of the trial was admitted to prove as evidence showing systematic conduct of the prisoner at the time of the offence charged against him and, therefore negating accident or mistake on his part in the last occasion."

Of course such evidence is not admissible merely for the purpose of showing that the character of the accused was such that he was a person likely to commit the acts of cheating with which he is charged. That is a totally different question, and the distinction between the two classes of cases is well brought out by *Channel J* in *Reg v Fisher* 26 L T R 122. "The principle" said the learned Judge "was perfectly clear and if attended to the difficulty disappeared. That principle was that the prosecution must not prove facts to show that the prisoner was guilty because he was of bad character and, therefore, likely to commit the offence charged. But if proof of the facts went to show that the prisoner was guilty of the offence charged, it was admissible notwithstanding the fact unfortunately for the accused, that it showed that he had committed another offence. For instance, in a charge of embezzlement, when the prisoner said that he had made a mistake evidence could be given to show other instances of the same kind, because such evidence tended to show that he was not making a mistake on the occasion charged. Whenever it could be shown that the question involved was whether there was a mistake, or whether there was a system, evidence might be given although it proved other offence, that the prisoner's actions were systematic and fraudulent."

In *Reg v Rhodes*, 68 L J Q B 83 = (1899) 1 Q B 77, the prisoner was indicted for obtaining eggs by false pretences and it was proved that he had falsely represented by advertisement in news papers that he was carrying on a *bona fide* Dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements and the Court for the consideration of Crown case Reserved held that such evidence had been properly admitted. In delivering the judgment of the Court *Lord Russell L C* observed "It seems to me quite clear that, if the transactions with *Elston* and *Chambers* had taken place before that with *Boys* and at a period not too remote, the evidence of *Elston* and *Chambers* would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged?"



It depends as it seems to me, on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business, but that the business in which he was engaged was from first to last a bogus or show business. If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner, with no connection between them I should certainly say that evidence of transactions which took place after the offence charged was not admissible more generally. But the transactions took place two months after the offence. But never intended by the prisoner, the charge to be made out was that of carrying on a bogus business, and on the whole, I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and bonafide business. In the same case *Willis J* said 'The fact that his business is a bogus business can only be shown by giving evidence of transactions of a similar character. I do not see how the carrying on of a bogus business can be proved in any other way. If the transactions sought to be given in evidence had been prior to the offence charged and within a reasonable period of time, it is clear that they would have been admissible. What difference does it make if they were immediately after the act complained of? If they formed part of the same system of fraud, I think it can make no difference. The only difficulty in this case is I think the long interval of time that elapsed between the act charged and the other acts. Very often the only nexus between such transactions is their proximity in point of time. That however, is not the case here, and, had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the same advertisement continued to appear down to the last transaction and that it operated in the last case exactly as it did in the case on which the charge was based then as it seems to me, both in law and in common sense the evidence becomes admissible.'

So to come under this section it must be established that the act forms part of a series of similar occurrences. It is well established that the gist of the section is that unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a series. So where each of the occurrences had its own special features they could properly be deemed similar occurrences. *Per Hooley J in Emperor v Panchu Das*, 24 C W N 501 (517) F B. So "whether they were evidence or not depends upon whether they were evidence of similar transactions. *Per Reading C J in Rex v Baird* 84 L J K B 1785. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question. *Anita v King Emperor* 19 C W N 676 at p 692 see also *R v Smith*, 20 Cox C C 854=92 L J 208, *R v Rhodes* (1899) 1 B 77. Section 13 of the Evidence Act covers both previous and subsequent similar occurrences. *Raghubath v Emperor*, 22 C W N 491=46 Ind Cr 696=19 Cr L J 776.

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question. *Gurudhar v Emperor* 26 P W R 1910 Cr, see also *Emperor v Debendra* 36 C 573=13 C W N 973=9 C L J 610 but see *Golul v Emperor*, 29 C W N 483=29 Cr L J 300=38 Ind Cr 58. In the case of *Blair v Albion Life Assurance Co* 4 L R C P D 97 at p 106, Lord Lindley observed. Nothing could, at first sight seem more plain and straight forward and there would be no appearance of fraud, but then the plaintiff proposed to adduce evidence to show that the transaction was one of a fraudulent class. Was he or was he not to be precluded from doing this? I think he was quite at liberty to put his case in that way, and could only do so by going into a great number of other transactions having some features in common with this. I agree that in order to prove that A has committed a fraud upon B it is neither sufficient nor even relevant to prove that A committed frauds upon C D and E. Stopping there, I admit the proposition. But let it be shown that the fraud on B is one of a class of

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transactions having common features, then I disagree altogether with the proposition. The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company and the moment that is shown the plaintiff's case is established." Similarly in *Reg v Bond*, 75 L J K B 693=(1906) 2 K B 389, *Bray J* said "The ground on which in cases of this class evidence is admitted of act not charged in the indictment is, in my opinion that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan say for obtaining money by fraud, and the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and therefore, the guilty mind of prisoner."

**Evidence of the commission by the accused of a previous or subsequent offence—General Principle of** In *Malin v Att Gen of New South Wales*, 75 L J K B 693, 708 710 712=(1906) 2 K B 389 409, 414, 417 *Lord Chancellor*, *Lord Hershell* said "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would be otherwise open to the accused." In *Rex v Bond*, 75 L J K B 693=(1906) 2 K B 389, *Mr Justice Darling* and *Mr Justice Bray* called attention to the fact that *Lord Hershell's* last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the *Lord Chancellor* should be read with that limitation. Per *Banister J*, in *Rex v Rodley*, (1913) 3 K B 468=82 L J K B 1070. In *Rex v Bond*, *supra* *Mr Justice Bray* observed "A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads. First, where the prosecution seeks to prove a system or course of conduct, secondly, where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, and thirdly, where the prosecution seeks to prove knowledge by the prisoner of some fact." In their judgments in that case it was pointed out by several of the learned Judges who formed the majority of the Court that a single prior act of a like criminal nature would in general not be admissible as evidence of system. *Rex v Rodley supra*. In a more recent case of *Director of Public Prosecution v Ball*, (No 2) 80 L J K B 691 692 *sub nom Rex v Ball* (1911) A. C 47 71 the *Lord Chancellor*, in speaking of the grounds upon which he held that the evidence is admissible said "Further evidence was then tendered to show that these persons (brother and sister) had previously carnally known each other and had a child in 1908. The object was to establish that they had a guilty passion towards each other and that therefore the proper inference from their occupying the same bed room and the same bed was an inference of guilt, or—which is the same thing in another way—that the defence of innocent living together as brother and sister ought to fail." The first ground given by *Lord Chancellor* for the admissibility of evidence suggests an extension of the rules indicated in the case above referred to, but the second ground comes with the rule previously indicated that evidence is admissible to rebut a defence really in issue. *Rex v Rodley, supra*.

**Evidence of death by poisoning** The question is, whether the admission of poison to A by Z his wife in September 1848 was accidental or intentional. The facts that B C and D (A's three sons) had the same poison administered to them in December 1848 March 1849, and April 1849 and that the meals of all four were prepared by Z, are deemed to be relevant though Z was indicted separately for murdering A, B, and C, and attempting to

murder *D R v Geering* 18 L J M C 215, *Step Dig Et Art 12* In admitting the evidence *Pollock C B* observed "I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony." The ruling in this case was approved in *Malin v At Genl New South Wales*, (1894) A C 57 and has been followed in other indictments for poisoning. Vide *R v Heesom* 14 Cox 40, *R v Flannagan*, 15 Cox 403, *R v Neill* Cream 116 Cent. Crim Sess Pap 1451, *R v Klosou* J, 137 Cent Crim Ct Sess Pap 471. See also *R v Roden* 12 Cox 630 (a trial for murder of a child by suffocation in bed). In *R v Cotton*, 12 Cox 400 (poisoning a child) evidence was admitted of the previous deaths of other children by the same poison. The prisoner and his wife were indicted for the murder of his mother by poison. The prisoner's former wife died in March, 1861, and his present wife was then their servant. The prisoner's mother lived with him after his second marriage and died in December 1861. He sold arsenic for agricultural purposes and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained and of arsenical symptoms following. There was, however, evidence that three horses, one of them belonging to the male prisoner, had been accidentally poisoned by arsenic, and that some of his customers against whom he was not supposed to have any ill feeling, had suffered from arsenical symptoms evidently arising from some accident, and it was held that, in order to prove that the administration of the poison to the mother was wilful evidence was admissible of the circumstances which attended the death of the first wife and to show that she had died of arsenic. *R v Garner*, 3 F & F 681 4 F & F 346. *Wills J* after consulting *Pollock, C B R v Winslow* 8 Cox 397, in which *Wilde C J* after consulting *Martin, B* excluded evidence of the same character, has been disapproved in *R v Flannagan*, 15 Cox 403 and in *Malin v At Genl N S W* it was pointed out that *Martin B*, was consulted by and agreed with *Wills J*, in admitting such evidence in *R v Gray* 4 F and F 1102, and that *R v Winslow* could not therefore be treated as of much importance. 2 Russ Cr 311. On an indictment for murder by poison of S, evidence was admitted of the previous and subsequent deaths of J and L under like circumstances, and from similar symptoms to show that the poisoning, was not accidental, and it being proved that a motive for the death of S might exist from the fact of the prisoner having insured the life of S in a Benefit Society, evidence was also admitted to show that there might be an equal motive for the deaths of J and L by showing that they also had been insured by the prisoner. *R v Heesom* 14 Cox 40 see also *R v Flannagan*, 15 Cox 403, where *Brett J* took a similar view. 2 Russ Cr Ev 2112. In *K v Armstrong*, (1922) 2 K. B 550=91 L J K B 904 where the accused was charged with the murder of his wife by administering arsenic, evidence that the accused had attempted to poison another person with arsenic on a subsequent occasion was held to have been rightly admitted to rebut the defence that the wife had committed suicide and that arsenic was kept by the accused for innocent purpose. See also *Lala v Crown*, 32 P L R 1191=12 Cr L J 125=9 Ind Cas 701, *Kasnam v Emperor* 73 Ind Cas 262.

**Causing death by other means.** On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had given it back to its parents and that they would take the child, with whose murder they were charged, and would adopt it as their own for the payment of £3. Evidence was admitted to show that several other infants had been received by the prisoners on like representations, and

- S 15. upon payment of sums inadequate for their support for any long period, and also that the bodies of several infants had been found buried in a similar manner to that of the infant in question in the gardens of other houses which had been occupied by the prisoners. On appeal it was held that this evidence was relevant to the issue and was rightly admitted. *Makin v Att Gen of N S W* (1894) A C 57, 2 Russ Cr 2112. Appellant was charged with the murder of B M a woman with whom he lived and with whom he had gone through a form of marriage. She was found drowned in her bath. Evidence was admitted that subsequently two other women with whom he had gone through a form of marriage had been found drowned in their baths in very similar circumstances. *R v Palmer*, 84 L J K R 713. In *R v Voke*, (1823) R and R, 531 where the charge was one of maliciously shooting at the prosecutor, evidence was admitted that defendant fired at prosecutor twice during the day, partly on the ground that the two shots were one continued transaction, but also that counsel for defendant by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident.

**False representations and cheating—Principles of admitting other evidence.** The utterance of forged paper or counterfeit money is simply one species of false representation, a representation in conduct instead of in word. The general principle of evidencing knowledge is examined in the other topics, applies equally to this topic. "Other former acts of a similar sort in certain conditions show the likelihood of a warning being received, but this specific form of proof is rarely brought out clearly. No doubt with every prior occasion of the sort the probability grows that the prior promises would have sought out and charged the defendant with the falsity of the representations, but this reasoning does not appear to be used by the courts. The argument to the improbability of innocent intent from the repetition of similar acts is the apparently accepted ground for the use of this class of evidence. As to the similarity of the other representations, no attempt has been made by the courts to lay down a general test. The precedents illustrate a wide variety of rulings on this point. A common sense liberality is the best guide for decision. As to the length of time over which the evidence should range, it is equally impossible to fix a general test. The circumstances of each case must determine it. Subsequent representations are equally admissible with prior ones, because on the principle of Intent, it is the repetition of them that is significant, and a subsequent instance reduces the probability of innocence equally as well as a prior one. Knowledge of the falsity of the other representations, need not be shown for, if it could be shown there would be an end of the proof, and practically the present question would never need be discussed. It is the mere recurrence of similar incorrect (not necessarily knowingly false) representations which lead to the belief that they could not have been made innocently. We may assume that any given one might have been innocent but cannot concede this when we note the recurrence.

"When the very act of making the representations is to be proved, and a system or design is to be argued from the evidence is to be restricted by the rigorous rule applicable to that purpose, i.e., there must be shown a connection of features, in all the instances so strong as to indicate a system throughout them. What is to be noted is that occasionally a court is found applying the same test where the doing of the act is not disputed but the intent alone is in issue. This is wholly misplaced strictness, out of harmony with all other analogies, and resting on a confusion of Intent and System. *Wignmore* 3 J 32.

**False representations and cheating—Illustrative Cases.** In *Hillhousey's Trial* 11 How St Tr 664, cheating was by pretending to be bewitched by Sarah M. So that he fasted, went into a trance etc., through her bewitching. The popular belief was that the sorcery was true, for many people had been fasting for twelve weeks. To show that the fasting was a fraud in that he secretly took food evidence to that effect was offered covering a fortnight of it, which, however, fell after the date of the information charging him and therefore objected to. In admitting this evidence *Hill* 1 C J 51. It

an evidence of his cheating since that time, and that one of the information (the other not charged), but it is in evidence also to prove that his pretended fasting before was a mere deceit for he then pretended to have fasted ten weeks before he came hither, and afterwards pretends to continue fasting in the same manner, if that be proved to be a fraud it is strongly to be inferred that this pretended fasting was so too." In *R v Roberts* 1 Camp 399 the charge was criminal conspiracy to obtain goods fraudulently by representing themselves as wealthy people. The evidence of representations by the accused to other trade-men were admitted. In *R v Sturges* (1899) 1 Q. B. 77 where prisoner was indicted for obtaining eggs by fraudulently pretending by repeated advertisement that he was carrying on a substantial business it was held that evidence was rightly admitted that persons other than the prosecutor had subsequently been deceived by similar advertisements, issued by the prisoner. In admitting such evidence Lord Russell C. J. said "On the whole I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and bona fide business. The transactions in all three cases were, therefore, connected by the advertisement which formed part of the scheme." *Pouell Et 125, Rex v Smith* 92 L. T. 208. See also *Reg v Stinson*, 25 L. T. 666=12 Cox C. C. 111, *Reg v Hamilton*, 1 Cox C. C. 211. The question being whether an Insurance Company acted fraudulently in obtaining a premium from A through their agent B who had represented to A, that if he would insure, B would procure him a loan from the company. The fact that premium had previously been obtained by the same agent and by same means from other persons to the knowledge and benefit of the company, without loans being made, held admissible, as showing fraudulent character of the transaction in question. *Blair v Albion Co*, 4 C. P. D. 94=45 L. J. C. P. 663, *Thy S 340, Philp Et 142*. Upon a trial of an indictment for obtaining money by false pretences by means of worthless cheques evidence of other and similar frauds by the prisoner, given in support of an indictment for a similar fraud upon another person in respect of which the prisoner was acquitted, is relevant and admissible as illustrating a course of conduct showing an intention to defraud. *Reg v Ollis*, 69 L. J. Q. B. 918=(1900) 2 Q. B. 758. Upon a trial of an indictment for obtaining credit by means of fraud evidence of other similar frauds by the prisoner immediately preceding the offence charged in the indictment is relevant and admissible as tending to show a system of fraud and negating any honest motive on the part of the prisoner. *Rex v Wyatt*, 73 L. J. K. B. 15=(1904) 1 K. B. 188 see also, *R v Walford*, 7, J. P. 215, *R v Jean* 69 J. P. 27. So evidence of the same kind of practice is admissible, when only separated by a short interval of time as tending to negative accident or mistake and to show system. *Rex v Walford* 71 J. P. 215. Upon the trial of an indictment charging the prisoner with having obtained goods and credit by false pretences, and also with having obtained credit by fraud other than false pretences, evidence cannot be admitted that on two previous occasions the prisoner had obtained goods from other persons on credit by false pretences in as much as it does not tend to show that he is guilty of the offences charged in the indictment. *Rex v Fisher* 79 L. J. K. B. 187=(1910) 1 K. B. 149. On a trial of an indictment for endeavouring to obtain an advance from a pawn broker upon a ring by the false pretence that it was a diamond ring evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawn brokers advances upon a ring which he represented to be a diamond ring, but which in the opinion of the witness was not so. *Reg v Francis* 43 L. J. M. C. 97=L. R. 2 C. C. 128. In *R v Holt*, 8 Cox C. C. 411=30 L. J. M. C. 11 A was indicted for obtaining money from B by false pretences. He was employed by his master to take order but not to receive moneys, and he was proved to have obtained the specific sum from B by representing that he was authorized by his master to receive it. Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the

**S. 15.** purpose of proving the intent when he committed the acts charged in the indictment *Reg v Holt* 10 L J M C 11. In *R v Stenson* 12 Cox C C 11=20 L J 666 the charge was false pretences by causing an order to be given to a book seller purporting falsely to be from a lady of quality, for a book sold by the accused. The fact of sending of other false orders of the same sort was received to show the intent.

In *R v Saunders* 1 Q B D 19 which was a case of false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions the fact that a number of other persons have been induced afterwards by him in the same way to forward money on such advertisements was received to show intent. In *R v Smith* 20 Cox C C 501 the charge was that the accused obtained credit on false pretences as agent of M. The accused alleged that he had merely given M's name as a reference. Evidence of his representation to another vendor a few days later that he was agent of M was admitted (*R v Wyatt* commented on *R v Holt* discredited).

In *Reg v Baird* 81 L J K B 1785 the prisoner was convicted on an indictment which charged him that in incurring a certain debt by purchasing a motor cycle he did unlawfully obtain credit by means of fraud. The fraud charged against him is that at the time he bought the cycle he had no intention of paying for it, for it is said that he knew quite well that he was not in a position to do so. His defence was that he was purchasing the machine on the credit of his parents. In that case evidence of two other transactions were admitted in evidence to show his intention. By the first transaction the prisoner obtained a motor cycle and in the latter he had obtained a camera. He had failed to pay for either. In the Court of appeal *Lord Reading C J* in disallowing the evidence observed: "The circumstances of the offences are certainly peculiar, but in the opinion of this Court, would not have justified a criminal charge. They were used in this case for the purpose of proving to the jury that the appellant had used in the case before them an intent to defraud. It is only in that way that they ever could be relevant to the charge then being investigated. Whether they were evidence or not depends upon whether they were evidence of similar transactions, and we are of opinion that neither of those cases was of a similar character, and that the evidence of those two transactions was not admissible."

**Setting fire to buildings.** Illustration (a) is based on the facts of *R v Gray* 4 F and F 1102. This case was decided by *Hiles J* Mr Justice Stephen in a note to this case in his Digest of Evidence art 12, states that he acted on this case in *R v Stanley* Liverpool Summer Assize 1882, but he greatly doubts its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, and it would be hard to exclude evidence to show that the other fires are accidental. This kind of evidence is admissible not on the Knowledge principle (*Vide p 231*) nor on Intent principle (*Vide p 233*) but on the principle of "Anonymous Intent" as *Professor Wigmore* terms it (*Vide p 236*). In *R v Bailey*, 2 Cox Cr 311 the fire had originated near the kitchen, where the accused stayed as servant. Evidence was offered of two fires occurring shortly before in the prosecutor's shop and ware houses attached, though no connection of the prisoner or any one else with these was shown. In admitting this evidence *Pollock C B* observed: "I think this is clearly evidence and may be used at all events for the purpose of showing that the present fire which was third on the same premises within so short a time, could not have been the result of accident. Surely, if a man finds certain mysterious circumstances to arise day after day in his establishment, he is at liberty to refer to them, if only for the purpose of showing that they could not have had their origin in accident and that a repetition of them could only lead to the conclusion that they resulted from malice and design. This course of evidence is not without precedent and authority, moreover, for on the trial of *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish, had been sawn almost in two by some unknown person. This was proved to show that some one entertained a design against the life of *Sir Theodosius*, for he was accustomed to stand on the tree while engaged in fishing, and the

natural presumption was that whoever cut the tree did so with the design of precipitating the deceased into the water. Those facts were given in evidence on the trial of *Donellan* for murdering *Sir Theodosius* afterwards and were received, though quite unconnected with the prisoner in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death." Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Jelang J* in *R v Vayiam* 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recidivism of a similar fire may tend decidedly to negative innocent intent, even though the author of the other fires is not shown thus the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having fired a gun very near it. It was proposed to prove that the rick had been on fire on the previous day, and that the prisoner was then close to it with a gun in his hand. The defence was that the firing of the rick was accidental. It was contended that the evidence was not admissible. The firing of the rick on the previous day, if wilfully done, was a distinct felony. *Maule J* in admitting the evidence said "Although the evidence offered may be proof of another felony that circumstance does not render it inadmissible, if the evidence is otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. It is only by the conduct of the prisoner that a judgment can be formed whether the act was accidental or intentional." But on an indictment for setting fire to a building, *Farl J*, held that the mere fact of the prisoner's having given notice of other fires, and claiming the reward usually paid on such occasions at the engine station, was not evidence which could be adduced to found a presumption that he caused the fire in question. *R v Regan* 4 Cox C 337. In *R v Nattrass*, 15 Cox C 73 (charge of attempt to burn the house by setting fire to articles so that the house would catch fire) the fact was admitted that on the same day articles were found on fire at four different times in different parts of the house.

**Embezzlement** Illustration (b) is founded on *R v Richardson*, 2 F & F 343. On an indictment for embezzlement where the entries of sums were correct but the castings up incorrect, a series of similar errors in casting up both previously and subsequently to the cases to which the indictment referred were held admissible in order to negative the evidence that the errors were mere accidental errors. *R v Richardson* 2 F & F 343. *R v Balls* L R 1 C C R 328, *R v Proude*, L & C 97. *R v Stephens* 16 Cox 38, *R v Girod* 70 J P 514. In *R v Stevens*, *supra*, *Manisty J* said "This cannot be done merely with a view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another, but only by way of anticipation of an obvious defence,—such as, that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake." It is not with a view of proving guilt, but of proving the intention with which the act was done, that you anticipate it by such evidence." See also *R v Readon* 1 F & F 79, *Lemprier v. Babbington*, L R 1927 L R 549 = 28 P L R 313. In *People v Sharp*, 107 N Y 468 *Peckham J* said "A man indicted for the embezzlement of funds by false entries might claim with some degree of plausibility perhaps, that the entry was a mistake, but the probability of such mistake would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person."

**Extortion and black mail** In *R v Cooper* 3 Cox Cr 517 the prisoner was charged for feloniously accusing H C S of in a suit with intent to commit an unnatural offence with the intent to extort money. *Cresswell J* held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening

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In *Reg v Daint* 84 I J K B 1785 the prisoner was convicted on an indictment which charged him that in incurring a certain debt by purchasing a motor cycle he had unlawfully obtained credit by means of fraud. The fraud charged against him is that at the time he bought the cycle he had no intention of paying for it, for it is said that he knew quite well that he was not in a position to do so. His defence was that he was purchasing the machine on the credit of his parents. In that case evidence of two other transactions were admitted in evidence to show his intention. By the first transaction the prisoner obtained a motor cycle and in the latter he had obtained a camera. He had failed to pay for either. In the Court of appeal *Ford* leading C J in disallowing the evidence observed 'The circumstances of the two cases are certainly peculiar, but in the opinion of this Court, would not have justified a criminal charge. They were used in this case for the purpose of proving to the jury that the appellant had in the case before them an intent to defraud. It is only in that way that they ever could be relevant to the charge then being investigated. Whether they were evidence or not depends upon whether they were evidence of similar transactions and we are of opinion that neither of those cases was of a similar character and that the evidence of the two transactions was not admissible.'

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**Embezzlement** Illustration (b) is founded on *R v Richardson*, 2 F & F 343. On an indictment for embezzlement where the entries of sums were correct, but the castings up incorrect, a series of similar errors in casting up both previously and subsequently to the crimes to which the indictment referred were held admissible in order to negative the evidence that these were mere accidental errors. *R v Richardson* 2 F & F 343. *R v Balls*, L R 1 C C R 328, *R v Proude*, L & C 97, *R v Stephens*, 16 Cox 38. *R v Girod*, 70 J P 514. In *R v Stevens*, *supra*, *Manisty J* said: "This cannot be done merely with a view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion he is likely to have committed a similar offence on another, but only by way of anticipation of an obvious defence,—such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake. It is not with a view of proving guilt, but of proving the intention with which the act was done that you anticipate it by such evidence. See also *R v Readon* 4 F & I 79, *Imperial v. Balkayay*—A. I R 1927 Lah 349=28 P L R 313. In *People v Sharp*, 107 N Y 468, *Pechani J* said: "A man indicted for the embezzlement of funds by false entries might claim with some degree of plausibility perhaps, that the entry was a mistake, but the probability of such mistakes would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person."

**Extortion and black mail** In *R v Cooper*, 3 Cox Cr 547, the prisoner was charged for feloniously accusing H C S of an assault with intent to commit an unnatural offence, with the intent to extort money. *Cresswell J* held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening

**S 15.** to take him to the guard house, and accuse him of an unnatural crime, was admissible. The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question was, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved out of his own mouth that he was aware that such a result would follow, and if it could be proved out of his own mouth that he was aware that such a result would be produced, it was an ingredient in the necessary proof that he contemplated it. 2 Russ Cr 1168 See also *R v Blynnell* 4 Cox 402. The argument is here applied, seemingly <sup>some</sup> what forced, such knowledge being a matter of common understanding and not needing to be proved. It is clear, however, that the intent argument is entirely applicable to the doing of similar act at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example, with a genuine desire to obtain compensation for supposed injuries). This use of such evidence is generally sanctioned. *Vide* *Barnard's Trial*, 19 How, St Tr 825. *R v Hinkworth*, 4 C & P 444, *R v Egerton*, R & R 375, *R v Boyle & Merchant* (1914) 3 K B 339, but see *R v McDonnell* 5 Cox Cr 153, *Wigmore* § 352, 2 Russ Cr 1168.

**Rape** When the charge is of assault with intent to rape, the propriety of admitting evidence of similar offences cannot be doubted. There should be some limitation of time, but merely to avoid the objection of unfair surprise. There need be no limitation as to the person assaulted, because the only purpose is to negative any other than the rape intent and a previous rape-audit on another woman has equal probative value for that purpose, for it is the general desire to satisfy the test that is involved in this crime, and no particular woman is essential for this. *Wigmore* § 357. But mere liberties taken by the defendant with the prosecutrix, does not show hurtful intention. *R v Light*, C & P 318. So also where the charge is burglary with intent to commit rape the evidence of defendant's entry into another house on the same night and having intercourse with a woman is not admissible as being relevant. *Rodley's Case*, 9 Cr App 69 = (1913) 3 K B 468. On an indictment for abducting a child under the age of ten years the first occasion spoken by the child was a Thursday morning on which the prisoner threatened to beat her if she told, and it was held that evidence of subsequent perpetrations of the offence on Saturday and Monday was admissible. *Wiles J* said "I shall allow all the matters to be proved in order to show the real nature of the case. It has repeatedly appeared to me in cases of this sort that a man by a threat of violence detains the child from complaining, and thus requires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions and this seems to me to give a continuity to the transaction which makes such an evidence properly admissible."

**Abortion** In *R v Dale*, where an instrument or appliance is used which might be properly employed for innocent treatment of women, *Charles J* ruled that evidence that the accused had by similar means caused or attempted to cause miscarriage was admissible to prove that the act was done with a guilty intent. In *R v Perry*, 2 Cox Cr 223, when the charge was to administer a drug with intent to miscarry, *Wilde C J* admitted evidence of subsequent administrations of other drugs to show intent. See also *R v Palm* 4 Cr A R 233 1910. *R v Starkie*, (1922) 2 K B 275-334. In 181 In *R v Bond*, (1906) 2 K B 389 where the admissibility of similar acts is discussed at length and which was also a case of abortion the evidence of the use of similar instruments upon another woman three months later to procure a miscarriage, was admitted on facts. "Such evidence could be admitted with great caution. It should only be admitted where the prisoner has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself. And proof of only one other similar case, without any special connection with the case charged in the indictment, ought not to be admitted the object being to rebut legitimate action or accident." *Halsbury* Vol. 11.

p 597, *Roscoe v El* 367, see also *Thomson's Case*, 7 Cr App 276, *R v Lovegrove*, 90 L J K. B 285=(1920) 3 K B 643 In such a case Knowledge principle has application in as much as prior or subsequent acts are available to show a knowledge of the nature and effect of the instruments or drugs used, if that is disputed Similarly such evidence is also admissible on Intent principle Other occasions of using such instruments or drugs whether prior or subsequent, tend to negative an innocent intent *Brunet v The King*, 42 D L R 405 (Canad), but see *R v Hicks*, 36 L J O 421

**Indecent Exposure, etc.**—The above principles are occasionally applicable on a charge of indecent exposure, sodomy, buggery, or enticing for prostitution and cognate offences *Wigmore* § 360 In *Pertins v Jeffery*, (1915) K. B 702 which was a case of obscene exposure in July, the respondent taking the stand was cross-examined as to a former exposure to the same woman in May, and the prosecution offered to prove the fact if denied Held that this former instance was admissible to show intent, but that an offer of a systematic course of conduct etc should not be admitted until the defence of accident or mistake or absence of intention to insult is definitely put forward In *R v Thompson*, (1917) 2 K B 630 on appeal (1918) A. C 221 which was a case of gross indecency with boys, evidence of possession of photographs of naked boys and other appliances or implements was admitted, see also *R v Twiss*, (1918) 2 K B 853

**Other acts to show intent or plan in civil cases** The principle under which other acts are admissible to show plan or intent in criminal cases applies equally in civil cases The peculiarity of the question involved is merely whether and under what conditions other similar acts are receivable to show Knowledge Intent or Design is to the act charged The question is of much less frequent occurrence in civil cases than in criminal cases mainly because the issues of intent and the like are less commonly open in civil cases But wherever Knowledge or Intent or Design is relevant in a civil case the foregoing principles are equally applicable Thus, where the act of forgery is in issue, there may be a criminal prosecution for the forgery or there may be a civil action based on the forged document, and the same evidence may be applicable in both So where a false representation is charged it not only may be but usually is a civil case in which the issue arises and the foregoing principles become applicable In almost every one of the foregoing classes of cases there are instances of the application of the principles in civil litigation The salient feature is the nature of the issue and the kind of evidence offered not the penal or the civil form of the proceeding *Wigmore* § 371

**Copyright infringement** In Copyright infringement cases the defence often is that the passage in question is taken from the common source But this hypothesis of other sources is not available as an explanation where the same errors—either of fact or of printing—occur in the defendant's as well as plaintiff's books Accordingly the recurrence of such errors is a well established mode of evidencing to a high degree of probability the copying of such a specific passage by B from A *Spiers v Brown*, 31 L J 16 *Wigmore* § 372 So 'if evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original is a strong argument to show copying which the ordinary and familiar mode of trying the fact whether the defendant had used the plaintiff's book But assuming in this way there is shown the probability of the copying of the specific passages it remains to invoke the principles of intent and design, and to argue that the copying of a number of such passages indicates a more extensive copying of other passages not otherwise shown to have been copied This argument is always open and its use has constantly been sanctioned there can merely be a question of its weight in a given instance *Longman v Winchester*, 16 Ves Jr 269, *Mauinan v Tegg*, 2 Russ 385, *Leuis v Fularton* 2 B & W 6 *Wigmore* § 373

*Admissible*

Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926, evidence was adduced by the prosecution of similar acts done by the accused before 1925. *Held* that the evidence was admissible under section 115 to rebut the probable plea of mistake or innocent condition of the mind of the accused, the evidence being that of a system in which there was a common link between acts of 1924 and those of 1925.

The accused, a grocer at *Bluandi* ordered goods for Bombay and the goods were put into a hired motor lorry. To reach *Bluandi* the lorry passed through the limits of the *Kalyan* Municipality, but the lorry driver instead of paying octroi on the goods at *Kalyan* rapidly passed the incoming *Nala* and similarly passed out at the other end of the limits. The *Nahedar* in charge of the incoming *Nala* reported this matter to the municipality. The accused was charged under s 77 (2) of the Bombay District Municipal Act for introducing the said goods within the Octroi limits without paying dues. *Held*, that the evidence that the accused had been connected with similar cases as the one under charge was admissible to show his knowledge and intention. *Emperor v. Haynam Vala*, A I R 1926 Bom 231 = 50 B 174 = 28 Bom L R 115.

The accused on the 7th June 1909 administered *dhutwa* poison to A and B both of whom died from the effects thereof, and on the following day administered the same poison to C and D. The former got ill and recovered but the latter died. *Held* that the events which occurred or were said to have occurred, on the 7th and 8th of June were relevant to the case of charge of murder of D as forming incidents in series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident. *Lala v. Emperor*, 9 Ind C 18 731 = 32 P L R 1911, see also *Kasiram v. Emperor* 73 Ind C 18 262 = 6 N L J 111. Where in a trial upon a charge under section 399 of the Penal Code the accused pleads that their presence at a particular spot armed and in company was accidental and innocent it

*Inadmissible*

Where the accused was charged under s 409 Penal Code, for embezzling three specific sums. *Held* that evidence of collateral offences in respect of other sums was not admissible. *Pid chair v. Emperor*, A I R 1923 Loh 382.

In a suit on libel evidence of instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to him in the libellous statement is inadmissible. The defendants can justify the libel as true in substance and in fact by proving its truth not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and continuous, not accidental, conduct of the plaintiff. *Nadirsha v. Piraj Shah* 19 Ind Cas 98 = 15 Bom L R 150.

It is not open to the prosecution to adduce evidence to show that on two previous occasions the accused ~~was~~ had committed murders ~~them~~ but had falsely charged and got convicted some other persons as murderers. *Gangaram v. Emperor* 62 Ind C 1 545 = 23 Bom L R 1274 = 22 Cr L J 529.

Two persons A and B were tried on 21st July 1919 for the offence of murdering D a woman of the town, on the 10th December 1914, of conspiring to rob her, of theft of property from her house and for abetment of murder and theft. At the trial the prosecution wanted to adduce evidence (1) of association of the two accused, (2) of their association in crimes spoken of by other women of the town in connection with the charges of theft which they made against them and generally of a series of incidents from 1914 to 1918 that they used to go about together under different names, A taking B with him as his ~~driver and introducing him to~~ Bibu to rich prostitutes of the town, and this being followed by their frequent disappearance and discovery of loss of money and ornaments. *Held* that the evidence was not admissible. *Emperor v. Panchu Das* 44 W N 501 (F B).

In a case under s 420 of the Penal Code the question of the guilt or innocence of the accused depends on

*Admissible*

is open to the prosecution to rebut the plea, and section 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon the acts of the accused which in themselves might or might not be preparatory for deceit, and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible for the purpose. *Khuaja v Emperor*, 71 Ind Cas 361=24 Cl L J 136

In a case of cheating it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him, or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused, is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible. *Gardhari v Emperor*, 26 P W R 1910 Cr =6 Ind Cas 964

In a charge against the accused of cheating by falsely representing that he was the Dewan of an estate and could procure employment for the complainant and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected, transactions with other persons before or after the date of the offence charged, is admissible, not to establish the factum of the offence but to prove that the transaction in issue was one of a systematic series of fraud, that the intention of the accused on the particular occasion in question was dishonest and fraudulent. *Emperor v Debendra*, 36 C 572=13 C W N 1011. See also *Reg v Rhodes*, 1 Q. B. D. 77. *Reg v Wyatt*, 20 Cox Cr C 462

*Inadmissible*

proof of actual facts and not upon the state of the accused's mind. Therefore evidence as to any previous act of fraud (committed by the accused) is not admissible under any provision of the law. *Gokul v Emperor*, 29 C W N 483=26 Cr L J 906=86 Ind Cas 970 (But see *Emperor v Debendra*, and other English cases)

In a trial of an accused person for giving false evidence in respect of an alleged forged document 'to judge of the intention and knowledge of the scribe and attesting witness by the opinion of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature. *Gumant v Emperor*, 38 Ind Cas 723=13 N L R 35

**16** When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done is a relevant fact

*Illustrations*

(a) The question is, whether a particular letter was despatched

Existence of course of business when relevant

S 16

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

**Principle** Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough. *Wigmore* § 92. 'Customs may, like any other facts or circumstances, be shown where their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest.' *Per Flandam, J* in *Walker v Barron*, 6 Minn 598, 618 (Am). In another American case *Sargent C J* said "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it, in a particular way, according as he is in the habit of doing or not doing it." *State v Railroad*, 52 N H 528, 532. In *Mathias v O'Neill* 94 Mo 527=6 S W 3, (Am) evidence of a book keeper's custom of handing over collateral notes to the teller as indicating that it was done in this instance was admitted. The reason of such admission is thus given by *Sherwood J* "It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom. These things being proven the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern hims if by the rule of right reason, and consequently that he acquits himself of his engagement and duty. Whenever it is established that one act is usual concomitant of another, the latter being proved, the former will be presumed, for this is in accord with the experience of common life. It is simply the process of reasoning one fact from the existence of another." There is however, much room for deference of opinion in concrete cases owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable irregularity of action, there can be no doubt that this fixed sequence of acts tends to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case. *Wigmore* § 92.

**Scope of the section** In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. *Henry v Bensila* 37 Fl 609. 'Where the maxim of *omnia presumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly) applies, there indeed if the event ought probably to have taken place on Tuesday, evidence that it did take place on Tuesday or on Wednesday, is strong evidence that it took place on Tuesday.' *Avery v Bowden*, 6 E & B 973. So to prove that an act has been done it is admissible to prove any general course of business or office, whether public or private, according to which it would ordinarily have been done, there being a probability that the general course of business will be followed in a particular case. This probability is stronger in the case of public offices, e.g. the Post Office. *Phip Et* 84. There is no presumption that the course of business in a private office has the regularity of that in a public department. But the existence of any course of business, according to which an act in question would have been done, is relevant to the question whether such act was in fact done. *Hetherington v Kemp* 16 R R 773. Illustration (ii) is based on this case. The question in that case was as regards the post of a particular letter. In this connection *Lord Ellenborough, C J* observed "You must go further. Some evidence must be given that the letter was taken from the table in the counting house and put into the post office. It is

you called the poster, and he had said that although he had no recollection of the letter in question, he invariably carried to the Post Office all the letters found upon the table, thus might have done, but I cannot hold this general evidence of the course of business in the plaintiff's counting house to be sufficient. In a private office the course of business is only a relevant fact. In a public office the Court will presume that the act was properly done." So if a letter be properly addressed to A and posted and if it does not come back through the Dead Letter Office the Court will presume that A had received it. *Warren v Warren*, 1 C M & R 250. *Jones v Great Central Railway, C A* (1909), *Powell, 141*. In *Ault v Loan Assn*, 47 Pac. Rep. 13 (Wash.) it was said "The evidence that a letter left at the *Therment House* and addressed to B actually reached him is of the same nature as a similar presumption arising from putting a letter so addressed into the Post Office, and may even be considered as considerably stronger in as much as there would be less probability of a failure." It is the usage at a Boston hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they are distributed every fifteen minutes to the rooms of the different guests to whom they are addressed. B is a guest at the hotel on a day on which A leaves at the bar a letter addressed to B. The presumption is that the letter was received by B. *Dana v Kemble*, 19 Pick. 112.

In *Warren v Warren* 1 C M & R, 250 Parke B said "If a letter is sent by post, it is *prima facie* proof, until the contrary be proved that the party to whom it is addressed received it in due course." See also *Sundersons v Judge* 2 H Bl. 509, *Woodcock v Holdsworth*, 16 M & W 124, *Shipley v Todhunter*, 7 C & P 680 (686), *Abbey v Hill*, 5 Bing 299, *Kent v Louen*, 1 Camp 178, *Phumer's case*, R & R 264, *Dunlow v Higgins*, 1 H L Cas 381, *House hold Fire v Grant* 48 L J C P 577, *Bussard v Leiering*, 6 Wheat 102. To prove the posting of a letter it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter, took all letters delivered to him to the post. *Hetherington v Kemp*, 4 Camp 193, *Trotter v Mc Lean*, 13 Ch D 574, *Phip Ev 3rd Ed 97*, *Shibbel v Garbett* 7 Q B 846, *Ward v Londesborough*, 12 C B 252, *Percy Supper Club v Whyte*, 106 L T Jo 308. But without any proof that it was properly addressed, stamped and posted, there is no presumption of its receipt. *Best v German Ins Co* 68 Mo (App) 520 (U S).

A telegram properly addressed is delivered to a telegraph company. The presumption is that it was received by the addressee. *Oregon Steam Co v Otis*, 100 N Y 416, *Gerding v Harlin*, 21 N Y S 636. To prove that a certain indorsement had been made on a (lost) licence entered at the custom house, it is relevant to show that the course of the office was, not to permit the entry without such licence. *Butler v Allnut*, 1 Stark. 222, *Phipson 3rd Ed 97*, *Taylor § 183 A*, *Van Omerson v Douiel*, 2 Camp 41, *Waddington v Roberts*, L R 3 B 579.

In an action against the acceptor of several bills of exchange which were made in November, 1850 and became due on February 5th and March 12 1851, the defence is that they were accepted by the defendant while an infant. It is proved that the defendant came of age on March 11th 1851. The presumption is that all the bills were accepted before he attained his majority. *Roberts v Bethel*, 12 C B 779. The reason of this presumption is thus expressed by *Jervis C J*. "There is nothing on the face of the bill to show when it was accepted. Why, then, is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and, secondly, before the commencement of the action, because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out and within a usual time after the drawing of them. I decide this case upon this broad ground, that we are to presume, unless the contrary is shown that a bill of exchange has been accepted not on the day of its date but within a reasonable time afterwards. It is not to be presumed that the acceptance took place after the maturity of the bill. That view disposes of the case as to all these bills—as to five of them, because they became due before the defendant attained the age of twenty-one, as to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority. And *Maule J* added 'Although it is not usual to accept a bill on the day

**S 16** on which it is drawn, it is usual to do so at some early opportunity after that day. Therefore, where the drawer and acceptor are both living in the same town, the presumption is that the bill is accepted shortly—within a few days—after it is drawn, it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early as conveniently may be. The date of the bill, therefore, though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill will have to travel from the one party to the other. Upon the same principle upon which that presumption rests, it may be presumed in this case that the bills were accepted before they arrived at maturity." It is alleged in a bill for relief that a certain agreement was in writing. The presumption is that it was signed. *Rist v Hobson*, 1 Sm and Stu 543

**Course of business, meaning of**—The expression "course of business" must mean the ordinary course of a professional avocation or mercantile transactions or trade business. *Lingama v Bharmappa*, 23 B 63 (66). The usage in a private house, however methodical, cannot convey the same weight as the ordinary routine of office. *Ibid*

**Regularity in Public Office** It has already been stated that the fixed method and systematic operation of the Government postal service have long been conceded to be evidence of the due delivery to the addressee of letters, notices etc, duly placed for that purpose in the custody of the authorities. The only requisites to raise a presumption of due delivery are that the letters are duly stamped, addressed and posted. *Walter v Haynes*, Ry & M 149. *Slutbeck v Garbet*, 7 Q B 846. This presumption is so universally conceded, that the strength of the evidence of this kind has been even raised to a presumption (*vide* illustration (f) to section 114, *Mediapalli's Case* 40 L J Ch 39). Of course it is always open to show circumstances which would rebut that presumption. The general experience that a rule of official duty, or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise to a presumption of due performance. *Wigmore* § 2534. The strength of this presumption is so great that provisions have been made in certain Statutes for the service of notice etc, by post. (*Vide* ss 148, 149 of the *Indian Companies Act, VII of 1913*, *Taylor* § 180). So, on proof that goods, which cannot be exported without a license were entered at the custom house for exportation license to export them will be presumed. *Van Omeron v Dunch*, 2 Camp 44, *Taylor* § 180. An envelope produced bears the post mark and date of a certain office. This raises the presumption that the letter was mailed and sent at this time. *New Haven County Bank v Mitchell* 15 Conn 906 (Am), see also *Fletcher v Braddyll* 3 Stark R 64, *Stocken v Collin* 7 M & W 515. *R v Johnson*, 7 East 65, *R v Watson*, 1 Camp 215, *Archbald v Thompson*, 2 Camp 623, *R v Plumer*, R & R 264, *Butler v Mountgarret*, 6 Ir L R N S 77, *Taylor* § 179.

**Course of business in private firms** The habit of a private house, doing systematically a similar service being equally relevant, the principle has been applied to an express carrier's delivery of packages and to a telegraph company's transmission of telegraphs. *White v Flemming*, 20 N Sc 332 (Canada). *Epping v Scott*, 112 Cal 369 (Am). *Com v Jeffries*, 7 All Ma s 519 (63) (Am), *Heatherington v Kemp*, 1 Camp 193. The application of the same principle would also admit a private person's usual course of business to rebut any act of delivery or transmission, such as the sending of a notice or letter by post. The only difference is that the course of business followed in a Government Office will be judicially noticed without further evidence whereas in the case of private business the system alleged to have been followed must be proved like all other facts. The course of business of an individual firm may under circumstances not appear sufficiently fixed to be of that probable value. In *Heatherington v Kemp*, 1 Camp 193 on which illustration (a) was based to show the sending of a letter, the usage of the country house in placing the letters on a table and the testimony of the partner as to his habit of posting them, were held admissible. In *Hart v Alexander*, 7 C & P 746, 751, the



question was whether a circular was sent. Evidence of the practice of the house to send circulars on every change in the firm was admitted. In the course of his judgment, *Lord Abinger*, said "That does not show that a particular person received a circular, except upon the presumption that a jury may make upon the general habit." In *Woodcock v Houldsuorth*, 16 M. & W. 124, *Parke B* said "He has done all that was usual and necessary, and he does not guarantee the certainty or correctness of the Post Office delivery." See also *Dunlop v Higgins*, 1 H. L. C. 381 (398), *Trotter v Maclean*, L. R. 13 Ch. D. 574 (580). In *U. S. v Babcock*, 3 Dillon, 571-575 the evidence of telegrams delivered to a door-keeper accustomed to distribute despatches to defendant's office was admitted. In a case of injury at a high way blockaded by a train to disprove the blockade, evidence was admitted of a practice of managing trains so as not to obstruct the highway. *Hall v Brown*, 58 N. H. 93 (1m). A course of liquor sales in a preceding month, was admitted to show a specific sale. In admitting such evidence the Court observed "Where there is a question whether a particular act was done the existence of any course of business according to which it naturally would have been done is a relevant fact." *State v Shaw*, 58 H. N. 73. In a North Carolina case, where the question was whether a receipt for rice was given by a miller evidence of his habit to give a receipt was admitted. *Ashe v De Rosset*, 3 Jones p. 240.

In *Lucas v Norosiheshi*, 1 Esp. 296 to prove payment of wages, evidence was offered of the defendant's custom of paying the workmen every Saturday night and of the plaintiff's presence waiting with the rest. This evidence was admitted "as he worked under the same terms with the other workmen." See also *Sellen v Norman*, 4 C. and P. 80. So also in *Evans v Birch*, 3 Camp. 10, which was an action against a milk carrier for moneys not turned over to his employer, evidence of the regular course of business in paying over the receipts duly, was admitted as showing payment. Similarly where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time (e. g. 14 years), that he has accounted. *Topham v Braddell*, 1 Trant. 72. In a case of non-delivery of a package evidence of custom of the plaintiff's driver of a package is admissible. *American Express Co v Hoggard*, 37 L. M. 465 (1m). In *Vaughan v R. Co.* 63 N. C. 11 (1m) where the question was whether goods have been received by a railway company evidence of its custom to weigh and mark goods was received as showing that they would have been found marked. In *Hine v Promeroy*, 24 Viet. 211, 214 (1m) the question was whether an attorney had directed a process server to take N and M as receptors. Evidence of his uniform course of business to give no instructions as to receptors was admitted as corroborative. In *Houard v Sherwood*, L. R. C. P. 148, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff, had authority to do so. To show probable non-existence of such authority, evidence was offered of a usage among horse dealers not to warrant under the circumstances.

**Refusal of a registered letter.** The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative though there has been some fluctuation of judicial opinion on the subject. In the second place the question arises, whether if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer is in the affirmative. In the third place the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed. The mere fact of a notice bearing a certain date is no proof that it must have been posted on the same date. An article posted and delivered may be inferred to have been delivered in due course of post. *Gobinda v Duarka*, 20 C. L. J. 455.

**Telegrams—Times of delivery.** The documents kept by the Post Office showing the terms of receipt and delivery of telegrams are not admissible in evidence as public records, in as much as they are kept only a short time, are

S. 16 not accessible to the public, are not the result of public enquiry, and do not deal with a general public right but are merely kept for the purpose of regulating the pay and the work of the post office servants *Heyne v Fichel*, 110 L T 264=30 T L R 190

## ILLUSTRATIVE CASES

*Admissible*

A notice was sent by the plaintiff firm to the defendant firm by registered letter which was posted to the correct address of the latter, but was returned with the word 'refused' endorsed upon it by the Post Office. *Hell* that under section 16 of the Evidence Act the presumption was that the letter had reached the *Kothi* of the defendant firm *Louis Dreyfus & Co v Chumandas*, 50 Ind Cns 195=2 S L R 142, see also *Jogendra v Dwarla Nath*, 15 C 631, *Baluram v Bali Pannabai*, 11 Ind Cns 351=13 Bom L R 328.

The question is, whether a letter was sent on a given day. The post mark upon it is deemed to be a relevant fact *R v Canning* 19 St 370, *Gobinda v Duala* 20 C L J 455=15 C W N 489=26 Ind Cns 962.

To prove the posting of a letter, it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter habitually took all letters delivered to him to the Post Office. *Heathcriston v Kemp*, 4 Camp 153, *Frotter v Mclean*, 13 Ch D 574 or, that the letter was put in a given place, where all letters were regularly put for posting, whence they were always carried to the post by a servant (*Heathcriston v Kemp*, *supra* *Skilbeal v Gorbett* 7 Q B 846, *Percy Supper Club v Whyte*, 106 L T Jo 303)—*Phip Li* 3rd Ed. p 97.

In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm's account books and their periodical transaction to the principals that it was reasonable to presume that that which was the ordinary course was pursued in that case. *Dwarika v Laboo*, 6 M I A 88 (90).

To prove the delivery of a letter on a given date, it is relevant to show that the letter was properly addressed posted in due time and not afterwards returned. *Warren v Warren* 1 C M & R 20, *British and Am Telej Co v Colson* L R 6 Ex 122, *Phip Li* 98.

*Inadmissible.*

An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of the statement by the peon and would be admissible either under section 32 (2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled. If it be not admissible under sections 32 (2) or section 33, in that case the events recited therein by the peon must be proved by calling him as a witness. *Gounda v Dwarika*, 26 Ind Cns 962=20 C L J 455=19 C W N 489.

To prove the posting of a letter written by A to B,—evidence by one of A's clerks that he habitually copied all letters written by A, then returned them to A to seal, and that afterwards when A gave back, the witness or another clerk posted them, held in the absence of evidence to show that A had returned that particular letter to the clerk, this is no proof of posting. *Toosey v Williams*, M & M 19, *Phip Li* 97. So also where A's clerk proved that the letter had with several others been given by him to a decided clerk to post, and that the letter had left for the post with them, held that here possession for posting was insufficient. *Roulunds v De Vecchi*, 1 C & E 10, *Phip Li* 97. So handing a letter to a town postman is no evidence of posting as it is against his duty to receive it (*Re London etc Ld*, *Exp Jones*, 1900 1 Ch 220) *Phip Li* 97—see also *Ram Dass v Official Liquidator* 9 A 366.

To prove the delivery of a letter posted to H at Bristol, the fact that it was addressed as "Mr H Bristol" was insufficient. *Waller v Haycraft*, M & M 149.

## ADMISSIONS

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**17** An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned

Admission defined

**Admissions, meaning of**—An admission is defined by *Stephen* to be “a statement, oral or written suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact made by or on behalf of any party to any proceeding” *Step Dig Ev*, Art 15 In English law the term admission, means any statement made out of the witness box by a party to the proceedings whether civil or criminal, or by some person whose statements are binding on the party against his own interest *Wills Ev 2nd Ed* 149 In our law says *Mr Taylor* ‘the term admission is usually applied to civil transactions, and to those matters of fact, in criminal cases which do not involve criminal intent, the term confession being generally restricted to acknowledgment of guilt This distinction will be better understood by an example Thus in the trial of *Lord Melville*, who was charged, amongst other things, with criminal misapplication of money received from the Exchequer, the admission of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money, though, had such admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected The law was thus stated by *Lord Chancellor Evershine* “This first step in the proof” (namely the receipt of the money by the agent,) ‘must advance by evidence applicable alike to civil, as to criminal cases, for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence, but it is a totally different question, in the consideration of criminal as distinguished from civil justice how the noble person now on trial may be affected by the fact when so established The receipt by the pay master would in itself involve him civilly, but could by no possibility convict him of a crime” *Lord Melville’s Trial*, 29 How St Tr 746—761, *Taylor* § 724 citing *verbatim from Greent Ev* § 170

So it is impossible to hold that admissions only mean statements, made by parties to civil proceedings, and that they do not include statement of accused persons in criminal proceedings All admissions of an accused person are not, in the eye of the law, confessions To ascertain whether a certain statement, made by an accused person is an admission only, or amounts to a confession, a reference must always be made to the terms of the statement Every statement, oral or documentary ‘which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under ss 17 and 18 of the Evidence Act, which is provable against the person making it, unless some provision of the Evidence Act or other law renders it inadmissible *Itahu Bai Sh v Empress* 16 P R 1886 Also in India the restrictions put by *Prof Greent* and *Taylor* that “admission is usually applied to civil transactions and to those matters of fact in criminal cases, which do not involve criminal intent have no application *Vide Peroz v Emperor*, 45 Ind Cr 343=11 P R 1919 Cr =19 Cr L J 651 *Shere Singh v Empress* 21 P R 1881 Cr *Bula v Empress*, 52 P R 1887 Cr *Madan Guru v Emperor*, 4 Pat. 381=73 Ind Cr 963=24 Cr L J 723 *Raj Kumar v Emperor* 9 Pat. L T 449=A. I R 153 Pat 473, *Bishen v Tam* 106 P R 1915 *Ganpat v Emperor*, 8 Ind Cr 1181 But the statements of an accused cannot be used against his co accused *Emperor v Akbar* 34 B 599

The word ‘admission’ as used in sections 17—23 does not include admissions of relevant facts made by party in the witness box, since these are part of his direct oral evidence, nor admissions made on pleadings since their function is to limit the issues and therewith the scope of the evidence admissible *Wills Ev 2nd Ed* p 150 An admission in a pleading is a different thing from such an admission as is contemplated by these sections of the Evidence Act It is generally understood to be a concession made by one of the parties that a fact alleged in the pleading of the party opposed to him need not be proved



time of trial, a statement which, when brought into the case, comes in as a piece of evidence, direct or circumstantial, from which the Court and jury may draw an inference or inferences as to the truth of the fact in issue *McKeeley's Ev* § 61. As to the formal admissions little need be said. They simply fix the relation between the parties as to the facts. They help to define the issues concerning which evidence is to be heard, but they are not in themselves evidence. As to the second kind of admissions those which may be called evidential admissions, they be of many different kinds with respect to form and character, but in general they fall into two classes. First, direct statements of main facts in issue, second, statements of facts from which inferences may be drawn as to main facts in issue. Both kinds of statements may be called evidential admissions, because of the fact that they are introduced as evidence. It will be readily seen however that they may differ very much in conclusiveness, that in the latter case they are likely to be in the nature of circumstantial evidence, as to which there is always much uncertainty while in the former case they are likely in themselves to carry conviction. *McKeeley's Ev* § 67.

**Direct Admissions** Direct and express admissions are practically the same. They are direct statements of main facts in issue. As regards this kind of admissions there is nothing to be said, except that, to be available, the statements which constitute the admissions must be proved in the ordinary way. The form in which the admission is made is immaterial, so that it amounts to a statement of fact, and is not a statement of opinion or promise. *Driscoll v City of Taunton*, 160 Mass 486 (Am). The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission. The statement constituting the admission may be oral or written. Its form is immaterial. So, also, are the place and circumstances attending its making. It may have been heard by witness over a telephone. *Wolfe v Railway Co*, 87 Mo 473=10 Am St Rept 331 (Am).

**Indirect Admissions** Indirect admissions are in the nature of circumstantial evidence. An illustration of indirect admission may be found in the following. A sues X for damage done by X's cattle on A's crop, and for the purpose of showing an admission on the part of X that his cattle had caused the damage A offers the testimony of a witness to the effect that X had told witness that he had offered A a certain amount of money to cover the damage. From such statement an inference naturally arises that X's cattle did do the damage. *Story v Nidiffer*, 146 Cal 549 (Am). That the defendant in the illustration just used made the statement that he had offered the plaintiff something to cover his damages although not equivalent to a direct admission that the cattle caused the damage, is, nevertheless, very nearly so. An illustration of an admission somewhat further removed in character from a direct admission is found in a case where A sued X for the loss of his sheep charging that X's dog had killed them and as a proof of the fact of the killing, which was the main fact in issue offered evidence that X had killed his dog, at the time remarking that it would not kill any more sheep. *Anderson v Halperson*, 126 Iowa, 125 (Am). A step further from the direct admission is the statement which by omission becomes evidence of some fact. When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence. According to *Bow* implied admissions are those which result from some act, or failure to act of the party. *Bow* *ex's Law Dict*. They may also arise from acquiescence. An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question. There are various cases of implied admissions strictly speaking. In most instance when actions or conduct are introduced as bearing upon the truth of a fact it is as circumstantial proof of the fact itself, and not as proof of an admission. The term "implied admission" is often used to designate proof of this sort, but really the element of admission is frequently wanting. *McKeeley's Evidence* § 65. Admissions by conduct are not included under this section. Under this section admission is a statement oral or documentary. An admission by conduct has been dealt with in section 8. Such admissions

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Unless a statement in a pleading is in the nature of such a confession, it can hardly be considered to be a fact admitted in the pleadings for purposes of the proceedings in which the pleadings are originally filed. *Ippara Chathur v. Annappa* 20 Ind. L. J. 792 = 25 M. L. J. 329 = 11 M. L. T. 117. Nor the sections include any admissions made out of Court in so far as they are not so-called admissions of fact, but create specific rights and liabilities, as known party, statements made in the pleadings include admissions made by the opposite party, circumstances were such as to make it a part of the Civil Procedure Code or in an

**Principle on which admissions are received.** The admission is received as evidence, and on the faith of its own natural truthfulness, and in dispensation of the ordinary tests of cross-examination. *Goodere F.* 496. See also *Spargo v. Brown*, 9 B. & C. 935 (938). "Another class of evidence" says Mr. Starnie "which is admissible though the usual tests are inapplicable, consists of declarations made by one of the parties to a suit, in the nature of a confession or admission contrary to his own interest. Whatever a party voluntarily admits to be true though the admission be contrary to his interest, may reasonably be taken for truth. The same rule, it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declaration may be considered to have been made by himself. As to such evidence, the ordinary tests of truth are properly dispensed with, they are inapplicable and oath is administered to a witness in order to impose an additional obligation on his conscience, and so to add weight to his testimony, and he is cross-examined to ascertain his means of knowledge as well as his intention to speak the truth. But where a man voluntarily admits a debt, or confesses a crime, there is little occasion for confirmation on the ordinary motives of human conduct are sufficient warrants for belief." *Starnie on Evidence* p. 20. Admissions and confessions are generally admitted as an exception to the Hearsay rule, considering them as declarations against his interest, and therefore probably true. But there is nothing in their nature which entitles us to say that they are explainable only as made against the person's interest. The simple and broad rule for receiving them is, in the language of Chief Baron Pollock, that "if a party has chosen to talk about a particular matter, his statement is evidence against himself (*Darby v. Ouseley*, 1 H. & N. 1) and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness viz., a means of discrediting his present claim by showing that he has at other times made a smaller or otherwise different claim. If a witness says on the stand that he saw the plaintiff give the defendant one hundred dollars a prior statement of his that he saw fifty dollars given, discredits his present testimony, in that both statements cannot be true and at one time or the other the witness has apparently erred. In a similar way, a plaintiff's statement at a prior time that he lent the defendant fifty dollars, throws discredit on his present claim in the pleadings that he lent one hundred dollars. The evidential weight of the inconsistency may be greater if his prior statement was against his interest—as if he declared that he never lent any money at all—but that is not essential to its admissibility so that in the end the purpose and effect of using admissions of this sort is simply to get a prior statement of the party against the statement now advanced by him in his pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one. *Green v. Evans* § 169.

**Probative Status of Admission.**—Prof. Wigmore's views "The statement made out of Court by a party opponent are universally deemed admissible and offered against him. What is their probative status?"

"(i)—Regarded from the point of view of ordinary logic and psychology they are of course testimonial utterances like any other human assertion whether made in or out of Court.

"But even from this point of view they have two kinds of probative value. "(a) One is the ordinary value of any person's testimonial utterance, this value depending on his capacity to observe, etc., his means of knowledge, his

time of trial, a statement which, when brought into the case, comes in as a piece of evidence, direct or circumstantial from which the Court and jury may draw an inference or inferences as to the truth of the fact in issue *McKelvey's Ev* § 61. As to the formal admissions little need be said. They simply fix the relation between the parties as to the facts. They help to define the issues concerning which evidence is to be heard but they are not in themselves evidence. As to the second kind of admissions, those which may be called admissions, they be of many different kinds with which he has made a statement but in general they fall into two classes: first, a party opponent is discredited when he makes an issue, second, a statement which he has made is inconsistent with his present claim against him. The witness speaks in Court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party-opponent whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of his witnesses put forward to support his pleadings hence the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him. Thus, in effect and broadly, anything said by the party opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the fact now asserted by him in pleadings or in testimony.

"(2) But, regarded from the point of view of the legal rules of admissibility, the party's extra judicial statements, like all other extra judicial statements, are met and challenged by the Hearsay rule. How is it, then (since they are nevertheless admissible against the party opponent,) that they are able to pass the gruntlet of the Hearsay rule?

"Very simply. The answer is that the party's testimonial utterances do not pass the gruntlet of the Hearsay rule when they are offered for him (unless they can satisfy some exception to that rule), but that they do pass the gruntlet when they are offered against him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he does not need to cross examine himself. The theory of the Hearsay rule is that an extra judicial assertion is excluded unless there has been sufficient opportunity to test the assertion by cross-examination by the party against whom it is offered e.g. if Jones had said out of Court, 'The party opponent, Smith borrowed these fifty dollars', Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out of Court, 'I borrowed these fifty dollars', certainly, Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking viz the need and prudence of affording an opportunity of cross examination. In other words, the Hearsay rule is satisfied. Smith has already had an opportunity to cross-examine himself, or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion. The Hearsay rule, therefore is not a ground of objection when an opponent's assertions are offered against him in such case, his assertions are termed Admissions.\* But the Hearsay rule is a ground of objection by the first party when the opponent's assertions are offered in his favour and such statements are then not termed admissions.\*

"(3) It follows that the subject of an admission is not limited to facts against the party opponent's interest at the time. No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time but that circumstance has no bearing upon their admissibility. On principle, it is plain that the probative reason why a party opponent's utterance is sought to be used against him, is ordinarily the reason noted above in para 1b viz that it exhibits an inconsistency with his present claim, tending to throw doubt upon it, whether he was at the time speaking

\* This does not accord with the definition given in the Indian Evidence Act, *Vide* s. 17, 21

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apparently in his own favour or against his own interest. For example a plaintiff who now claims a debt of £ 100 is clearly discredited by having made a demand a month ago for only £ 50, even if at the time the debtor conceived only £ 25, and thus put the demandant in the position of then making an assertion purely in his own favour for the aggravation of his claim. If the principle upon which admissions were received rested at all upon the discrediting quality of the fact asserted at the time of assertion, such a statement would be certainly rejected with as much force as an admission made by the first party as it would be when even offered by the opponent himself in his own favour. Nevertheless the fallacy is sometimes committed of placing the inadmissibility of such statements on the ground that it is a fallacy, in the abstract, as to be seen not only by reflecting upon the principle involved, but also by observing that no Court ever yet excluded an opponent's admission because of such a limitation. Doubtless and unquestioned tradition are here unmistakable.

(4) The logical value, therefore of the use of admission is two fold. In the first place, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction, the nature of this inference, both in its strength and in its weakness, has been already examined, and need not here be reconsidered. In the next place, all admissions used against the opponent, satisfy the Hearsay rule and, when once made, have such testimonial value as belongs to any testimonial assertions under the circumstances, and the more notably they run counter to the natural bias or interest of the party when made, the more credible they become. This element adding to their probative value, but not being essential to their admissibility. This double evidential utility explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony for the party offering it. However, any attempt to stress this distinction tends to vain logical quibbles and should not be made basis of any instruction on the weight of evidence." *Wigmore* § 1048

**Admissions, distinguished from Hearsay exception for statements of Facts against interest, Death not necessary.** It has already been stated that the use of admissions in the sense of self harming statement is on principle not obnoxious to the Hearsay rule. Nevertheless because, most statements used as admissions do happen to state facts against interest, admissions are generally treated as obnoxious to the Hearsay rule, and are only allowed as exceptions to it (*Vide Taylor Et* § 723). In such cases, as the statements are against the interest of the persons making it, their trustworthiness is supposed to be guaranteed. That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may be seen from three circumstances first, that the limitation of the Hearsay exception to facts against pecuniary or proprietary interest (*Vide* s. 32, clause 3) has never been attempted to be applied to admissions, secondly that the further requirement of the Hearsay exception namely, that the declarant must be accounted for as deceased, absent from the jurisdiction, or otherwise unavailable (*Vide* section 32), has never been enforced for the use of a party's admissions (*Vide Woolway & Roue* 1 A & E 114), and thirdly that if an opponent's admission fell under the protection of that exception they would be equally admissible in his favour, but of course they are not. *Wigmore* § 1049. But under the Indian Evidence Act admission which is not a self harming statement is made admissible in favour of the party making it, if it satisfies the conditions of clauses (1), (2) and (3) of section 21.

**Admissions whether subject to rules of testimonial qualifications, such as personal knowledge, infancy, Opinion Rule, etc.** "A primary use and effect of an admission says *Prof. Wigmore* 'is to discredit a party's claim by exhibiting his inconsistent other utterances. It is therefore immaterial whether these utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force.' *Wigmore* § 1053. For such admissions therefore a party's personal knowledge is not indispensable and it may be founded on Hearsay although its weight may be slight. *Re Perton*, 53 L T 766. But



where the admissions" says Mr Taylor "whether oral or in writing, contain matters stated as mere hearsay, it may be questionable whether such matters can be received in evidence. If tendered against the party making the statement, they are clearly entitled to very little weight, and unless connected with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest, to be inadmissible. *Lord Trimblestown v Kemmis*, 9 Cl and F 780, 784." Taylor § 737 Mr Justice Chabrie in the case of an answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible, "for" he added, "it appears to me that where one party gives a part of the answer of the other party in evidence he makes the whole inadmissible so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery. But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made, though some parts of it be only stated from the hearsay and belief *Greene v* § 202, Taylor *Et* § 737. But *Stephens J* in *Kitchen v Robbins*, 29 Ga 713, 766 (*Am*) expressed contrary view where he said: Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest that they are true, and that is evidence to the jury that they are true. Admissions do not come in on the ground that the party making them is speaking from his personal knowledge but upon the ground that a party will not make admissions against himself unless they are true. The fact that he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of evidence. The source from which a knowledge of fact is derived, is a circumstance for the jury to consider in estimating the value of the evidence but that is all." See also *Wigmore* § 1053 *Bishop of Meath v Marquis of Winchester*, 3 Bing, N C 183 (203), *Bulley v Bulley*, L R Ch App 739 (747). But such considerations do not apply when a party wants to use testimonially his own admission in his own favour under clauses 1 to 3 of section 21. In such cases personal knowledge seems to be necessary. In *R v Waller*, 1 Cox 99, where the question was whether A was an infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay. See *R v Symonds*, 4 Cox 277, *Re Peston*, 53 L T 706. As to statements by an agent containing hearsay or opinions, vide *The Actaeon* 1 Speaks E & A 780 *The Solway* 10 P D 137 cited in *Philp v* 196, 216.

On the same principle the admission of an infant party would be receivable. *O'Neill v Read*, 7 Ir L R 434. See also *Dharamaji Vaman v Gurrar Shrinivas*, 10 B. H. L. R. 311. Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be nil. *Wigmore* § 1053. The opinion rule also does not limit the use of a party's admissions. *Doe v Stell*, 3 Camp 115. But a bare statement that a party is informed without addition of his belief in the information will not amount to an admission. *Trimbletown v Kemmis*, 9 C and P 780, *Roe v Ferris* 2 B and P 548 *Philp v* 196.

Admission distinguished from confession.—Admission is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in criminal Court as denoting an acknowledgment of guilt. The accused in a criminal case may make admissions, just as a party in a civil case, i.e. by saying things inconsistent with the present points of proof. Admissions in the sense of inconsistencies are not peculiar to civil cases. *Greene v* 170. Admission in a civil suit that a document is genuine can not in a forgery case be regarded as confession at all. *Per Rankin C J* in *Ambar Ali v Emperor* A. I. R 1929 Cal 339. "A confession" says *Prof Wigmore* "is one species of admissions, namely an admission consisting of a direct assertion, by the accused in a criminal case of the main fact charged against him or of some fact essential to the charge."

Wignmore § 1050, Taylor Ex § 724, Steph Dig Art 24 "Confessions" are a sub species of 'statements' and a 'species of admissions.' Per Rankin J in *Amuddy v Emperor*, 44 C L J 253 (259) = A I R 1927 C 17 The expression confession occurs under the category of admissions, it has not been defined in the Evidence Act. Per Mahmood J in *R v Babu Lal*, 6 A 509 (539) But there is distinction between 'an admission' and 'a confession' in the Evidence Act. *R v MacDonald*, 10 B L R App 2, *Empress v Jugrub*, 7 A 746, *Empress v Pandharinath* 6 B 34 *Empress v Maher Ali*, 15 C 389, *Empress v Dabee Pershad* 6 C 530, *Empress v Almadhab*, 15 C 595 A confession, is only an admission of guilt. 4 A L J 174 (Journal) The word confession, as used in the sections of the Evidence Act relating to confessions, should be construed as including inculpatory admissions which fall short of being an admission of guilt. *Empress v Jugrub*, 7 A, 646 = A W N (1885) 131 All the admissions of an accused person are not, in the eye of the law confessions. It is also impossible to hold that admissions only mean statements made by parties to civil proceedings and that they do not include statements of accused persons in criminal proceedings. A confession may be defined as 'an admission made at any time by a person charged with an offence stating or suggesting the inference that he committed the offence.' When the statement taken by itself does not suggest the inference of guilt in relation to the particular charge, it is not a confession. *Mahabaksh v Emperor*, 16 P R 1886 Cr An incriminating statement which falls short of an absolute confession but from which the inference of guilt follows is a 'confession' *Hakiman v King Emperor*, 31 P L R 1900 = 2 Cr L J 239 = 20 P R 1905 Cr For further elucidation of this subject, vide s 24 *infra*

Admission as distinguished from conduct. Admissions are statements or assertions in words, and it is their inconsistency with the party's other assertions that discredits the latter. Hence conduct cannot of itself be treated as an admission. Yet various sorts of conduct, which indicate a guilty consciousness and are undoubtedly receivable in evidence, are sometimes spoken of as admissions. The truth is that they are just what they seem to be, namely, acts not assertions, and that their use in evidence is strictly a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact. But the above observations are not applicable where silence is treated as admission on the part of a party. When by a party's silence an assent is given to the assertion of a third person on that assertion is thereby adopted by the party, and therefore may be used against him as his own statement and admission. It is the statement, however, that constitutes the admission; the conduct merely effects its adoption.

Wigmore § 1052 *Mercantile Bank v. Talulram*, 8 S. L. R. 112 = 27 Ind. C. 309

Admission must be taken as a whole. When an admission is tendered against a party, he is entitled to have proved, as part of his adversary's case so much of the whole statement, document, or correspondence containing or referred to in, the admission as is necessary to explain the admission and although such other parts may be favourable to himself, but the jury may attach different degrees of credit to different parts. *Phipps v. Inland Waterways*, 33 Ed. 19. The reason for this rule is that unless the whole is received and considered the true meaning and import of the part which is good evidence against the party making the admission cannot be ascertained. *Thompson v. The People*, 201 N.Y. 225, 100 N.E. 725. For general statements of this principle see *Stoddard v. The People*, 22 How. St. Tr. 217; *Per Abbott C. J. in Queen's Case*, 2 B. & B. 287; *Thomson v. Rusten*, 2 Dowl. & R. 361; *Fletcher v. Froggatt*, 2 C. & P. 366; *Cobbett v. Grey*, 4 Ex. R. 729. So it is a well settled rule of law that the whole of a declaration or statement containing an admission should be received together. In the United States the rule is thus laid down by Mr. Justice Field in *Mutual Benefit Life Ins. Co. v. Newton*, 23 Wall. (U.S.) 332. Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify or destroy its effect on the other side. This rule together with its reason, is thus stated by Mr. Best: "Where part of a document or statement is used as self-harm,"



**S. 17.** admissions. The law is practically the same with regard to them as to letters, and is, that that which is written by a person or at his direction may properly be used in evidence against him in any proceeding to which the written matter may relate. So that on principles already discussed other documents or memoranda written or authorized by a party may be offered as admissions against him like his oral statements. If self-disserving in their character, it is immaterial in what form the document may appear. *Burr Jones* § 270. This rule has been applied to receipts [*Harrison v Remington Paper Co*, 140 Fed 385, (Am), *Gadian v Veeralapa*, 28 M L J 92], bills of lading [*Shanell v Hart* 2 A K Marsh (Ky) 191 (Am)], orders [*Macomber v Parley* 14 Pick (Mass) 497], advertisement [*Mann v Russel*, 11 Ill 585, (Am)] newspaper articles verified as being the approved statement of the person making the admission [*Eduard v City of Watertown*, 59 Hun, 620] maps [*Bridgman v Jennings*, 1 Ld Raym 734] *Huronath v Poonath*, 7 W R 249], Wills [*Cowan v Hite* 2 A K Marsh (Ky) 255], circulars [*Berry v Mathews* 7 Ga 457, (Am)] hand bills [*Dennis v Van Foy* 31 N J L 38 (Am)], and under certain circumstances, entries in the books of a bank held admissible in favour of a receiver of the bank in an action against its president [*Olney v Chadsey* 7 R J 224] *Burr Jones* Ev § 270.

The entries in account books are, like other admissions, evidence against the party making them, (*Lang v State* 97 Ala 41) and, of course, equally admissible if made by some person authorized to make them, against the party giving the authority [*San Pedro Lumber Co v Reynolds*, 121 Cal 74 (Am)] *Sri Kishen v Huri Kishen* 5 M I A 432 (433) *R v Hanmantia*, 1 B 610, 617]. They are admissible irrespective of the name by which the book may go or pass, or the manner in which it is kept. The reason is that such book entries are not admissible merely because they are book entries but because they are statements in writing which are binding upon the party responsible for their inscription whether the entry is in his own hand writing or that of the person he has authorized in that behalf. *Leowenthal v McCombee*, 101 Ill, 143. An entry in a book belonging to a Zemindar and showing the extent of a tenant's holding and the rate of rent even when unstamped, can be admitted as an admission on the part of the defendant that the particulars contained in the entry were true. *Narain Coomar v Ramkrishna*, 5 C 864=6 C L R 256. Similarly partnership books are presumed to be equally under the control of the several partners, and to be kept under their direction. Therefore entries in such books are competent as against the firm as admissions (*Glover v Hunbert*, 89 Ala 324) and in controversies between the members of the firm, such entries are competent against each member. *Daji Abaji v Gound*, 10 Bom L R 811. They are presumed to be with knowledge and consent although the presumption may be rebutted by proof that the partner or partners, against whom the entries are offered, have not had access to the books and have not inspected them and that the entries are incorrect. *Burr Jones* § 271. The horoscope of the plaintiff can be relied on by the defendant under ss 17 and 18 of the Evidence Act. *Raja Goundan v Raja Goundan*, 17 M 134 (139) distinguishing 9 C 613 and 17 C 949. Admissions in affidavits or in answers to interrogatories in the same or former proceedings are also competent. *Phip* Ed 4th Ed p 213. *Fleet v Perius* L R 3 Q B 536, *Harish v Prosumo*, 22 W R 303, *Legal Remembrancer v Motilal Ghose*, 41 C 173, *Bhugwant v Lall Jha*, Mar h 48.

Of the various kinds of judicial admissions, those contained in pleadings command careful consideration by reason not only of these presumed solemn contents but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the change in circumstances by withdrawal and amendment, in brief by the circumstances surrounding their offer in evidence against the party making them, and those who of course their verification by parties having absolute knowledge and those who speak only from information and belief. When parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged. *Gursh Chander v Shama Charn*, 15 W R 137. *Iusten v Ferst* 2 Ga App 91 (Am) A statement in the plaintiff's unchallenged and made by the putni dar after his interest had been transferred is in no way binding upon the transferee. *Jahnomull v Saroda Prosad*, 7 C

L J 604. The plaintiff may also rely upon the defendant's admission in the pleadings *Farince v Dwarla Nath* 15 W R 451. But admissions contained in a statement filed in plaintiff's name are not proof that they have been made by her *Asmuttoo v Alla Hafi*, 25 W R 125. A defendant's written statement referred to as evidence in plaintiff's favour makes the whole of it evidence in the suit. *Ridha Churn v Chunder Monce*, 9 W R. 290, *Viamutullah v Hummat* 11 22 W R 519. But it does not bind his co-defendant *Lochman v Tansukh*, 6 A 395 = 1 W N 1881, 136, 1, *ullah Khan v Ahmad*, 7A 353 = A W N 1885, 54. So also admissions may be made in verified petitions *Girish v Shama*, 15 W R 437, *Mohun v Chuttoo* 21 W R 24, *Gour v Mohesh* 14 W R 484. An admission in a *subhlyat* is also competent *Jogeswar v Akhoy* 19 C L J 1. An admission in a previous deposition is also admissible *Bibee v Ahmut*, 14 B L R App 3. *Ali Mahomed v Sh Moharaj* 36 C L J 186.

**Admission on points of law** — An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the Appellate Court. *Secretary of State v Shubprosad*, 27 C L J 447 = 45 Ind Cts 953. *Tugore v Tugore*, 9 B L R 377 = 18 W R 359 = 1 A Sup 47, *Beni Pershad v Dudhmalh* 27 C L 156 = 26 I A 216, *Holms v Johnston* 12 Heisk (59 Ten) 155, *Urquhart v Butterfield*, 37 Ch D 357. *Abdullah v Israf Ali* 7 C L J 152, *Ramsaran v Khalhan* 11 C W N 340. So also an erroneous admission of the pleader of a party on a point of law cannot bind the party. *Dwar Bux v Katil* 3 C W N 222. See also *Krishna v Rajmat* 24 B 360. *Narayan v Venkata* 28 B 105.

**Statements made under constraint or duress** — In regard to admissions made under circumstances of constraint a distinction is taken between civil and criminal cases, and it has been considered that on the trial of civil actions admissions are receivable in evidence provided the compulsion under which they are given is legal, and the party was not imposed upon or under duress. Thus in the trial of *Collector v Lord Keith*, 4 Esp 212 the testimony of the defendant given as a witness in an action between other parties in which he admitted the taking of the ship was allowed to be proved against him, though it appeared that, in giving his evidence, when he was proceeding to state his reason for taking the ship, *Lord Kenyon* has stopped him by saying it was unnecessary for him to vindicate his conduct. In that case *Le Blanc J*, remarked, that the manner in which the evidence has been obtained might be matter of observation to the jury but that, if what was said bore in any way on the issue he was bound to receive it as evidence of the fact itself. See also *Bushun das v Ramlabanya*, 106 P R 1915. *Neuhall v Jenlins*, 2 Gray 562. The rule extends also to answers voluntarily given to questions improperly asked, and to which the witness might successfully have objected. So the voluntary answers of a bankrupt before the commissioners are evidence in a subsequent action against the party himself, though he might have demurred to the questions, or the whole examination was irregular (*Holt v Squire Ry* and M 282), unless it was obtained by imposition or duress (*Maltby v Christie* 4 Esp 342, as expounded by *Lord Ellenborough*, in *Rand v Horner* 16 East 193), *Green Et* § 193. When such admissions are obtained by illegal duress they are not admissible. *Stockfield v De Tastel* 4 Camp 11. *Robson v Alexander* 1 M and P 448.

## 18 Statements made by a party to the proceeding, or

Admission— by an agent to any such party, whom the  
by party to proceeding Court regards, under the circumstances of the  
or his agent, case, as expressly or impliedly authorized by  
him to make them, are admissions

Statements made by parties to suits sung or sued in a representative character, are not admissions, unless they were made while the party making them held that character

by sutor in representative character,

# THE INDIAN EVIDENCE ACT

Statements made by--

(1) persons who have any proprietary of pecuniary interest in the subject-matter of the proceeding, and who make the statement in the character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

the admissions, if they are made during the continuance of the interest of the persons making the statements

**Principle** The general rule is that an admission is an evidence against the party making it and not against any other party, in as much as in the case the rule against Hearsay is not violated (vide p 284) Moreover one can with impunity take a position in the trial of an action inconsistent with the previous position taken by him, and accordingly any acts or statements made by him which show a different attitude or position from that which he has taken in the action are admissible *Melchey's Ex* § 66 It is likely, however, that the prohibitive or evidentiary quality of the statement is secondary to the other element mentioned, which may be called the "estoppel element," and this is the real reason why it is admissible *Ibid* § 65 Many admissions, however being made by third persons are receivable on the mixed grounds, partly as belonging to the *res gestae*, partly as made against the interest of the person making them and partly because of some privity with him against whom the are offered in evidence *Greenl Ex* § 169 In the case of admission of person not parties to the suit the doctrine of estoppel plays no part, but admissions of statements rests solely upon the fact that they have been made against interest of the party making them, and that interest is identified with *Melchey Ex* § 66 To make such admissions receivable in evidence three no suggest themselves as possible By pre appointment, or reference to and designate a person whose utterance, he assented to before as correct and utterance, when made, thus represents the party's own belief (*Vide* S 20) By adoption the party may assent to a statement already uttered by another person which thus becomes effectively the party's own admission By privity of interest and by agency the party's rights may in the substantive law be affected by the acts of another person and thus the other person's admissions may equally be available evidentially *Hignore* § 1070 In order that an admission may be relevant it is necessary to show that the person who made it had one interest at the time of making it within the meaning of section 18 of the Evidence Act *Jogesca v. Khoy* 19 C L J 1=22 Ind Ca 714 see also *Washene v. Maun* Da Li 33 Ind Cas 888

**Scope of the section**—This section deals with admissions in general by persons by whom admissions may be made are the parties to the suit or the agents (Cl 1), or those identified in interest with them (Cl 2) *Spargue v. Brown* 9 B & C 938, or persons *sub modo* in sub-clauses (1) and (2) If they proceed from a stranger, and cannot be brought home to the party, they are inadmissible unless upon some of the other grounds stated in sections 18 to 20 Thus the admissions of payee of a negotiable promissory note, not overdue when made, cannot be received in an action by the indorsee against the maker, impeach the consideration there being no identity of interest between him and the plaintiff *Borough v. White* 1 B & C 325 *Bristol v. Dunn*, 12 Wend 14 An admission made by an infant after he attains age will bind him So if an action be brought against an adult for necessities supplied to him during minority, admissions made, and letters written by him while under age, may

proved on behalf of the plaintiff *O'Neill v. Read*, 7 Ir Law R 434 "No distinction should be drawn between nominal and real parties to a suit. The Courts of India being Courts of Equity should deal directly with admissions made by nominal parties, e.g. consignees suing in the name of consignor. When the Court considers the admission of such a party fraudulent, it should be rejected at once. See notes to *Banerman v. Radinius*, 2 Sm L. C. 363." *Nort F.* 143 Admissions under this section are only evidence against the persons making them. Under section 32, *infra* the admissions there enumerated are evidence against all the world.

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was derivatively interested through the other and a mere community of interest will not be sufficient. Thus, where two persons were in partnership, and an action was brought against them as partners of a vessel, an admission made by the one, as to a matter which was not a subject of co-partnership, but only of co-part-ownership was held inadmissible against the other *Taylor* § 750 *Rausstorne v. Gandell*, 15 M. & W. 304 *Phillips v. Elaget* 11 M. & W. 84. So, where a joint contract it severed by the death of one of the contractors nothing that is subsequently done or said by the survivor can bind the personal representative of the deceased, (*Mims v. Tiedtgold*, 2 B. & C. 23 *Fordham v. Wallis*, 10 Hare, 217, *Slaymaker v. Gundacker* Ex. 10 Serg. & R. 75), nor can the admissions of the executor bind the survivor *Seaton v. Lawson* 4 B. & Ad. 396, *Hathaway v. Hasell*, 9 Pick. 24. Neither will the admissions of one tenant in common be receivable against his co-tenant, though both are parties on the same side of the suit *Dun v. Braun* 4 Cowen 483 (492) *Taylor* § 751.

Where a party sues in a representative capacity—i.e. as trustee, executor, administrator, or the like,—the representative is distinct from ordinary capacity, and only admissions made in the former quality are receivable, in particular, statements made before or after incumbency are admissible. Conversely his admission as executor or the like would not be receivable against them as a party in his personal capacity. A guardian so far as his powers place him in a representative capacity, is subject to the same rules, but the function of a guardian ad litem begins to end with the litigation, and consequently his extrajudicial admissions are not receivable at all. *Wymore* § 107 citing *Pindell v. Rubenstein* 115 Atl. 809, *Stevens v. Continental*, 97 N. W. 862 *Chipman v. R. Co.* 12 Utah 8 (1m).

Where procedure still permits my litigation to be conducted without joining the real and beneficial party in interest, his admissions would nevertheless be received *Hanson v. Parker* 1 Wils. 257, *Wymore* § 107. In *R. v. Hardwicke* 11 East. 578 584 *Bayley, J.* said "Banerman v. Radinius only decided that the declarations of the nominal party in the record were evidence against him, but not that the declarations of the real party would not also have been evidence." In *Smith v. Lyon* 3 Camp. 455 which was an action by a ship master, for the benefit of the owner on a charter contract, *Ellenborough L. C. J.* said "Although this action is in the name of the master, it is brought for the benefit of the owner, I am therefore of opinion that anything said by the latter is admissible evidence for the defendant. A shareholder of a company is not the real party in legal interest, and his statements cannot be received as admissions of the corporation *Wymore* § 107. But a contrary view was early taken in England for purchase inhabitants *R. v. Hardwicke*, 11 East. 578, 585.

Sub-clause (2) is the converse of sub-clause (1). There the statement was that of the representative, here it is of the party through whom he derives his right to sue. Thus if an executor were to sue for a debt, the declaration of his testator that the debt was paid would be evidence against him. *Pocock v. Billings*, 1 R. and M. 127, *Smith v. Smith*, 3 Bing. N. C. 29. In the same way the declaration of the ancestor respecting his title to the land held by him is evidence against the heir (*Doe v. Pette* 5 B. and A. 223) and the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them *heriot* *Hat v. Finch*, 1 Taunt. 141 *Nort E.* 148.

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**Statements made by a party**—It has already been stated that declaration of a party to the record, as against such party, admissible in evidence. *Spargo v Brown* 9 B & C 935. In the Court of Chancery, in England, evidences are not received of admissions or declarations of the parties, which are not put in issue by pleadings and in which there was not, therefore any opportunity of explaining or disproving. *Copland v Toulmin* 7 Cl & Fin 350 373, *Austin v Chamber* 6 Cl & Fin 1. *Attwood v Small* 6 Cl & F 231. The admissions of a party are not open to objections to which other parol evidence may be open. For example, the admission of a party is not subject to the "best evidence" rule. In an action by A against X for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X, A offered admissions by X of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence and that a certified copy of the judgment should be produced.

In *Smith v Palmer* 6 Cush (Mass) 513 521 *Fletcher J* says "This is a case of the admission of a party and the admission of a party stands on different grounds. The admission of a party is not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus the statements of a party that certain land had been conveyed might be admitted, though the conveyance must be by deed recorded. The general principle as to the production of written evidence is the best evidence does not apply to the admissions of parties, as what a party admits against himself may reasonably be taken to be true."—A statement made by defendant in another suit may be used as an admission within the meaning of this section. *Harish v Prosunno*, 22 W R 303, *Mohun v Chittoor*, 21 W R 34. *Lala v Digambar* 22 W R 301 N, *Jorbes v Mahomed* 14 W R 28 P C, *Haranath v Paresh*, 7 W R 249. *Kashy v Bama* 23 W R 271, *Gurish v Shama* 15 W R 437. *Obhoy v Bijoy*, 14 W R 165.

The subject of admission is presented in its simplest form when the admissions are made by one who is a party to the record and who is also a real party in interest. In such a case it is very clear that the statements and acts of the party when they afford pre-emption against him may be received in behalf of the adverse party. *Scales v Chambliss* 35 Ala 19 (1m). It cannot be made too plain that this evidence is not by way of attacking the credibility of the party witness and there is no occasion to lay the foundation of a link him first if he made the statement. When the statement proven is between the parties to the transaction it has always been the rule that one party could prove the statements of the other at any time which would throw light upon the issues involved or facts relevant to the issues. *Moore v Crosthwait*, 12 Ala 272 (1m). It follows that the admissibility of such admissions is independent of explanations which may come later, and of the date or place. *Lorenson v Camarillo* 45 Cal 125 (1m) at which they were made or of such other circumstantial verification which ordinarily accompanies the recounting of an event. *London v Gibbes* 10 Ala 155 (1m). Such statements or admissions are original evidence and the point in controversy is not their truth or falsity but whether or not they were made. *McBlain v Edgar* 65 N J L 631=40 Al 600 (1m). It is axiomatic to say they are not conclusive but are in the nature of *prima facie* evidence and go to the jury to give them their just weight in settling questions of fact involved in the case to which they are directed. *Casseratta v Casseratta* 21 Mo 237. The principle on which the plaintiff is held bound by his acts, conduct or representation is of common law origin, and results from the rule that parties to a suit are bound by admissions against their interest, respecting the subject of the action. Such a plea is *prima facie* conclusive against the party who makes it, and may be explained or qualified but if evidence for this purpose is introduced, the whole is submitted to the tribunal and the liability of the party is decided by its verdict as a question of evidence. *Car v Buck* 18 Ark 277 (1m). The question always is, did the party (by a party is meant party to the act) who has been proved with process. *Hunter v Coal Co v Hunt*, 14



Ill. App 1) make the statement? And if they did, the jury will weigh the presence or absence of confirmation, and the strength or weakness of the establishment of the fact. *Mason v. Lothrop*, 7 Gray (Mass.) 304 (Am.), *Burr Jones v. Ft* § 237. In holding that admissions of parties to the record are receivable in evidence it matters not whether such admissions were made before or after the party had arrived at full age, and therefore, if an action be brought against an adult for necessities supplied to him during his minority, admissions made, and letters written by him while under age may be proved on behalf of the plaintiff. *O'Neill v. Read*, 7 Jr. L. R. 431, *Taylor* § 740, but see *Haulins v. Lusecombe*, 2 Swins, 375. An accused is a party to a proceeding, but it is doubtful whether a person against whom an offence has been committed is also a party to the proceeding. (*Cun. Ft* 5456). But his admission may be accepted as an agent of the crown or under section 19. Previous depositions of a party to the suit are admissible in evidence. *Sooyun v. Achmuty*, 21 W. R. 411=14 B. L. R. App 3, *Moloi v. Queen Empress*, 21 C. 392. Maps filed by the parties in former arbitration proceedings may be used as admissions against them in a subsequent suit. *Haronath v. Piconath* 7 W. R. 249 (see also *Slack v. Buchanan*, 1 Per R 5, *Gregory v. Howard*, 3 Esp 113). Admissions made by an accused in his previous examination in the Insolvency proceeding are admissions under section 17 of the Evidence Act. So they are relevant and admissible unless they are excluded by sections 18-31 of the same Act. *Per Woodroffe J in Joseph v. Official Assignee* 47 C. 201=24 C. W. N. 425-31 C. L. J. 209=36 Ind. C. 778=21 C. L. J. 722. "Admissions are always evidence against the party who makes them, but they are evidence which varies much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they are untrue." *Golul v. Karlash*, 55 Ind. C. 345. "But what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the facts admitted must be taken to be established." *Ghulam v. Muhammad*, 65 Ind. C. 398 (400). See also the observations of Lord Atkinson in *Chandra Kunwar v. Chaudhuri*, 29 A. 184=11 C. W. N. 321 P. C.

**Parties on record—Nominal parties.** This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit, whether others or joint parties on the same side with him or not, and howsoever the interest may appear and what ever may be its relative amount. *Baneriman v. Radenius*, 7 T. R. 663=2 Esp 603, *Gibson v. Winter* 5 B. & Ad 96. "Whatever a party voluntarily admits to be true, though the admission be contrary to his interest may reasonably be taken for the truth. The same rule it will be seen applies to admissions by those who are identified in situation and interest with a party that this declaration may be considered to have been made by himself. As to such evidence the ordinary tests of truth are properly dispensed with, and they are inapplicable. An oath is administered to a witness to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross-examined to ascertain his means of knowledge as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation, the ordinary motives of human conduct are sufficient warrants for belief. *Southern Ins. Co. v. White* 58 Ark. 277 (Am.). "But where the party sues alone and has no interest in the matter, his name being used of necessity by one to whom he has assigned all his interest in the subject of the suit though it is agreed that he cannot be permitted to retract his acts or admissions, to disavow the title of his innocent assignee or vendee, yet the courts are not so clearly agreed in the mode of re-training him. What Chancery will always protect the assignee, either by injunction or otherwise, is very certain, and formerly this was the course uniformly pursued, the admissions of a party to the record at common law being received against him in all cases. But, in later times the interests of an assignee suing in the name of the assignor, have also to a considerable extent, been protected in the Courts of Common Law, against the effect of any acts or admissions of the latter to his prejudice. A familiar example of this sort is that of a receipt in full,

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given by the assignor, being nominal plaintiff, to the debtor after the assignment which the assignee is permitted to impeach and avoid, in a suit at law, by showing the previous assignment. *Henderson v Wild* 2 Camp 561. *Greenl* 17 § 172. 'In modern practice at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest.' *Dacey v Mills*, 10 Ill 67, *Shaler v Bumstead*, 99 Mass. 112, 127.

**Statement by agents—Principles of admissibility** *Qui Per Alium Facit Scipsum Facere Videtur* (He who does an act through another is deemed in law to do it himself). This maxim is of universal application. *Per Tindal C J* in 8 Scott N R 830. The agency may be constituted by an express limited authority to make such contract or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any, or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as for instance, that of partner, by which relation when complete one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special or usually belonging to it or the relation of husband and wife, in which the law under certain circumstances, considers the husband to make his wife an agent. In all these cases if the agent in making the contract acts on that authority, the principal is bound by the contract, but not otherwise. This agency may be created by the immediate act of the party, that is by really giving the authority to the agent, or representing to him that he is to have it or by constituting that relation to which the law attaches agency, or it may be created by the representative of the defendant to the plaintiff that the party making the contract is the agent of the defendant or that such relation exists to constitute him such, and if the plaintiff really makes the contract on the faith of the defendant's representation the defendant is bound—he is estopped from disputing the truth of it with respect to that contract, and the representative of an authority is *quoad hoc* precisely the same as a real authority given by the defendant to the agent. This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him and may be made by words and conduct. Upon none of the propositions is there, we apprehend, the slightest doubt and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury is to apply the rule with due assistance from the Judge. *Reynell v Lewis* and *Wyde v Hopkins* 15 M & W 517. *Colquhoun v Berkeley* 15 C B N S 140. *Cross v Williams* 7 H & N 675, *Baker v Stead* 16 L J C P 160. So statement made by parties includes the statement of his agent as well. *Chall v Jahar* 39 C 995. The words 'whom the Court regards under the circumstances of the case, as expressly or impliedly authorised by him to make them' leave it open to the courts to deal with every case that arises upon its own merits. *Field* p 44.

The principal constitutes the agent his representative, in the transaction of certain business whatever therefore the agent does in the lawful prosecution of that business is the act of the principal whom he represents. *Greenl* 17 § 184C. And where the acts of the agent will bind the principal, there his representations declarations and admissions, respecting the subject matter will also bind him if made at the same time and constituting part of the *gestae*. *Story on Agency* §§ 134-137. He who sets another person to do an act in his stead as agent is chargeable by such acts as are done under that authority, and so too properly enough is affected by admissions made by the agent in the course of exercising that authority. *Hignore* § 161. In *Williams v Innes* (1808) 1 Camp 364 Lord Ellenborough said 'a man refers another upon any particular business to a third person on being bound by what this third person says or does concerning it as much if it had been said or done by himself.' So a statement made by an agent whom the Court regards under the circumstances of the case, as expressly or impliedly authorised to make it is admissible though not on oath. *Per Jenkins C J* in *Gowdridge v Chattalal* 2 Bom L R 651 (652). In *Franklin Bank v Pennsylvania*, D & M S N Co 11 G & J 28, at p 33 *Buchanan C J* said

"The principle upon which the representations or an agent, within the scope of his authority, are permitted to be proved, is, that such declarations, as well as his acts, are considered and treated as the declarations of the principal. What is so done by an agent, is done by the principal through him, as his mere instrument. So whatever is said by an agent, either in making a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority having relation to and connected with, and in the course of a particular contract or transaction in which he is then engaged, is in legal effect, said by his principal, and admissible in evidence, not merely because it is a declaration or admission of an agent, but on the ground, that being made at the time of and accompanying the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestae* a part of the contract or transaction, and is binding upon him as if in fact made by himself. But declarations and admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of the principal, nor made at the time he is engaged in the transaction to which they refer are not binding upon his principal, not being part of the *res gestae* and are not admissible in evidence but come within the general rule of law excluding hearsay evidence, being but an account or statement by an agent of what has passed or been done or omitted to be done—a part of the transaction, but only statements or admissions respecting it.

The declarations by agents are original evidence and not hearsay, and being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them *Doe v Haulins*, 2 Q B 212, *Tay* § 602. They are the ultimate facts to be proved and not an admission of some other fact, and the only question is whether the declarations were made and relied upon. It often happens, however that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel in which cases they are, of course, open to explanation or may be shown to be incorrect, like admissions in general. *Burn Jones* § 255. The admission of an agent that he purchased as agent is evidence that the purchase was made by him in that capacity and not on his own account. *Gorebollah v M R G D Boyd* 2 W R 10.

**Admission by agent—When receivable.** The admission of an agent can not always be assimilated to the admission of the principal. The party's own admission, whenever made may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending *et dum confertur opus*. *Karl stall Brewery Co v Fenness Ry Co* 9 L R Q B 468=43 L J Q B 142, *Re Derala Prov Gold Min Co* L R 22 Ch D 593, *Taylor* § 602. The question therefore turns upon the scope of the authority. This question frequently enough a difficult one depends upon the doctrine of Agency applied to the circumstances of the case and not upon any rule of evidence. *Wigmore*, 1078. The best of the earlier expositions is that of Sir W Grant M R in 1803 in *Fairlie v Hastings* 10 Ves Ir 123. Lord Kenyon who became Chief Justice in 1788 had set himself against receiving any admissions by agent, and it was some time before the true principle was defined and accepted. *Ibid* foot note (1). As the case of *Fairlie v Hastings*, 10 Ves 123 (1804) is of some importance as well as of interest the judgment of Sir William Grant, Master of the Rolls is given *in extenso*. 'The subject of this cause is a loan of money by the plaintiff, Maharajah Nabolissen to the defendant Warren Hastings. As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the plaintiff to state, and to prove, some ground for coming into this Court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill, which states that the defendant applied to the plaintiff for the loan of three lakhs of rupees upon the security of the defendant's bond, that the plaintiff agreed to advance that sum by instalments, that a bond was executed which it was agreed should remain with a Cauntoo Baboo, an agent of the defendant, until the whole money should be advanced, and then should be delivered to the plaintiff, that the money

18. was advanced, but the plaintiff never received the bond, *Cauntloo Baboo* in answer to his repeated applications at length informing him that it had been delivered up to the defendant. In support of this statement the plaintiff has not read, and could not read any part of the answer. But the plaintiff has gone into evidence of declaration by *Gobindee Baboo* and *Cauntloo Baboo*, and the question is whether these declarations can amount to proof of such facts as are alleged by the bill. Upon that question my opinion is, that these declarations do not come within the principle upon which they are supposed to be admissible. As a general proposition, what one man says not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declarations made by one. An agent may, undoubtedly within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to, the agreement. Therefore if writing is not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore to be bound by the act, must be affected by the words. But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. For instance, if it was a material fact that there was the bond of the defendant in the hands of *Cauntloo Baboo* that fact would not be proved by the assertion that *Gobindee Baboo* supposing him an agent, had said there was for that is no fact, that is no part of any agreement which *Gobindee Baboo* is making or of any statement he is making as inducement to an agreement. It is mere narration, communication to the witness in the course of conversation, and therefore could not be evidence of the existence of the fact. The bill was dismissed. The same general principle is tersely put by *Mr Justice Gibbs* in *Loughborn v Allnutt*, 1 Trunt 519 where he said: "When it is proved that A is agent to B whatever A does, or says, or writes in the making of a contract as agent of B, is admissible in evidence against B because it is part of a contract which he makes for B and which therefore binds B but it is not admissible as the agent's account of what had passed." So letters of the agent to the principal containing narrative of the transaction in which he had been employed, would not be admissible as evidence against the principal. *Ibid*, see also *Kahl v Jansen* 4 Trunt 565, *Admiralty Com v Aberdeen Steam* (1909) 5 C 335.

In another case where the plaintiff sued the defendant, a coal merchant, for a penalty for selling short measures a witness was proceeding to state what was said to him by one *Peely* who managed the defendant's business, as to a sale about to take place. *Lord Ellenborough* admitted the evidence saying: "*Peely* appeared to be the manager and conductor of the defendant's business, what he might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master, but what he said respecting a sale of coals then about to take place, and respecting the disposition of the coals then lying at the wharf which were the object of sale, was in the course of witness's employment for the defendant and was evidence to affect his master." *Peto v Hague* (1804) 5 Esp 134. In an action against the Railway Company for loss of a parcel of money statements made by the station master to a Police Officer, tending to show theft hereof by one of the Company's servants, were received as admissions against the company, the station master being the proper agent to make such statements. *Ibid*. In that case *Coolburn C J* said: "I think it is impossible to say that a man who had the sole management of a railway station, and had authority to cause a person to be apprehended if he had reasonable and probable cause to suppose that a felony had been committed could not have authority to give instructions to the Police and could not make such communications as would be admissible in evidence just as if they were made by principals. In the same case *Quaint J* said: In putting the police in motion he

was acting within his duty, and within the scope of his authority.' Similarly *Archibald J* said "Being in charge of the station at the time a felony was committed, it was his duty to put the police in motion. That being so, I think he was acting within the scope of his duty that he had power to bind the company, and therefore that the evidence is admissible." This appears to be scarcely a case of "course of employment," but of "scope of authority." The matter may be responsible in tort for acts of his servant quite unauthorized by him, if done in the course of employment. But in contract and as regards admissions, the question appears to be one of authority. *Cockle Cas* 177. In *Peto v Haque*, *ubi supra* Lord Ellenborough used the expression 'course of employment,' but it would appear that statements outside the scope of authority of an agent would not bind the principal although made in the course of employment. But to be within the scope of authority the statement must apparently be made in the course of employment. *Cockle Cas* 178.

Where an agent, acting within the scope of his authority, wrote to his principals, that he had received a sum of money on their account, and they replied giving directions as to its disposition it was held that the agent's statement was evidence that the principal received the money. *Coates v Bambridge*, 5 Bing 58, *Pouell* 438. So the declarations of an agent bind the principal only so far as the agent had authority to make them. *Faussett v Faussett* 7 Ecc & Mr Cas 93-95. *Hogg v Garrett*, 12 Ir Eq R 559. If goods were deposited with a pawn broker in the ordinary course of business a declaration of the shop man that his master had received the goods would probably be admissible against his master, because it might be assumed that the shopman was authorised to answer any inquiries respecting the goods, made by persons interested in them but if the admission related to a transaction unconnected with the immediate business of the shop—as, for instance, if it referred to the loan of several hundred pounds on a single pledge at 5 per cent interest—it could not be received. *Gaith v Howard*, 8 Bing 451. See also *Vanlata Vamana v Chanla*, 6 M H C R 127. In that case *Tindal J* said "It is dangerous to open the door to declaration by agents beyond what the cases have already done. The declaration itself is evidence not given upon oath, it is made in his absence, when he has no opportunity to set it aside, if incorrectly made by any observation or any question put to the agent." Evidence of such a nature ought always to be kept within the strict limits to which the cases have confined it.

In an action against a Railway company for not delivering cattle promptly the plaintiff gave evidence of a conversation a week after the transaction between himself and the company's night inspector who had charge of the night cattle trains at a certain station, in the course of which the night inspector said the cattle had been forgotten. It was held that this statement was not an admission against the company, as the night inspector was a subordinate servant without authority to make such statement and also the statement was made sometime after the transaction. *G O Ry Co v Willis* 34 L J C P 195=18 C B N S 748. In rejecting the evidence *Earle C J* said "I am of opinion that this night inspector is not to be presumed to have authority to make admissions relative to transactions gone by, so as to bind his employers."

"It is sometimes said that the declarations of an agent are not receivable as to past transactions. This is misleading and has probably arisen from the common saying that the declarations of the agent must constitute a part of the *res gestae*. But it has been pointed out that the Latin phrase is here used merely as a compact expression for 'the business regarding which the law identifies the principal and agent, and must not be taken to import that the declarations must form a part of the *res gestae* in the evidentiary sense of the term for so long as they are made concerning the principal's business and in the ordinary course thereof, it is immaterial whether they relate to past or present events' (*Prof Thayer* Ir L T Feb 19 1891). Of course, if the transaction or business in which the agent is employed is at an end, his subsequent admissions regarding it will be rejected, as will his admissions regarding matters which are not properly within the scope of his employment. *Phyp Et* 3rd Ed p 210. So when the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declara-

**S 18** rations, any more than by his acts, but they will be rejected in such case as mere hearsay. *Fairlie v Hastings*, 10 Ves 123, 126, *Garth v Howard*, 8 Bing 451, *Langhorn v Elliott & Taunt* 519, *Betham v Benson* Gow R 40, *Mortimer v Callan*, 6 M & W 58 69, *R v Hall* 8 C & P 358, *Hannay v Stewart* 6 Watts 487, *Stoelton v Demuth*, 8 Watts 39, *Barug v Clarl* 29 Pick 220, see also *Paramesuar v Vijaythen*, 25 M L J 51 = 79 Ind Cas 637. Before admission of an agent can be received the fact of his agency must be proved. *Ram Balash v Kishori Mohan* 3 B L R A C J 273, *Emperor v Ribaram*, 4 Pat L W 120 = 46 Ind Cas 709. So the one condition of receiving the declarations of one alleged to be an agent is that the agency must be proved *abunde* (*Clarle v Dun* 161 Ala 633 (In) and not by the declarations themselves even when accompanied by acts purporting to be acts of agency. *Montgomery v Leith* 162 Ala 246 (Am). Unless and until the agency is so proved and the declarations acts or admissions of the agent come within the rule laid down the evidence is not admissible. Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the Court. *Burr Jones* § 255. Declaration and acts are competent to prove agency if there is proof of former similar acts or declarations recognized or approved by the principal. *Burr Jones* § 255. Agency may also be proved by proving that the agent has acquired credit by acting in that capacity, and that he has been recognized by the principal in other instances of a similar character to that in question. In *Wallins v Venice* 2 Strk, 368 a guarantee signed by a son for his father was admitted upon proof of the son having signed for his father upon three or four previous occasions. *Roscoe v P L* 68 but see *Consteen v Touse* 1 Camp 43. Such relationship may be established by oral evidence, *Whitfield v Brand* M and W 282. Where a particular person is proved to be the general agent special power to do a particular act need not be shown. *Ram Balash v Kishori Mohan* 3 B L R A C J 273.

Agency may be either general or special and it may be express as when it is constituted by written or verbal authority in the first instance or it may be implied and inferred from the acts and conduct of the parties, or the original act, though not authorised at the time, may be adopted by the principal subsequently and be an equivalent to an original authority, *Omnis ratihabito retrotrahitur mandato priori equiparatur*. (A subsequent ratification has a retroactive effect and is equivalent to prior command.) So where A and B were jointly interested in a quantity of oil which A contracted to sell without B's authority, and B at first refused to be bound by the agreement on hearing of it, but afterwards assented, B's subsequent ratification made the contract binding upon him. *Shomes v Spencer*, 1 D and R 32. The point to be regarded in this clause is not only the establishment of an agency as to which the Court must be satisfied but that there was authority given sufficient to cover the particular statements relied on as admissions. Though the maxim is *qui facit per alium facit per se* the identity cases where the agent exceeds the scope of his authority, and his admissions in such cases will not bind his principal. *Nort L* 141.

The declarations and acts of an agent can not bind an infant because an infant can not appoint an agent. *Doc v Roberts* 16 M and W 778. *Hograze v Hograze* 12 Ben 108. Where a wife is authorised to carry on the business of her husband's shop during his absence, her admission within the scope of her necessary authority will bind her husband. *Clifford v Benton* 1 Bing 192. But her acknowledgments of an antecedent contract for the hire of the shop or her agreement to make a new contract for the future occupation of it will be rejected, as it can not be necessary that the wife should have this extensive power of binding her husband for the mere purpose of conducting the business of the shop. *Meredith v Footner* 11 M and W 202. Tay § 602.

Where a party to a suit directly or impliedly constitutes a third person his agent for the purpose of an admission the admission so made is evidence. Thus, if a person agrees to admit a claim provided J. S. will make an affidavit in support of it, such affidavit is proof against him. *Lloyd v Willan* 1 L. P. 173. *See also v Theaker* Praks 157. *Roscoe v P* 73. Statement by an agent to a party to proceedings in circumstances which show that they are expressly

impliedly authorised to make the admissions are admissible in evidence *Rugby S* *Fateh v Baldeo*, 5 O W N 155=A I R 1928 Oudh, 233

Statements made by one before his appointment as agent or after the termination of his agency by revocation or otherwise are not binding upon the principal as admissions of his agent *Burr Jones* § 255, see also *Parameswara v Niyathen*, 25 M L J 51=20 Ind Cis 51 But where evidence of a deceased agent's statements was admitted a letter written by him after the termination of his agency on the same subject matter was also admissible to discredit the alleged oral statements *Turnbull v O'Hara*, 4 Yerets (Pr) 446

**Effect of agent's declarations** When the agent is acting and speaking for the defendant within the general scope of his authority his admissions are to be taken as if they had been made by the defendant himself *Barring v Clark*, 19 Pick (Mass U S) But the opinion or conclusion of an agent relative to the legal effect of acts and transactions is not binding on his principal unless the latter has authorized his agent to form and express an opinion on his behalf, and when the expressions of the agent are but legal conclusions they are not admissible Therefore the evidence of agents duly authorized is admitted but is regulated by rigid rules The declarations of an agent authorized to make a contract are incompetent to establish breach of a contract by his principal *Burr Jones* § 256

**Agents of Corporation** The same rule applies to corporations and associations, which usually act through officers and agents The admissions of the latter will only be evidence against their principals if the officer or agent make them (a) in the course of executing and as forming part of an authorized transaction, or (b) in pursuance of an authority to make statement or reports as to matters affecting his principal's business or interests or (c) in the due execution of a general authority to carry on the business of his principal or a particular department of it with full discretion and powers of management *Hills v 165* So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M was admitted on behalf of his executors, in proceedings against them *Meuse's Executors Case* 2 D M & G 522, see also *Natural Exchange Company of Glasgow v Drew*, 2 Macq 103 But a statement made by the chairman of a company incorporated under the Companies Act, 1862, at a general meeting of the company cannot be used as an admission against the company In *Re Devala Provident Gold Mining Co*, 22 Ch D 593 *Roscoe N P 70* in rejecting the admission of the chairman *Fry* said "The only ground upon which, in my view, this statement could possibly be admitted would be that the chairman was the agent of the company, and that he was making the statement in the course of a transaction with a third party in which he was acting as the agent of the company, and that it was within the scope of his agency If that were so the statement would be admissible against the company It appears to me, however, that it was not admissible for it was made by the agent, not in the transaction between the company and a third party, but at a meeting of the company It is the case of an agent making the report to his own principal, and in my view when an agent is making a confidential report to his principal, the report is not admissible evidence in favour of a third party" So also the secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admission *Burnside v Dayrell* 3 Exch 225 In *Bruff v Gt N Ray Co* 1 F & F 345, *Hilles J* rejected an admission of the secretary of a company as to the receipt of a letter And an admission by the board meeting of a company registered consisting of a less number of directors than was required by the deed of settlement was rejected in *Ridley v Plymouth Banking Co* 2 Exch 711 Admissions by servants of a company as to ferocious habits of a dog were not allowed to bind the company, in the absence of evidence that the servants had the care of animal *Shles v Cardiff* 33 L J Q B 310, *Roscoe N P 70*

The subject is also frequently illustrated in the case of declarations of agents and employees of corporation and other defendants in action for negligence Thus, the declarations of an employee or officer as to who was responsible for

**S 18.** an accident, or as to the manner in which it happened, when made at the time of the accident or soon after have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he performed his duty and that this declaration did not accompany the act from which the injuries arose and was not explanatory of anything in which he was then engaged but that it was a mere narration of past occurrence. But as has already been pointed out that there is a class of cases in which the rule that the declarations must be contemporaneous with the act is construed less strictly, and in which such declarations are admitted, although not technically contemporaneous if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable. Accordingly in numerous cases the declarations of employees and agents, made soon after an accident have been received as part of the *res gestae*. The transaction may be of such a character as to extend through a considerable period of time and in such cases the declarations of the agent in reference to the business if within the scope of the authority may be received, provided they are made before such transaction is completed. *Burr Jones* § 357, see also *Arlstall Brewery v Furness Ry Co* L R 9 Q B 468 *Gt W Ry Co v Willes* 18 C B N S 748, *Payton v St Thomas Hospital* 3 M & Ry 625n, *Agassi v London Tramway Co* 27 L T 492 *Mayhew v Nelson* 6 C & P 58 *Loughboro Highway Board v Curzon* 55 L T 70, *North v Miles*, 1 Camp 389. But in all such cases to bind the principal the declarations must be within the agent's authority, and must accompany an act which he is authorized to do. *Murdoch v Humberston Ry Co*, 72 Iowa, 201. So in every case the question invariably arises—Was the declaration made by the agent in the scope of his authority or, as it is sometimes put, in the time of his duty? If so it is admissible against the corporation. The declarations of the agent are admissible only when made in the execution of the duties imposed upon him, and concerning a matter regarding which he is called upon to act, and which matter is within the scope of the authority usually exercised by him. *Burr Jones* *Et* § 357.

**Manager of a Hindu Joint Family** The manager of a joint Hindu family is the agent for the other members, and is supposed to have their authority to do all acts for their common necessity or benefit. *Kota Rama sams v Bangari* 3 M 115 (150). But in a later Madras case it is held that the manager of a joint family is not an agent in the strict sense of the term. *Kandla sams v Somasanda*, 3 M 177=20 M L J 371=5 Ind Cas 922. Although the head of a joint family administers its properties for the purposes of the family as its accredited agent, yet so long as he does so manage its affairs he is not under the same obligation to economize or to save as would be the case with a paid agent or partner in trade or a trustee. *Sircar's Hindu Law* p 334. Where the business like money lending, has to be carried on in the interests of the family as a whole the managing members may properly make contracts, give receipts, compromise, and discharge claims ordinarily incidental to business. *Hir*, 38 I A 1=33 A 272=13 C L J 345=15 C W N 321. He can maintain suit on behalf of the family and can execute decrees and can receive payments and give valid receipts which will be binding on the family. *Shah Ibrahim v Rama* 37 M 655. *Shree v Jaddo*, 36 A 383=18 C W N 963 (P C). *Subramani v Ramkrishna* 15 Bom L R 810, *Hari v Munman*, 34 A 101 (F B). *Ichubar v Ram*, 13 A 380. *Sarkar's Hindu Law* p 33.

An acknowledgment of debt made within the period of limitation by the manager of a joint Hindu family is binding on the other members of the family. Vide section 21, sub-section 3 (b) see also *Indar-Pat v Mevahi Pat*, 23 Ind Cas 41=36 A 261=12 A I J 374, *Thankamnal v Mullatta* 53 Ind Cas 578=3 M L J 293. *Chinnaya Naydu v Gurunatham* 5 M 169 (I B). Payment made by the managing member of a joint Hindu family is payment by an agent duly authorized within the meaning of section 22 of the Limitation Act (1877) and will bind all the co-partners. *Sarala v Durga Churan* 11 C W N 11=1 Ind Cas 181=37 C 461=11 C L J 481 see also *Lama Chandra v Gopal Prasad* 4 A 122 (F B). *Bhasker Patya v Tayal Nathu* 17 B 31. *Harpasad Das v Bilashi Harshar Pasal*, 19 C W N 200, *Chunda v Datta*.



31 C L J 7, *Hari v Sowendra*, 11 C L J 535 "But it seems clear that when, a creditor deals not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction, thereby avoiding any question as to whether the transaction was really for the benefit of the family, he can not rely upon an acknowledgment of the liability made by one of them as an acknowledgment duly made on behalf of all co-obligors by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors" *Narayyan Ayyar v Venkata ramana*, 25 M 220 (231) F B., *Baikanta v Lalchand*, 26 Ind Cas 511 So an acknowledgment of liability by the manager of joint Hindu family will not, save under special circumstances, bind the other adult co-parceners, who are also parties to the original contract. *T S Duraiswami v Krishner*, 54 Ind Cas 318=10 L W 460=(1919) M W N 797 It is also not open to a member of a joint Hindu family, not being its manager to make an acknowledgment so as to bind the other members of the family, except those who claim through the person acknowledging *Ram Kishan v Hundi Ram*, 71 Ind Cas 737=1923 Lah 135

**Admission by agents in cases of torts** The most difficult field in the application of this principle is in that of tortious liability. For example, If A is an agent to drive a locomotive, and a collision ensues, why may not his admissions after the collision ensues, acknowledging his carelessness be received against the employer? Because his statements under such circumstances are not made in performance of any work he was set to do. If he had before the collision been asked by a brakeman whether the train would take a switch at a certain point, and had then mentioned receiving certain instructions from the train despatcher, this statement might be regarded as made in the course of performing his appointed work. *Wigmore* § 1078

**Admission by agents in criminal cases**—The rules of admissibility are in general the same for the trial of civil and of criminal causes. Not only in practice but in principle and in spirit there is no occasion for a distinction. *Wigmore* § 4. "I have never heard" said *Grove J* in *R. v Mallory*, 15 Cox. 460, "that there was any difference (between civil and criminal cases) in the rules of evidence as to the admissibility of evidence, though there may be a difference in their application, and it may be that a piece of evidence, admissible in either class of cases, may not be sufficient in a criminal case (for conviction) that is, without further evidence, but the evidence is not the less admissible." So conformably to the general doctrine by which the rules of evidence are not different in criminal cases the admissions of an agent may equally be received in a criminal charge against the principal. But whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or connivance would depend upon the particular rule of criminal law involved. *Wigmore* § 1078 The law on this point has been elaborately dealt with by *Story J* in *United States v Gooding*, 12 Wheaton 460 (Am). In that case the indictment was against one Gooding for being engaged in a slave trade, contrary to the prohibitions of the Act of Congress of the 20th April, 1818. *Story J* in delivering the judgment observed "The first question that arises is upon the division of opinions whether under the circumstances of the case the testimony of *Captain Cout* to the facts stated in the record, was admissible. That testimony was to the following effect. That he, *Captain Cout* was at *St Thomas* while the *General Winder* was at that island, in September, 1824, and was frequently on board the vessel at that time, that *Captain Hill* the master of the vessel, then and there proposed to the witness to engage on board the *General Winder* as mate of the voyage then in progress, and described the same to be a voyage to the coast of Africa for slaves and thence back to *Trinidad de Cuba*, that he offered to the witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba, that, on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, *Captain Hill* replied '*Uncle John* meaning (as the witness understood), *John Gooding*, the defendant,

S 18. "It is to be observed that, as preliminary to the admission of this testimony, evidence had been offered to prove that *Gooding* was owner of the vessel, that he lived at Baltimore, where he was fitted out, and that he appointed *Hill* master, and gave him authority to make the fitments for the voyage, and paid the bills therefor, that certain equipments were put on board peculiarly adopted for the slave trade, and that *Gooding* had made declarations that the vessel had been engaged in the slave trade, and had made him a good voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of *Captain Coit* was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offence, and that the doctrine of the binding effect of such declarations by known agent is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in civil and criminal cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must be shown that the agent has the authority, and that the act is within its scope, but these being conceded or proved, either by the course of business or by express authorization, the same conclusion arises in point of law in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial, but this is matter for the consideration of the jury, and not of the legal competency. So, in the cases of conspiracy and riot when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act by the illegal fitment.

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprises. He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish that he endeavoured to engage *Captain Coit* to go as mate for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasive to the undertaking. They were therefore, in the strictest sense a part of the *res gestae*, the necessary explanations attending the attempt to hire. If he had hired a mate, the terms of the hiring, though verbal would have been part of the act, and the nature of the voyage, is explained at the time, a necessary ingredient. The act would have been so combined with the declarations as to be inseparable without injustice. The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground that these were not the naked declarations of the master unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point whether mere declarations, under other circumstances would have been admissible. The principle which we maintain is stated with great clearness by *Mr Starkie*, in his *Treatise on Evidence*, 2 Stark. Evidence, p 4, p 60 "Where says he, 'the fact of

agency has been proved, either expressly or presumptively, the act of the agent, so extensive with the authority, is the act of the principal, whose mere instrument he is, and then whatever the agent says within the scope of his authority, the principal says and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself."

"An admission by an agent" says Mr Roscoe "is never evidence in criminal, as it is sometimes in civil cases in the sense in which an admission by defendant himself is evidence. Thus in order to make a client criminally responsible for a letter written by his solicitor it is not sufficient to show that such letter was written 'in consequence' of an interview, but it must be shown that it was written by the instructions of the client. *R v Downer*, 14 Cox C C 486. Where a person is charged with the offence with the mentality of an agent, then it becomes necessary to prove the acts of agent, and in some cases, as where the agent is dead, the agent's admission is the best evidence of the acts which can be produced. Thus, on the impeachment of Lord Melville it was decided that a receipt given in the regular and official form by Mr Douglas, Lord Melville's attorney to transact the business of his office as treasurer of the navy, and to receive and give receipts for all money, who was dead, was admissible against Lord Melville to establish the single fact that a person appointed by him as his pay master did receive from the exchequer a certain sum in due course 29 St Tr 746-64, 1806." In *Lord Melville's Trial*, Mr Serjeant Best, for the reception of the evidence said "We must first prove the money has been received, and after we have satisfactorily proved that then comes the evidence to prove what has been its application after it has been received. The learned counsel has endeavoured to distinguish between civil and criminal cases. There is a considerable distinction between civil and criminal cases but that distinction consists rather in the number of facts to be proved than in the manner of proving any of them. It is necessary that more facts should be proved for the purpose of showing that a man has money in his possession or has had money come into his possession, than to make him civilly responsible, but though more facts should be proven in one case than is necessary to be proved in the other, each particular fact is to be proved by precisely the same evidence." Mr Plumer on the opposite side "I desire it may be distinctly understood that I do not dispute that the rules of evidence are the same in both. What is the distinction, then? It is not that the rules of evidence are all altered, but that when you are looking at the individual who stands in a civil relation, and are pursuing it with that view there is an identity of persons between the agent and the principal and all that one has done or said is done or said by the other, (but otherwise for criminal responsibility) Lord Chancellor Erskine in admitting the certificate observed "This first step in the proof must advance by evidence applicable alike to civil as to criminal cases, for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence. But it is a totally different question in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly but could by no possibility convict him of a crime."

According to the Indian Evidence Act admission of an agent is admissible against the principal if made within his authority but confessions of an agent are not so admissible. But in a criminal trial if it is intended to bind a master by the statement of his servant, the relationship of master and servant must be strictly proved. It is not sufficient to say that because a man accompanied another to the thani, the former is a servant of the latter. *Rutbaram v Emperor*, 46 Ind Cas 709=1 P L W 120=19 Cr L J 789

Admission by wife The admission of the wife will bind the husband, only where she has authority to make them. *Emerson v Blomden*, 1 Esp 142; *Anderson v Sanderson*, 2 Stark-201; *Carey v Adkins*, 1 Campb 92. This authority does not result, by operation of law from the relation of husband and wife, but is a question of fact, to be found by the jury, as in other cases of agency, for though the relation is peculiar in its circumstances from its close intimacy and its very nature, yet it is not peculiar in its principles. As the

**S 18** wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either the transaction of his affairs in general, or in the particular matter in question. In regard to the inference of her agency from circumstances, the question has been left to the jury with great latitude, both as to the fact of agency and the time of the admissions. *Greenl. Ev* § 185, *Gregory v Parler*, 1 Campb 485, *Phonmer v Sells*, 3 N & M 422, *Riley v Snyder*, 4 Barb 222, *Palchrop v Furnish*, 2 Esp 511 N. Where a wife is authorised to manage business of her husband, during his absence her admission is evidence against her husband. *Clifford v Burton*, 1 Bing 199. The law on this subject is that laid down by *Alderson B in Meredith v Footner*, 11 M & M 202. "A wife can not bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him and which she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade." An admission of a daughter is not binding on the father. *Bucha v Lulee*, 2 Agia 20.

**Admissions by Pleadors, Attorneys and Counsels.** A valid in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England. *Woodroffe Et* 237; *Pratt Sukh v Parthe Ram*, 2 Agia Rep 222. An attorney is an agent to conduct litigation, his admissions, therefore under certain circumstances are receivable. So an attorney's admission may be used against the party client only so far as it concerns the management of the litigation. The reason for the limitation is that the attorney's admission can affect his client so far only as he has authority to act as agent in his client's place. That authority so far as it is to be implied from the mere general appointment as attorney, and has not been enlarged in the particular case extends only to the management of the cause. Yet, conversely, all his admissions during the management including utterances in the pleadings, do affect the client. *Higmore* § 1063. "The attorney is not the agent of the client for the purpose of making admissions except in the cause and for the purpose of the cause. All that appeared here was that one of the plaintiff's witnesses heard the plaintiff's attorney say that there was an agreement in writing. That clearly was no evidence at all to affect the plaintiff." *Per Wilde C J in Watson v King* 3 C B 608. *Wagstaff v Watson*, 4 B & Ad 339. *Ley v Peter* 3 H & N 101. 111 Barristers and solicitors are the agents of their clients for the purpose of making admissions while engaged in the actual management of the cause either in Court or in correspondence relating thereto, but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself. *Step Dig Ev* Art 17. An admission made by a barrister while conducting a suit is binding on the client. *Berkeley v Chultr*, 5 N W P 2. see also *Kalukanand v Giribala* 10 W R 322, *Srinani v Pitambar* 21 W R 332, *Abdul v Gourmani* 9 W R 375. *Rajendra v Bygob*, 2 M. L. A. 253, *Jahadali v Ajimunnissa*, 44 Ind Cr. 18. But it is clear that whatever the attorney says in the course of conversation is not evidence in the cause. *Young v Wright* 1 Camp 139, *Petch v Lyon* 9 Q B 147 (154). The reason for this distinction is found in the nature and extent of the authority given the solicitor being constituted for the management of the action in Court and for nothing more. *Ibid* see also *Parlins v Haulshau*, 2 Stark R 239, *Doe v Richards*, 2 C & Kir 216. *Wilson v Furnes* Taunt, 398, *Watson v King* 3 Com B 608. *Greenl. Ev* § 186. If the admission is made before suit, it is equally admissible, provided it appears that the attorney was already retained to appear in the cause. *Marshall v Cliff* 4 Camp 133. *Ellis v Allen*, (1914) 1 Ch. 904. But in *Wagstaff v Wilson* 4 B & Ad. 339 a letter threatening legal proceedings but written before action begun was excluded. See also, *Doe v Richards*, 2 C & K. 216. So in the absence of any retainer at that time in the cause there must be some other proof of authority to make the admissions. *Wagstaff v Wilson* 4 B & Ad 339. *Lord v Bygelow*, 124 Mass. 185, *Burghart v Angerstein*, 6 C & P 695, *Pope v Andrews* 9 C & P 564. *Greenl. Ev* § 186. The authority of an attorney may be delegated to a clerk. "If an attorney

leaves the conduct of a cause to his clerk, what the latter does therein binds the party, as much as the act of attorney himself" *Taylor v Williams*, 2 B & Ad 815, 855, *Standage v Creighton* 5 C & P 106 *Taylor v Foster* 2 C & P 195, *Griffiths v Williams*, 1 T R 710, *Truslove v Burton*, 9 Moore 64, *Lord Owen & Co v Wood*, 120 In. 303 (Im).

"Admissions made by counsel stand on much the same footing as those made by solicitors. Indeed, it may be laid down as a general proposition of law, that a consent once given, or an admission made by a counsel under his signature with the authority of his client, with a full knowledge of the facts and without some egregious mistake is conclusively binding and cannot afterwards be withdrawn" *Taylor* § 783 citing *Harvey v Croydon Union*, per Ct. of App 13 Feb 1884. But in *Colledge v Horn* 3 Bing 119, where there was no express authority, *Best C J* said "I can not allow that the counsel is the agent of the party." But in *Blutnath v Ramal* 6 C W N 82 *Mr Justice Lanerjee* said "When a person engages an advocate or vakil to conduct his case it must follow that he authorises his advocates or vakils to make binding admissions before the Court in the course of his conduct of the case." See also *Rajender v Byori*, 2 M I A 253 *Kalechand v Gireebala* 10 W R 322, *Kouer Naram v Sreenath*, 9 W R 485, *Jagapati v Chamba*, 21 M 274 *Venkata v Bhasya* 22 M 538 *Jang Bahadur v Shanlar* 13 A. 272, *Mathews v Munster*, 20 Q B D 141 *Macaulay v Polley* (1897) 2 Q B 122, *Venkata v Bhasya Kuree* 25 M 267 P C. A counsel's authority is less extensive than that of a solicitor *Richardson v Peto*, 1 M. & G 896, R. v *Greenwich* 15 Q. B D 54. But an admission of law where it is erroneous, by a vakil is not binding on the client *Kishnaswami v Rajagopal*, 18 M 73 (83).

In criminal cases there is no authority in a solicitor to bind his client by making admission, in the absence of express authority *R v Douner* 14 Cox 486, but see *Bansi Lal v Emperor*, 30 Bom L R 646 = A I R 1928 Bom 241. If a plaintiff relies upon any statement by the defendant or his pleader made in a previous litigation between the parties, that statement must be regularly proved. On proof of such statement the question arises as to the weight to be attached to it *Mam Lal v Uma Charan*, 19 C L J 541. A judgment deliberately recording the admission of a pleader must be presumed to be correct, unless contradicted by an affidavit, or the Judge's own admission that the record was wrong *Hur Dyal v Huna Lall*, 16 W R 107.

Oral testimony on behalf of a litigant in a litigation with A, cannot be admitted as evidence against him in a litigation with B on the footing of an admission by counsel. The case lodged by a litigant in the House of Lords is not strictly a plea, but is a document in the nature of a plea, and the statements in it, although binding on the party making them, ought not to be regarded in any subsequent action as admissions *British Thompson-Houston Co v British Insulated and Helsby Cables Ltd* (1924) 1 Ch 203 = (1923) W N 344 (Eng) = 68 Sol Jo 252 = 156 L T Jo 440 per *Russell J* affirmed an appeal in (1924) 2 Ch 160 = 93 L J Ch 467 = 131 L T 683.

**Partners and joint contractors.** A partner charges the partnership by virtue of an agency to act for it, how far his admissions are receivable depends therefore on the doctrines of agency as applied to a partnership *Wigmore* § 1078. According to section 11 of the Uniform Partnership Act, 1914 (Am) "an admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership." See also Cal C C P 1872, § 1870, *Adair v Kansas City* 282 Mo 133 = 220 S W 920 (Am). Whenever any number of persons associate themselves in the joint prosecution of a common enterprise or design conferring on the collective body the attribute of individuality by mutual compact, as in commercial partnership and similar cases the act or declaration of each member in furtherance of the common object of the association, is the act of all. By the very act of association each one is constituted the agent of all *Greenl Et* § 181 (b) *Taylor* § 508, *Sandilands v Marsh*, 2 B and Ald 673 *Wood v Braddick* 1 Taunt 104 *Pethering v Truner* 1 Taunt 104 *R v Hardwick*, 11 East 589, *Fbz v Clifton*, 6 Bing 792, *Nicholls v Dowding*, 1 Stark, R. 81,

S 18 *Lucas v De la Cour*, 1 M and S 249, *Whitcomb v Whithung*, 1 S L C 644-9  
*Dong*, 652, *Kali v Gope*, 2 C W N 166 168, *Doe v Hawkins*, 2 Q. B 212

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to the partnership transaction or joint contracts. *Step Dig Eo* art 17. See also *Kousullia v Mukta*, 11 C 588 (591). Depend upon this principal of agency are the rules with respect to the admissibility of admissions by partners as against partners. They are also admissible on the principle of joint interest. *Grunenburg v Smith*, 53 Ill App 281 (Am), *Re Whiteley*, L R 1 Ch 558. In a suit by or against several persons who are proved to have a joint interest in the decision, a declaration made by one of them while engaged in the joint business, concerning a material fact within his knowledge, is evidence against him and against all who are parties within the suit. This principle is often illustrated in respect of declarations of partners. Thus if the action is against partners to recover money alleged to have been obtained by false representations, the statement of either partner, made during the partnership relative to and tending to establish the cause of action, are admissible against both, and entries in the partnership books made by a partner during the continuance of partnership are admissible against both. Admissions of one partner are admissible against all to prove the execution of a promissory note the genuineness of such note the existence of other forms of indebtedness the financial condition of the firm the payment of money, the ownership of goods in possession of the firm, the authority of an agent, that a note made in the firm's name was given on the credit of the firm and not on individual credit, that one notice had been given of the dishonour of a bill, that the partners are liable as *Garnskees*. So statements of account by a partner in the ordinary transaction of the firm's business are admissible. Although one partner is shown to be hostile to another, such admissions may be received although of course this hostility may affect the question of credibility." *Burr Jones* § 248. The admissions of one partner are not received against another on the ground that they are parties to the record, but on the ground that they are identified in interest and that each is agent for the other and that the acts and declarations of one during the existence of the partnership while transacting its business and within the scope of the business are evidence against the others. *Kousullia v Mukta*, 11 C 588 (591), *Step Dig Eo* art 17, *Re Whiteley*, (1891) 1 Ch 598, *Calho v Jhoro*, 39 C 995. While the firm thus created exists, it speaks and acts only by the several member and of course when the existence ceases by dissolution of the firm, the act of an individual member ceases to have the effect. Their subsequent acts are binding on themselves alone, except so far as by the articles of association or of dissolution it may have been otherwise agreed. *Bell v Morrison*, 1 Peter-371, *Burton v Issit*, 5 B & Ald 267. *Wood v Braddick*, 1 Taunt 100, *Kilgour v Finlayson*, 1 H Bl 155.

The declarations of a dormant partner, relating to partnership business, are admissible against his co-partners [*Kasiusia Bridge v Shannon*, 1 Gilman (Ill) 15 (America)] and those of a deceased partner are admissible against his survivors. *Doremus v McCormick*, 5 McLean (U S) 44. There appears to exist some doubt as to the admissibility of statements concerning part transactions, but there is no reason for it. If the matter was within the scope of the partnership and the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm. *Burr Jones* § 248. In *Wood v Braddick*, 1 Taunt, 104 (1800) which was an action brought to recover from the defendant the sale proceeds of certain linens, which the bankrupts in the year 1796 had consigned for sale to America, as the plaintiffs alleged, to the defendant jointly with one Cox who was then his partner but as the defendant contended, to Cox only. The plaintiff produced a letter from Cox, dated 24th June 1804 stating a balance of £919 to be then due to the bankrupts upon this consignment. It was in proof that on the 30th of July 1802 *Braddick* and Cox dissolved their partnership, as from the 17th of November, 1800. *Cockell* and *Lens Seryls* objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick*. In rejecting the contention *Mansfield C J*

said "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation, but the power of partners with respect to rights created pending the partnership remains after the dissolution since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved his account of their joint contract should cease to be evidence?—and that those who are to dry as one person in interest should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united? This last exception may be illustrated by the case of *Pritchard v Draper*, 1 Russ and Myl 191, 199, 200, where Lord Brougham held, that the admission of one partner, as to the payment, subsequently to a dissolution, of a debt due to a firm, was admissible against the other partners. *Taylor* § 599, *Greenl Ev* § 184 (b), *Whitcomb v Whiting*, 2 Doug 652, *Mc Intire v Oliver*, 2 Hawk 209, *Loomis v Loomis*, 3 Deane Verne R. 198. In the case just cited, the party making the admission was at the time, so far as the debt in question was concerned, jointly interested with the parties against whom his statement was tendered in evidence. *Taylor* § 599, see also *Parker v Morrell*, 2 Phill 464, 465.

Where members of a firm sued upon a contract made by one of their number outside the scope of partnership business and without the knowledge of the others, admissions made by the signatory at a time other than the execution of the contract were held inadmissible. *Taft v Church*, 162 Mass 527 (Am). And where one partner after having given a note in his own name, said it was for the partnership firm such admission was held not to bind the firm. *Thorn v Smith*, 21 Wind (N Y—America). It is true from the very constitution of a partnership, that a presumption arises, that each partner is an authorized agent for the rest, in contracts relating to the subject matter of the partnership. But that relationship does not deprive either party of the liberty of making contracts for himself in similar matters. Thus, if A and B constitute a firm to merchandise goods, either of them, unless it is forbidden in the articles, is at liberty to enter into the same business, at the same place, on his own account. The legal presumption is, when a person purchases a thing, he purchases it for himself. In such case, the vendor in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. So where a member of a partnership bought a mule ostensibly for himself, and when it was sent home he said it was for the firm his declaration so made after the purchase was not of itself competent to bind them. It is a general rule of the law of evidence that the acknowledgment of one joint contractor or partner is evidence against all the rest, and sufficient to bind them. The principle upon which such evidence is admissible, is the community of interest between the party making the admissions and the party to be affected by them, and the presumption that the former would not make an acknowledgment against his own interest. Where therefore, it appears that it was the interest of the party making the admission to throw the burden of the contract on the firm, his acknowledgment could not be received when the rule of interest in the cause excluded the witness. *Burr Jones* § 248.

Partnership books being accessible to all the partners, and kept more or less under their individual supervision may also generally be received as *prima facie* evidence *inter se*. *Gething v Keighley*, 9 Ch D 547 551, *Lindley on Partnership* p 568. *Day v Gobind Narain*, 10 Bom L R 810. In *Lodge v Pritchard*, 3 De G M & G 906 at pp 909 910 *Knight Bruce & J* said 'Prima facie the books of partnership are evidence among all the partners for them all, and against them all owing to the agency which pervaded all the partnership transaction. If one partner succeeded in establishing a case of fraud that it would form a ground for an exception from the general rule nor is there anything in the rule to exclude an allegation of a mistake or erroneous omission or insertion. The only question is whether the books are *prima facie* evidence between partners and their estates. In my opinion they are. But it is not conclusive evidence against a person complaining of them if he can by clear evidence show that there is an error in the books, *Per Jessel M R* in *Gething v Keig Kley*, 9 Ch D 549, *contra*, *Sheuarts case*, (1865) 1 Ch App 587, *Hutchinson v Smith*,

**S 18.** 5 Ir Eq 117 The last two cases have been commented upon by *McLeod J* in *Day v Gobind*, 10 Bom L R 811

The general rule is that those admissions which relate to matters connected with partnership only bind the partners *Lucas v De la Cour*, 1 M and S 943. So an admission that two had committed trespass would not bind the other *Ibid*. But representation or misrepresentation of any fact made by one partner, with respect to some partnership transaction, will bind the firm *Raph v Latham*, 2 B and A 795, *Thwaites v Richardson*, Pea R 16, *Nicholls v Douding*, 1 Stark, R 81, per Lord Ellenborough, Tay § 744. But if an admission is made by one of several parties in fraud of the others jointly interested with them, and in collusion with the opponent, then, on proof of this fact by the innocent parties, such admission will, on principles of equity, be rejected by the Court *Kaustorne v Gandell*, 15 M and W 304, *Taylor* § 749. One member of a firm can borrow money for the firm by executing promissory notes and such promissory notes are binding on the firm *Shanmuga v Srinivasa*, 40 M 727, *Karmali v Karmaji*, 39 B 261.

**Limitation—Saving of, by acknowledgment of one partner** An acknowledgment or a payment by a partner without special authority is binding upon another partner. Under section 21 of the Limitation Act a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority. *Chegamull v Gounda Suami* A I R 1923 Mad 972. So in the absence of direct evidence that a contractor or partner has authorised his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances, such as the position of the other co-contractors or partners in the business *Pandiri Veerana v Veerabhadra-drudu*, 41 M 427=34 M L J 373=7 M L W 552=45 Ind Cas 18=(1913) M W N 285 (F B) overruling *Valusubramania v Ramanathan*, 2 Ind Cas 309=32 M 421 and *Sherkh Mohideen Saheb v Official Assignee*, 11 Ind Cas 332=35 M 142, see also *K R v Firm v Sathya vada*, 21 Ind Cas 630=31 M 146=25 M L J 501.

In *Premji v Dossa* 10 B 358, *Scott J* said "It must be shown that the partner giving the acknowledgment had the authority, express or implied to do so. In going mercantile concern such agency is, I think to be presumed as a rule." This case was followed with approval by the Allahabad High Court in *Gadu Bibi v Parsotam* 10 A 418 and *Candy J* of Bombay High Court in *Dulsukhram v Kaludas*, 26 B 42 see also *Khoode v Kishen*, 25 W R 145. *Lalla v Babu*, 32 A 31. So in the absence of evidence to the contrary one partner is presumed to be the agent of the other to make payments in respect of partnership debts (*Godum v Parton* 41 L T 91) and though the agency is in general terminated by a dissolution of partnership (*Watson v Woodman*, 20 Eq 721=15 L J Ch 57) it may under special circumstances be treated as continuing where for instance the retirement of a partner is kept secret and payments of interests are made in the name of the firm. *In re Tucker* (1894) 3 Ch 429=63 L J Ch 737, see also *Abdulhali v Ranchadial* 38 Ind Cas 573=19 Bom L R 86 (95), *Karamali v Boraharnji*, 26 Ind Cas 910=19 B 261=19 C W N 837.

In considering the effect on other partners of admissions of payments by one partner which result in removing the bar of the Statutes of Limitation as to that partner the question of the agency which is the basis of that particular form of liability is of first importance, and the solution lies in stripping the proposition to the bare statement of the authority, express or implied, with which the declarant was invested at the time of the declaration. The discussion is limited to admissions made after dissolution. Prior to it, and whether the admission be regarded as a new contract or an extension of an old one, there need be no question of the partner's ability to charge his co-partners with the act which bars the Statute. But after dissolution the agency and its cessation or rather the exact time of the determination of the agency regulates the period when such admissions or payments which operate as admissions become, as to the other partners, ineffectual. *Burr Jones* § 213.



But the mere fact of a partner being in charge of a branch of the partnership business does not authorize him to bind the firm by a payment or acknowledgment *Veesapa v Cudambara*, 28 Ind Cas 845. The test for determining the effect of the acknowledgment by third party will in each case be whether the person who keeps alive the debt, had express or implied authority to act on behalf of those against whom limitation is to be arrested *Kothandaraman v Shunmugam*, 32 Ind Cas 608. But admission of liability by a partner in his insolvency schedule does not bind the other partners 36 Ind Cas 389. So also in the absence of express evidence of authority an acknowledgment of a partnership debt by an ex partner after the dissolution of partnership does not bind any ex partner 30 Ind Cas 675=18 M L T 273. Similarly a partner of a money lending business which is being wound up has no authority to give an acknowledgment for a subsisting debt so as to bind the firm 36 Ind Cas 225=8 L B R 363.

**Parties suing or sued in representative character.** Admission of one party is receivable as evidence against another on the ground of privity of interest, i e, a relation which permits one person's rights, obligations or remedies to be affected by the acts of another person and thus also permit resort to such evidence as that other person may have furnished by way of admission. This privity may be of two sorts, namely privity of obligation and privity of title. Where the party sues in a representative capacity—i e, as trustee, executor, administrator, or the like—the representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable, in particular, statements made before or after incumbency are inadmissible. Conversely, his admissions as executor or the like would be receivable against him as a party in his personal capacity *Wigmore* § 1076. The admissions which are thus receivable in evidence, are those of a person having at the time some interest in the matter afterwards in the controversy in the suit to which he is a party. The admissions, therefore, of a guardian, or of an executor or administrator, made before he was completely clothed with that trust, or of *prochein amy*, made before the commencement of a suit, cannot be received either against the ward or infant of the one case or against himself, as the representative of heirs, devisees and creditors, in the other (*Webb v Smith*, R & M 106, *Fraser v Marsh*, 2 Stark 41 *Coulching v Ely* 2 Stark 366) though it may bind the person himself, when he is afterwards a party *suo jure*, in another action. A solemn admission however, made in good faith, in a pending suit for the purpose of that trial only is governed by other considerations *Greenl Et* § 179.

Generally the competency of admissions is not affected by the time at which they are made. But it is an important qualification of the above statement that, if the admission is made by a person suing or being sued in a representative capacity only, it must be made while the person making it sustains that capacity *Freeman v Breuster* 93 Ca 648 (1m). On this point there was some dispute in England. In one case, *Chief Justice Tindal* is reported to have received an admission of a person, who was crying as an assignee now called the trustee of bankrupt, though it was made before he became such *Smith v Morgan*, 2 B & Rob 257. But *Lord Tenterden* has ruled otherwise on precisely the same point *Fenwick v Thornton* M & M 51. In that case he allowed the admission by an Official Assignee made before his appointment. See also *Methers v Brown* 32 I J P 140 *Plant v M Puen* 4 Cox 341, *Taylor* § 755. So statements of an executor or administrator, guardian, or trustee made before his appointment, cannot be received except to affect themselves individually. *Church v Howard* 79 N Y 415, *Imor v Ilico* 112 U S 452 *Moore v Butler* 49 N H 161 *Whitton v Smyler* 88 N Y 299 *Burr Jones* § 266, *Leyge v Edmunds*, 25 L J Ch 125, 110 111. It certainly appears to be a somewhat startling proposition says *Taylor* that the assets of a testator, and the consequent rights of legatees may be affected by some inconclusive statement, which the executor before the death of the testator, may have been induced to make. *Taylor* § 755. But statement of such persons is competent, if made while representing the person beneficially interested, and in the true action of business or in performance of the trust in such manner as to be part of *res gestae* *Church v Howard* 79 N Y 415 (Am.) *For v Walters* 12 A & E 43. So

**S 18** An affidavit of a guardian of an infant in one suit can not be used against the infant in another suit *Deeleston v Speke*, 3 Mod 258. So admissions made during the representative tenure of a trustee are competent against his beneficiary, assuming them to be made within the scope of his authority, but not of a "dry" or "technical" trustee *Thompson v Dale*, 32 Alr 99 (Am). "If he was a continuing trustee, holding the legal title for them, his admissions, while actually handling the subject matter of the trust in such acts as collecting the rents (which as trustee he was authorized to do), would be good against them" *Knorr v Raymond*, 73 Ga 749 (4m). In *Beknapp Sa Bant v Lamo Land etc Co*, 28 Colo 326 the Court refused to hold beneficiaries bound by fraudulent admissions of a faithless trustee. In delivering the judgment the Court observed "We decline to dignify with discussion the argument that such action of a trustee binds its beneficiaries. We merely dismiss, with the observation that neither in morals nor in law will it bear scrutiny and the Court of Equity will not listen for a moment to such an unconscionable proposition." Executors or administrators who are specially charged with the general interest of the state, and statements made concerning it while they are transacting its business are admissible *Duarlanath v Chundee*, 1 W R 339, *Chunder Kant v Ramnarain*, 8 W R 63. The admission of the executor of a donor must be treated as the admission of the donor *Duarla v Chundee* 1 W R 339. The admissions of one executor will not bind the others *Stator v Lawson*, 1 B & Ad 396, *Tullock v Dunn*, Ry & M 416, *Chundra Kant v Ramnarain*, 8 W R 63, *Scholey v Walton*, 12 M & W 514, *Fox v Walters*, 12 A & E 43, *Brwyn v Russell*, 32 Hun 17=4 N Y Supp 784 (Am), *Church v Howard* 79 N Y 415 (1m). But where one of several trustees, who are personally liable admits the receipt of money his admission will not bind the others *Phup Ev* 4th Ed 222 *Shaife v Jackson*, 3 B & C 221, *Davis v Rudge*, 3 B & C 421. But such receipt may operate as a waiver *Kaulas v Sheikh Chhenu*, 42 C 546, *Woodroffe*, 232.

**Guardians**—A guardian, so far as his powers place him in a representative capacity, is subject to the rules which govern executor-administrators etc but the function of a guardian *ad litem* begins and ends with the litigation and consequently his extrajudicial admissions are not receivable at all *Wigmore* § 1016 (2) see also *Eggleston v Pettit*, 3 Mod 258. But admissions made by the guardian of the person of an infant as to the property right of the latter are not binding on the infant but such admissions may be receivable for other purposes *Per Mookerjee J in Banuari Lal v Duarlanath*, 52 Ind Cas 825 see also *Brojendra v Chairman*, 20 W R 223, *Surya v Bhagwati*, 10 C L R 341 *Ran v Mahammad* 24 I A 107=24 C 853=1 C W N 417. An admission by the Court of Wards, made at the time when the estate was in charge of the Court, can not bind or prejudice the infant proprietor *Banuari Lal v Duarlanath* 52 Ind Cas 825, *Ram Autar v Rajah Mahammad* 24 C 803=1 C W N 417, 21 W R 253. An acknowledgment of debt by a duly constituted guardian, gives a fresh period of limitation *Ram Charan v Gaya Prosad*, 30 A 230 (F B)=5 A L J 375, *Sobhanidari v Suramulu* 17 M 221, *Karlasa v Ponnu Ram* 18 M 456 *Annahaganda v Sangadigayya* 26 B 221 contra *Hajlan v Kadu*, 13 C 292 *Chhato v Butto* 26 C 15, *Tilal v Chhutu*, 26 A 58. But a *de facto* guardian of a Hindu minor has no power to keep debt alive against the minor *Ramaswamy v Kashinath*, 108 Ind Cas 529=4 I R 1928 Muz 226.

**Admission by co plaintiff or co defendant**—It is clear that in receiving the admission of a party as such the only question can be who the party is. The probative process consists in contrasting the statements of the same person made now as litigant and made formerly elsewhere, and it is in that view that it becomes necessary to define the identity of the person. It follows that the statements of one who is confusedly a distinct person B do not become receivable as admission against A merely because B is also a party. In other words, the admissions of one co plaintiff or co-defendant are not receivable against another, merely by virtue of his position as a co party in the litigation. This is necessarily involved in the notion of an admission for it is impossible to dis-credit A's claims as a party by contrasting them with what some other party

B has elsewhere claimed, there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted. Moreover ordinary furnaces would forbid such a license, for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co party and then employing that person's statements as admissions. It is plain, therefore, both on principle and in policy, that the statements of a co party (while usable of course against himself) are not usable as admissions against a co party. *Wigmore* § 1076. In *Morse v Royal* 12 Ves Ir 355, 361, Lord Chancellor Erskine said, "So in trespass, where the defendants may be found severally guilty or not guilty, a witness may say he heard one acknowledge that he committed the act with others, that is decisive against that one, and as it is legitimate evidence against him, the Court must hear it, though it is no evidence against the others." In *Dan v Brown*, 4 Cow N Y 483, 492, *Woodworth* J said "An admission by a party to the record is evidence against him who makes it, but not against others who happen to be joined as parties to the suit." See also *In re Whiteley*, L R (1891) 1 Ch 558, *Azizullah Khan v Ahmad Ali* 7 A 353, *Lachman v Tansulh* 6 A 395, *Kali Dutta v Abdul Ali*, 16 C 627 (635), *Amrita v Rajanee Kant* 15 B L R 10 (P C)=23 W R 214=2 I A 113, *Chandeswar v Chum Ahu*, 9 C L R 359, *Niamutoollah Khadim v Hummut Ali*, 22 W R 519. "In general, the statement of defence made by one defendant can not be read in evidence either for or against his co defendant, neither can the answer to interrogatories of one defendant be read in evidence, excepting against himself (*Meyer v Montiron* 9 Bery 521, *Stephens v Heathcote*, 2 Drew and Sm 138, *Parler v Morrell* 2 Phill 463, *Hoare v Johnstone*, 2 Keen 553, *Statmarsh v Hardy*, 42 L J Ch 423), the reason being, that as there is no issue between the defendant, no opportunity can have been afforded for cross-examination (*Jones v Turbeville*, 2 Ves 11, *Morse v Royal*, 12 Ves 355, 361, 362, and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage. *Wyche v Meal*, 3 P Wms 311." *Taylor* § 754.

But the situation has often been obscured by the circumstance that the co party's admissions are received against himself, and that they are sometimes received also against the other co party because of a privity of obligation or of title. But it is not by virtue of the person's relation to the litigation that this can be done; it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party. *Wigmore* § 1076. In *R v Hardwicke* 11 East 578, *Ellenborough L C J* said "Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co trespassers. But if they be established to be co trespassers by other competent evidence the declaration of the one, as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object." The payment of interest by the principal debtor cannot create a new period of limitation for the surety's debt. *Gopal Das v Gopal Ban*, 28 B 248.

In *Ambor Ali v Lutfee Ali*, 45 C 159=25 C L J 619=21 C W N 986 at page 999 *Justice Uppaljee* said "There can be no room for controversy that the admission is good evidence against the maker of conveyance, but the question arises whether it is admissible against the other defendants. These defendants, it will be observed, are jointly interested in the land now in dispute, along with fourth and fifth defendants, in fact they claim under a common lease from the landlord, and have on the basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them merely because since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion this contention is well founded and section 18 of the Evidence Act is of no assistance to the Plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant, as against another defendant, was formulated in the cases of *Kowsullah Sundari v Mukta*

**S. 18.** *Sundari*, 11 C 585, *Chulho Singh v Jharo Singh*, 39 C 995 and *Meayan v Ali muddi*, 44 C 130=20 C W N 1217. The principle is that when several persons are jointly interested in the subject matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in the character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance. *Elentinschopp v Blentinschopp*, 11 Beav 134. On this principle the position has been maintained that the joint ownership must have existed at the time the statement was made. Thus in *Blalency v Ferguson* 14 Ark 641, it was ruled that the admission of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject unless the interest is a subsisting one at the time of the admission, and where the interest is derivative, it must have been acquired after the admission was made. To the same effect is the rule enunciated in *Alburn v Ritchie* 9 Cal 145=56 Am Dec 326 (1841) that the declaration of one of two joint owners is admissible against the other if made at a time after the joint interest came into existence, if made before they became joint owners, the declaration is not admissible. The distinction is based upon obvious good sense. The admission of one co plaintiff or co defendant is not receivable against another, merely by virtue of his position as a co party in the litigation, if the rule were otherwise it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co party, and then employing that person's statements as admissions. Consequently it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other it must be because of some privity of title or obligation."

The admission made by K in the proceeding under section 145 of the Code, when examined as a witness therein is evidence against him as a piece of admission but as to the admissibility of the admission against the co defendant the words of section 18 were perfectly clear and in as much as he made the statement when he had parted with his interest in favour of his co defendant in the present suit the admission made by him could not be treated as evidence of admission against the co defendant. *Brayballav v Alhoy Baydi* 30 C W N 204=93 Ind Cas 115=A I R 1926 Cal 705. Plaintiffs who were two out of five brothers sued to establish their right to a two fifths share in properties which were sold in execution of a money decree against another brother U and purchased by the defendant on the allegation that the properties, when sold, were the joint family properties of the five brothers. The defendant whose case was that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U. Held that the deposition of K in the previous suit was not admissible against the plaintiffs. The reasons given by the Court for not admitting this deposition are as follows: "The plaintiffs asserted that at the time when the *patta* in respect of the *putni* taluk was obtained they and their brother including defendant No 6 constituted a joint family and that a certain property was joint family property. The defendant No 6 in the course of his deposition as a witness on behalf of the representatives of Upendra Nath Ghose in suit No 127 of 1911 stated that on the death of the plaintiffs' father, Upendra separated from his brother and that there was no joint family. The defendant No 6 therefore was not claiming any interest in the interest in question and in the admission made by him in the previous suit he did not fulfil the character of a declarant jointly interested with the party in respect of the property concerned against whom the admissions are sought to be used. Further more, it is to be noticed that the defendant comping do not themselves say that at the time when the admissions referred to above were made by defendant No 6 there was any community of interest between defendant No 6 and his brother." *Nogenra v Lawrence Jule Mills* 25 C W N 89 (94)=61 Ind Cas 544. An admission of one defendant in a written statement in a suit will not be evidence

against the others unless it is made evidence at the trial by examining that defendant who made the statement *Seshagiri v Sadachin*, 22 Ind Cas 924, see also *Ippaiu Chettiar v Nanjappa*, 20 Ind Cas 792=14 M L T 117=25 M L J 729 *Puran v Tariff*, 13 A L J 1089=30 Ind Cas 2, *Hat Balsh v Lachmina*, 22 Ind Cas 916 An admission or even a confession of judgment by one of the several defendants in a suit is no evidence against the other defendant *Dina Nath v Sayaa Habib A I R 1929 Lah 129*, *Amrto Lal v Rajanee Kant*, 2 I A 113=23 W R 314=15 B L R 10, *Narindar Singh v C M King*, A I R 1928 Lah 769, *Saidu v Meher*, 101 Ind Cas 389 *Jones v Furberelle*, 2 Ves Jur 11 *Hay v Gordon*, 10 B L R 301=18 W R 480 P C *Gopal v Gopal*, 28 B 248, *Morse v Royall*, 12 Ves 362, *Daniel v Potter* 1 M & M 303, *Chandrasekhar v Chum Ali*, 9 C L R 359

**Identity of interest** The general doctrine is that the declarations of a party to the record or of one identified in interest with him, are against such party, admissible in evidence *Spargo v Brown*, 9 B & C 935, *per Baley J* It is sometimes a question of some difficulty to determine just what will be sufficient identity of interest to render such statements admissible The cases have mainly turned upon this point Certain rules have become established as to identity of interest, and may be easily applied Many other cases arise which cannot be brought under any certain rule, but must depend largely upon the facts as to identity of interest, as they are brought out at the trial In either case the authority should clearly appear before the statement of one should be considered binding as against another Bare statements by an agent unaccompanied by any acts and not in connection with the doing of his principal's business would perhaps, never bind the principal, unless it were shown that the principal directed the particular statement to be made In most cases the statements of an agent which are admissible are connected with acts in such a way as to be admissible upon another ground, to wit, as part of the *res gestae* *McKelvey Et* § 125, *Greenl. Ev* § 109

**Admissions of persons having joint interest** The admission of one party may be given in evidence against another, when the party against whom the admission is sought to be used has a joint interest with the party making the admission in the subject matter or the thing to which the admission relates The rule depends upon the legal principle that persons seized jointly are seized of the whole each being seized of the whole the admission of either is the admission of the other and may be produced in evidence against that other *Nagendra v Lawrence Jute Co*, 25 C W N 89, *Ambar Ali v Lutfi Ali* 45 C 159=21 C W N 996=25 C L J 619 An admission made by some of several defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made, is binding on the other defendants *Bhika Mal v Ganga Ram*, 69 Ind Cas 35, *Meagan Matbar v Alimuddin Mea*, 34 Ind Cas 571=44 C 130=20 C W N 1217 Where several persons are jointly interested in the subject matter of a suit, the general rule is that the admissions of any one of those persons are receivable against himself and his fellows whether they be all jointly suing or sued, provided the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. *Dibesh Lal v Nohar*, 48 Ind Cas 193 *Meagan v Alimuddin* 34 Ind Cas 571=20 C W N 1217, *Sundari v Multa*, 11 C 588 In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was derivatively interested through the other a mere community of interest will not be sufficient *Taylor Et* § 750 An apparent joint interest is obviously insufficient to make the admission of one party receivable against his companions, where the reality of that interest is the point in controversy A foundation must be laid by showing *prima facie*, that a joint interest exists The existence of a joint interest which is disputed, can not be established by the admission of one of the parties sought to be charged, but this fact must be established by independent proof Therefore in an action against three makers of a promissory note, the joint execution of which was the point in issue, the admis-

18. sion of his signature by one defendant was held insufficient to entitle the plaintiff to recover against him and the others though theirs have been proved, the point to be established against all being a joint promise by all *Gray v Palmers*, 1 Esp 135 *Taylor* § 753 When one of two brothers admitted the claim of the plaintiff who sued them for a sum of money, the other brother is not bound by such admission *Manu v Madho*, 24 Ind Cas 105

**Admissions may be made by those not parties, if identified in interest** In addition to the real and nominal parties to a litigation, there often exist those who have such a pecuniary interest in the result that their admissions throw a relevant light upon certain of the facts in issue Consequently admissions may be made by such persons not parties to the record, provided they have a substantial interest in the result *Bowen v Snell*, 11 Ala 379 So the admissions of one entitled under a will are only competent against himself *Trimbletown v D Alton*, 1 Dow & C 85, *Morris v Stokes* 21 Gr 532 (Am) By substantial interest is meant some thing more than natural anxiety as in the case of parent and child It must be taken to mean pecuniary interest in the way of profit or legal obligation *Sanford v Sanford*, 9 Conn 275 (America) It must be shown *dehors* the declarations of such party In other words, before the declarations of one not a party to the record can be received on the ground that he is the real party in interest, such interest must be shown by competent evidence For example, the admissions and acts of *cestui qui trust* are admissible, although he is not a party to the record on the ground that he is a real party in interest But it is not every collateral, incidental or contingent interest in the result of a suit that furnishes legal ground for the introduction of hearsay testimony as being the admissions of party in interest Thus the interest of *cestui qui trust* of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit, so also, the interest of persons in a policy effected in another's name, for their benefit It is also a requisite that the statements should have been made during the continuance of the interest Declarations made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay *Burr Jones* § 233 The admission of one executor does not conclude another *Chunder Kant v Ramnaram* 8 W R 63 The admissions of the executor of a donor may be treated as the admission of the donor *Duarla nath v Chundeechurn*, 1 W R 339 The admission of a ryot of the rate of rent at which he holds a tenure can not be treated as evidence against another ryot to prove the rate at which he holds the tenure *Nuroohunry v Narance* W R (1 B) 23 = 1 Ind Jur O S 9

**Privies in Obligation** So far as one person is privy in obligation with another i. e., is liable to be affected in his obligation under the substantive law by the acts of the other there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish Moreover as a matter of probative value the admissions of a person having precisely the same interests it stake will in general be likely to be equally worthy of consideration There being an identity of legal liability, the two persons are one so far as affects the propriety of discrediting one by the statements of the other This principle finds constant application chiefly to the admissions of a co-promisor or of a principal (against his surety), and of one or two other classes of liability *Wigmore* § 1077

**Joint Promissors**—Co-promisors like principal and sureties are also privies in obligation and on principle the admission of one should be admissible in evidence against the other provided the other conditions are satisfied The rule is that, in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general evidence against all Such was the doctrine laid down by Lord Mansfield in *Whitcomb v Whitcomb* 2 Dou. 652 Its propriety and the extent of its application have been much discussed and sometimes questioned

ed but it seems now to be clearly established *Vide Perham v Rynal*, 2 Bing 306, *Burleigh v Stott* 8 B & C 36, *Wyatt v Hodson*, 8 Bing 309, *Brandram v Whorton*, 1 B & Ald 467, *Holme v Green* 1 Stark 481. They stand to each other in this respect, in relation similar to that of existing co-partners. Thus also the act of making a partial payment within period of limitation by one of several joint makers of a promissory note, takes it out of the Statute of Limitation *Burleigh v Stott*, 8 B & C, 36, *Munderson v Reece*, 2 Stark Evid 484, *Wyatt v Hudson*, 8 Bing 309, *Clippendale v Thurston*, 4 C & P 98, *Peace v Hirst*, 10 B & C 122. But it must be distinctly shown to be a payment on account of a particular debt *Holme v Green*, 1 Stark 488. But in India such questions must be decided by the Limitation Act IX of 1908. Section 19 requires the acknowledgment to be by the party against whom the right is claimed. Section 21 does not lay down in exception to section 19 but enumerates those cases in which the act of one member of a class is liable to be taken as the act of all. So acknowledgment of a judgment debt by one of several judgment debtors keeps alive the decree against such judgment debtor alone and not against the other *Chanda Kumar v Ramdin*, 16 C W N 498=13 Ind Cas 702 *Narayan v Venkata*, 25 M 220, *Subramania v Ramanathan*, 32 M 421. In the case of *Ashanullah v Dakhini*, 27 A 575 the Allahabad High Court (*Blau and Burlitt J J*) said "On general principles, one debtor by acknowledging a debt or making a part payment otherwise than as agent of the other debtors cannot keep alive the right of the creditor against those debtors." In a later Calcutta case however a contrary opinion was expressed by *Fletcher and N R Chatterjee J J* in *Ban Behary v Jnanendra*, 22 Ind Cas 709. According to the Madras High Court section 21 of the Limitation Act is really an explanation to sections 19 and 20 of the Act. The object of the explanation is to provide that one only of the contracting parties shall not ordinarily impose a liability on the other by anything done by him. Limitation, whether treated as a right or as a disability, is *prima facie* personal, and unless the Legislature so provides, a co-operative right or liability should not be imposed. *Muthu Chettiar v Muhammad*, 55 Ind Cas 763, see also 32 Ind Cas 608, 28 B 248, 27 M L J 455, 25 Ind Cas 927=(1914) M W N 792. So apart from the question whether payment by one of joint promisees, saves the limitation against the others, which must be decided in India in accordance with express provisions of sections 19 and 21 of the Indian Limitation Act, an admission made by one of them should be received in evidence against the other as they are parties in obligation. But the decisions of English Courts are by no means uniform in this respect. Thus, in an action against joint makers of a note if one suffers judgment by default, his signature must still be proved against the other *Gray v Palmer*, 1 E p 130, *Shurreff v Walks*, 1 East 48.

**Principal and surety** Principals and sureties are parties in obligation i.e. one is liable to be affected in his obligation under the substantive law by the acts of the other. *Wignore* § 1077. So where the effect of a contract is that a surety shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety. *Burr Jones & Co* § 238. So the entries of the principal were evidence against the surety because they were made by the collector (principal) in pursuance of the stipulation contained in the conditions of the bond. *Whitlash v George*, 8 B & C 556, 561 *Goss v Watlington* 4 B & B 132 (137), see also *Jordon School District v Gaets* 23 D L R 739 (Canada), *Sanders v Keller*, 18 Ida. 592. But ordinarily where a principal is not a party to the suit, his declarations are not admissible unless they are made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae*. *Burr Jones* § 238. The principle is thus laid down by *Greenleaf*. "The admissions which are thus receivable in evidence, must, as we have seen be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party. The law in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight, as though they were parties to the record. Thus the admissions of the *cestus que trust* of a bond, those of the persons interested in a policy effected in another's name, for their benefit, those of

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the shipowners in an action by the master for freight, those of the identifying creditor in an action against the sheriff, those of the deputy sheriff in an action against the high sheriff for the misconduct of the deputy are all receivable against the party making them. And in general the admissions of any party represented by another are receivable in evidence against his representatives. *Greene L. § 179-180*. But it is not every collateral, incidental or contingent interest in the result of a suit that furnishes legal ground for the introduction of hearsay testimony as being the admission of a party in interest. *Burr Jones § 278*.

So we are to consider the admissions of a principal as evidence in an action against the surety upon his collateral undertaking. In the cases on this subject the main enquiry has been whether the declarations of the principals were made during the transaction of the business for which the surety was bound so as to become part of the *res gestæ*. If so, they have become admissible otherwise not. The surety is considered bound by the actual conduct of the party and not for whatever he might say he had done and therefore is entitled to proof of his conduct by original evidence where it can be had, excluding all declarations of the principal made subsequent to the act to which they relate and out of course of his official duty. *Greene Fr § 179*. So in an action against a surety the liability must be proved against the surety independently of any admissions by the principal debtor which are in law no evidence against the surety. *Jambhajan Lal v. Sher Irasat 5 A L J 112* but see *Tanameswar v. Seedert 25 M L J 51-20 Ind C 14 637*. In *Ex parte Young*, (1881) 17 Ch D 668 *Lush J.* said: "The creditors must have proved it over again against the surety because he is not bound by the admissions or statements of the principal as to what amount is due. He is only bound to pay the amount, which shall be proved against him. But these declarations are hardly reconcilable with the principles already laid down under the topic 'primes in obligation,' vide p 318. But this principle is occasionally ignored. *Wigmore § 1077* notes. See also *Parameswar v. Tynthen 20 Ind Cas 637*. Thus where one guaranteed the payments for such goods as the plaintiffs should send to another in the way of their trade, it was held that the admissions of the principal debtor, that he had received goods, made after the time of their supposed delivery, were not receivable in evidence against the surety. *Pians v. Leathie, 51 p 26, Brown v. Chesney, 1 Starl 192, Longenecker v. Hyde 6 Bmg 1 Greene Fr § 187*. So, if one becomes surety in a bond conditional for the faithful conduct of another as a clerk, or collector it was held that in an action on the bond against the surety, confessions of embezzlement made by the principal after his dismissal, are not admissible in evidence. (*Smith v. Whittingham, 6 C & P 78, Goss v. Watlington, 3 Bro & Bing 132, Cutler v. Neulin Manning, 5 Digest N P 137*), though with regard to entries made in the course of his duty, it is otherwise. *Whitman v. George 8 B & C 556 Middleton v. Melton, 10 B & C 317, McGakery v. Alston, 2 M & W 213 214 Greene Fr § 187*. It was held in the case of *Ex parte Young*, (1881) 17 Ch D 668, that even a decree against the principal debtor is no evidence against the surety as to the amount of debt, but see *Drummond v. Prestman, 12 Wheat 515*.

On the other hand upon the same general ground, it has been held, that where the surety confides to the principal the power of making a contract he confides to him the power of furnishing evidence of the contract, and that if the contract is made by or through subsequent declarations of the principal are admissible in evidence though not conclusive. Thus where a husband and wife agreed, by articles to live separate and C as trustee and surety for the wife, covenanted to pay to the husband a sum of money, upon his delivering to the wife a carriage and horses for her separate use it was held in an action by the husband for the money that the wife's admissions of the receipt by her of the carriage and horses were admissible. *Fenner v. Lewis, 10 Johns 38 Greene Fr § 187*. So when A guaranteed the performance of any contract that B might make with C the admissions and declarations of B were held admissible against A, to prove the contract. *Meade v. McDouell 5 Bmg 195 Greene Fr § 187*.

But where the surety being sued for the default of the principal gives him notice of the pendency of the suit and requests him to defend it, if judgment



goes against the surety, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity, for the principal has thus virtually become party to it. It would seem therefore, that in such cases the declarations of the principal, as we have heretofore seen, becomes admissible, even though they operate against the surety. *Greenl Ev* § 188

**Privies in Title** The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*Vide Supra* p 318). Having precisely the same motive to make correct statement and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered to impeachment of the present claim. *Wigmore* § 1080. 'The confessions of the party himself,' says *Kennedy J* in *Gibblehouse v Stong* 3 Rawle, 436 (445) have always been considered good and admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence and who might all appear to be in the court house at the time when such confessions should happen to be offered in evidence against the party making them. And his rule of admitting the confessions or declarations of the party extends not only to the admissions of them against himself, but against all who claim or derive their title from him, in other words, between whom and himself there is a privity. There are four species of privity: privity in blood, as between heir and ancestor, privity in representation, as between testator and executor, or the intestate and his administrator, privity in law, as between the common wealth by escheat and the person dying last seized without blood or privity of estate, and privity in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee etc. *Vide Bigelow's Estoppel*, 597. The subject of the second clause of his section generally deals with the admissions by privies in title. "The declarations or confessions of the persons making them are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not supposed to make a statement less favourable to himself than the truth will warrant. At least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is therefore evidence against him, and his subsequent purchaser stands in his situation, for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions. It is asked, why not swear him? The answer is, the other party likes his declarations better. He may, from the same motive, vary his statement, and the party offering this evidence is alone to judge."

**Admission by former owner of land** A former owner of land is so identified in interest with a subsequent owner, holding under the same title, that his admissions respecting the title, made while in possession and vested with title are receivable in evidence. This rule is based on the theory that the self interest involved in the ownership of title is a sufficient guarantee for the truthfulness of statement against interest made by an owner. *Long v Long* 19 Ill 383, *Taylor*, § 787. It is imperative that the statements be made while the prior owner is vested with the title. If made after the title has been disposed of the guarantee of truthfulness is lacking and is universally held such statements are inadmissible. The admissibility of statements of this sort is not affected by the fact that the person making them is alive and in Court. *McKelvey's Evidence* p 130. In an action by X against Y for the pass for breaking and entering his close, called Scorhill. X called, to prove that Scorhill was a part of common lands, the son of M. M formerly owned the estate now held by the plaintiff, was alive and in Court. The son testified to admissions of his father that he had no right in Scorhill. *Lord Darham* in admitting the evidence said: "We think they are receivable on the ground of identity of interest. The fact of his being alive at the time of the trial, when perhaps, his memory of facts was impaired, and when his interest was not the same, does not in our opinion, affect the admissibility of those declarations which he formerly made

**S 18.** on the subject of his own rights" *Wooluay v Roe*, 1 Ad & E 114 So the declarations of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate *Taylor* § 758, *Doe v Justin*, 9 Bing 11, *Davies v Pierce*, 2 F R 53, *Doe v Jones* 1 Camp 367, *Jackson v Bord*, 4 Johns 230, 231, *Newton v Pettibone*, 7 Conn 319, *Weidman v Kohr*, 1 Serg & R 174, *Clarke v Brindaban*, (1862) W R T B 20 As the admissions must be made while the title to the property in question is in the declarant, (*Pandah v Gyadhar*, 10 W R 89) they therefore cannot affect a title subsequently acquired, nor are they admissible if made after the declarant has parted with his interest in the property (*Khemunlallee v Gour*, 5 W R 268), unless there is proof of some fraudulent scheme between the grantor and grantee, e.g. to defraud creditors. It follows that the declarant, if at the time owner or claimant, need not have been in possession, and conversely, that his being in possession after the title conveyed does not make his declaration competent as an admission *Emmons v Barton*, 109 Cal 662 (*Am*), *Hart v Randolph*, 142 Ill 521, 525 (*Am*) Ancient maps, books of survey etc, though mere private documents, are frequently admissible on this ground, where there is privity in estate between the former proprietor under whose direction they were made and the present claimant, against whom they are offered *Bull N P 288*, *Bridgman v Jennings* 1 Ld Raym 734 So, as to receipts for rent by a former grantor under whom both parties claimed *Doe v Seaton*, 2 Ad & E 171 Any admission by a landlord in a prior lease, which is relevant to the matter in issue and concerns the estate, has also been held admissible in evidence against a lessee who claims by a subsequent title *Crease v Barrett* 1 C M & R 919 932 *Greenfield* § 189 A letter written by a former vicar respecting the property of the vicarage, is evidence against his successor in an ejectment for the same property, in right of his vicarage. *Doe v Cole*, 6 C & P 359 The receipts, also, of a vicar's lessee, it seems, are admissible against the vicar, in proof of modus by reason of privity between them *Jones v Carrington* 1 C & P 329, 330 (*n*), *Maddison v Natall* 5 Price, 485 An answer in Chancery is also admissible in evidence against any person actually claiming under the party who put it in, and it has been held *prima facie* evidence against persons generally reputed to claim under him at least so far as to call upon them to show another title from a stranger *Earl of Sussex v Temple*, 1 Ld Raym 310 *Countess of Dartmouth v Roberts* 16 East 334 339 The admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors *Biharilal v Mukhdum* 35 A 194=11 A L J 221 *Brageswar v Budhanuddi*, 6 C 368, *Abdul v Madhub*, 10 A L J 390 *Rahhsh v Liladhar* 35 A 353, *Babal v Behari* 76 Ind Cas 815

The admission of a zamindar that the holding of certain tenants is *Mokur* *sure* at a given rent is binding on any zamindar who succeeds him without being an auction purchaser at a sale for arrears of revenue *Watson v Nobin*, 10 W R 72

**Sales for arrears of Revenue or Execution sales** An auction purchaser of an estate at revenue sale for arrears of Government revenue does not derive his title from the late proprietor and his laches are not binding upon the auction purchaser *Bu, lool v Prandhan* 8 W R 222, *Radha Gobind v Rakhai*, 12 C 82 *Forbes v Mir Mahomed* 5 B L R 529 (P C) *Enayet Hossain v Gudhance Lal* 2 Bom L R P C 78 *Poreshnath v Ananta Nath* 9 I A 14, *Watson v Nobin* 10 W R 72 The auction purchaser at a revenue sale acquired all the rights which the original seller at the date of perpetual settlement had *Forbes v Meer Mahomed*, 20 W R (P C) 44 He is not also bound by the admission of the previous owner *Rungo v Raj Coomaree* 6 W R 197 *Radha v Rakhai* 12 C 32 *Tura Prosad v Ram Nrising* L 6 B R App 5=11 W R 283 Under a sale in execution of a decree the purchaser notwithstanding that he acquired merely the right title and interest of the judgment debtor acquires that title by operation of law adversely to the judgment-debtor *Dinendra v Ram Coomiar* 7 C 107 P C=8 I A 65=10 C L R 281, In *Lala Prabhu Lal v Wylne* 11 C 401 (413) it was held that an auction purchaser is not a representative of the judgment-debtor within the meaning of section 115 of the Evidence Act.

See also *Gour Sunder v Hem Chander*, 16 C 355, *Rungo Monce v Ray Coomaree*, 6 W R 197 *Musst Imrit v Lalla* 18 W R 200 An auction purchaser is not barred by the acts or the omissions of the former proprietors *Koodep v Gort of India*, 11 B L R 71 (P C)=14 M I A 217 Where the property is sold in execution of a decree, it can not be correctly said that the owner gives any rights to the purchaser who acquires his rights by operation of law *Lalu Muly v Kashi Bai*, 10 B 401 (105) A purchaser at a Court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor in so far as he had a right to bring such right, title and interest to sale in satisfaction of the decree *Krishna v Bhupati*, 18 M 13 In *Ishan Chandra v Beni Madhab* 24 C 62 (F B) it was held that an auction purchaser of the judgment-debtor's interest, is a representative of the judgment debtor In delivering the judgment of the Full Bench *Banerjee J* observed 'It is true that an execution purchaser makes his purchase not from the judgment debtor and often against his wish and he is not bound by some of the acts of the judgment debtor such as alienations made by the latter to defeat the decree, but that does not show that his rights are not derived from the judgment-debtor or that he is not a representative in interest of the judgment-debtor in any sense or for any purpose As for the cases relied upon in the judgment of *Gour Sunder Lahiri v Hem Chandra Choudhury*, 15 C 355, the two Privy Council decisions do not in my opinion afford any basis for the broad proposition deduced from them" By this case the cases reported in 16 C 355 and 8 W R 304 were overruled In a later Madras case it was held by *Moore J* that an auction purchaser is a representative of the judgment debtor *Kashi Nath v Uthumansa*, 25 M 529, see also *Prosonno Kumar v Kalidas* 19 C 683=19 I A 166 *Devar Baksh v Fatie*, 26 C 254 In *Gulari Lal v Madho Ram*, 26 A 447, it was decided that an auction purchaser held in execution of a simple money decree against a judgment debtor is a representative of the judgment-debtor See also *Dorab Ally v Abdool*, 5 I A 116 (125), *Sundara v Venkatararada* 17 M 228, *Megji v Ramji* 8 B H C R 169 (174), *Sobhag v Bharchand* 6 B 193 (202), *Ganga Das v Yakub Ali*, 27 C 670, *Azgar Ali v Asaboddin* 9 C W, N 135 *Gopi v Sajani* 10 C W N 240, *Haradhan v Grish*, 8 C L J 327, *Gur Prosad v Ramlal*, 21 A 20 *Imtiyaz v Dhuman*, 29 A 275, *Ajodhya Roy v Hardwar*, 9 C L J 485, *Veyindra v Maya Nandan*, 43 M 107=38 M L J 32=54 Ind C's 209=(1919), M W N 881 (F B), *Mahomed Mozuffar v Kishori* 22 C 900 (919) The real test to be applied in determining the question whether the auction purchaser is to be regarded as the representative of the judgment-debtor or of the decree-holder depends upon the nature of the question raised and who the contesting party is If the question is between the judgment debtor and the auction purchaser and the interests of the two are conflicting, the auction-purchaser can in no sense be considered to be a representative of the judgment debtor *Narotam v Sukhray* A I R. 1928 Oudh 442 The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution Both parties claimed proprietary right and possession the defendants holding the latter The first of the decrees in date was the plaintiffs' for money against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title and interest The mortgagees, having got a decree upon their mortgage against the widow purchased at the sale in execution and defended the possession which they obtained The Privy Council held that the defendants in whose favour the decree had been made upon a bona fide mortgage without notice that the mortgagor had been only holding *benami* for her husband had the better title It was also further held that the owner, having in his life time authorized his wife to hold herself out as proprietor in her own right, could not have succeeded in a suit to disentitle the mortgagees without proving that they either had taken the mortgage with such notice or that they had been put upon enquiry, that the same principle applied to these plaintiffs who had purchased his right, title and interest, and that they were bound equally with him *Mahomed Mozuffar v Kishori Mohun*,

S 18 22 C 909=22 I A. 129, see also *Ram Coomai v Macqueen*, L R I, A. Sup 40=11 B L R 46=18 W R 166 (P C) It is clear from this case that an execution purchaser can be estopped by the admission of the judgment-debtor in as much as there is privity of interest between him and the judgment debtor whose interest he purchases. See *Ishan Chandra v Beni Madhab*, 24 C 62. Therefore an auction purchaser at the execution of a simple money decree is considered as the representative of the judgment-debtor and is bound by the admission of the former if made previous to the attachment. Vide s 21 *infra* see also *Um opoorna v Muffer Poddar*, 21 W R 148, *Krishna Lal v Gangaram*, 13 A 28, *Ishan v Beni*, 24 C 62. It appears on principle laid down in section 64 of the Civil Procedure Code that an auction purchaser even at the execution of a money decree is not bound by any admission after the date of attachment, but a purchaser at a private sale cannot object to any admission made by his vendor before the date of his purchase. But where an auction purchaser purchases the property at the execution of a mortgage decree he is not bound by any admission made by the judgment-debtor after the mortgage in as much as he is entitled to all the right, title and interest of the decree-holder, and as much of the equity of redemption which was possessed at the commencement of the suit by the judgment debtor. In an auction of realty, where the defendant bases his title and right of possession of the property upon the foreclosure of a chattel mortgage the admissions, declarations and statements of the mortgagor at a time subsequent to the execution of the mortgage are not admissible. *First National Bank of Emil v Yoeman*, 17 Okl 613. But where the declarations are made before the date of the signature of the mortgage, the mortgagee as well as the execution purchaser at such a mortgage sale is bound by the admission of the mortgagor. *Iboto v Beecher* 78 N Y 155, *Sherman v McDonald* 31 Kan 378, *Lala Parbhu v Mylne* 14 C 401. But a purchaser by a mortgagee at a sale in execution of a decree upon his mortgage of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties does not place such mortgagee in a better position as regards estoppel. *Poresh Nath v Anath Nath* 9 C 265=9 L A. 111 on appeal from 4 C 713. see also *Kishori v Mahomed*, 18 C 188, *Tota Hari v Hargobind*, 36 A. 111, *Bakshi v Liladhar*, 35 A. 303, *Bishambar v Parghade*, 10 A L J 112.

Persons from whom interest is derived. Statements by persons in possession of property qualifying or affecting title thereto are receivable against a party claiming through them by title subsequent thereto. *Phip v P* 203 A. recital in a mortgage deed is admissible in evidence as against the mortgagor as well as against those who derive title from him. Sections 18 and 21 make the recital admissible against them even as an admission. The probative value of such recital, however is a different question. *Nawal Kunnar v Bakhtaur* 11 Ind C 5 64=10 A L J 390. An admission against her own interest by the predecessor in title of the defendant is relevant under s 18 and 21, and though not conclusive is sufficient in itself to shift the burden of proof. *Sakharan v Sraman* 7 N L R 23=10 Ind. Cas 700. Where one person succeeds to the same rights of property formerly enjoyed by another, there is often such privity that the rights of the owner in such property may be affected by the statements of the latter. This rule is applicable both in respect of movable and immovable property. In either case where the successor in title claims under a former owner near or remote he may be charged, subject to the limitations hereinafter mentioned with the admissions of his predecessor qualifying or limiting his rights in respect of such property. The mode of proving such admissions is the same as that already described. After the necessary foundation of privity is laid for them the evidence is *prima facie* established when admission is proved, and there is no onus on the party using it to avail himself of the testimony of the witness who made the admission. The admissions with which the successor may be charged are of course of great variety. For example it is always admissible against the grantor to prove the declarations of the grantor while in possession that he has been antedated. *Jackson v Lord* (Johns (N Y) 24)=1 A. 12. The *17 Wallace v Lindley* 2 R & G 120 (Can). In *Guy v Hall* 1 A L J 112 (1st) the Court observed. But, it is said, that the person who declares

one offered is entirely disinterested and within the process of the Court, and therefore should himself be sworn. There would be some weight in this objection, if they were offered as the declarations of a disinterested individual in those cases where such declarations are admissible, to wit, in cases of pedigree and boundary, for then the declarations would be inadmissible, if the higher evidence, the oath of the party, could be had. In all other cases, except those of pedigree and boundary, the declarations of disinterested individuals are inadmissible, for they are nothing but hearsay. In this case, they are offered as coming from a *privy in estate*, and therefore in law, from the party himself, for the privy completely represents him, so that the question whether the person now disinterested to declare the truth and is amenable to the process of the Court does not affect the point under consideration. It is asked, why not answer him? The answer is, the party likes his declaration better. He may, from some motive, vary his statement and the party offering his evidence is alone to judge. It is true, if he be now disinterested either party may if he choose, call him as a witness." It may be stated generally that when a person takes an estate as successor to another, claiming under him, he takes such estate *cum onere*. The rule has often been stated that in such cases the declarations of the grantor against his title, while in possession of his premises, are always admissible, not only against him, but against those who claim under him. *Harp v Harp*, 136 Cal 421. It is not necessary, when the declarant is trying to call him as a witness, that his statement may be shown by a third person. *Jackson v Myers* 11 Wend (N Y) 533. But the declarations of the grantor are not to be treated as admissions, and are not competent if made before his interest in the property in question was acquired. *Stowell v Myers*, 11 Wend (N Y) 533, *Noyes v Morril* 108 Mass 396. As regards other admissions by persons from whom interest is derived held irrelevant *Vide* 13 C P L R 1 (6), 31 C 871, 10 W R 72 (73), 14 W R 28 (P C)=5 B L R 529=13 M I A 438, 10 W R 89 (90) W R (F B) 20 (1862), 5 W R 268, 15 M 19, 18 W R 105, 18 M 73, 23 W R 325, 18 W R 347, 7 M H C R 13.

**Admission of ancestor against heir etc.** The heir is always bound by a relevant declaration of the ancestor. *Pittman v Pittman* 124 Ala 306, *Baler v Hasell*, 47 N H 479. This is a case of privies in blood. *Greenl Ev* § 189, Co Lit 271 (a), *Cav's v Jason*, 4 Peters 1 (83). The grounds upon which admissions bind those in privity with the party making them are that they are identified in interest, and of course, the rule extends no further than this identity. Where the party by his admissions has qualified his own right, and another claims to succeed him as his executor, or the like, he succeeds only to the right, as thus qualified, at the time when his title commenced, and the admissions are receivable in evidence against the representative in the same manner as they would have been against the party represented. *Alexander v Caldwell* 55 Ala 517. Thus the declarations of the ancestor that he held the land as the tenant of a third person are admissible to show the seisin of that person, in an action brought by him against the heir for the land. *Doe v Pettett* 5 B & Ald 223, 2 *Poth on Obligations by Evans* p 254. Such declarations have been admitted to prove the contents of a lost deed (*Allen's Lessee v Hasell* 47 N H 479=93 Am Dec 455) to establish a boundary (*Jackson v McCall* 10 Johns (N Y) 377) a gift (*Pritchard v Pritchard* 69 Wis 373) to show that the ancestor had made a parol contract to sell if such evidence would have been admissible against him while living. *Chadwick v Fournier* 69 N Y 404. Stating the rule more broadly it has been held that whenever the admissions of an ancestor would be admissible against him, if living they are admissible against an heir claiming under him by descent. The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth and his interests were such that he would not make the admission to the prejudice of his title or possession unless they were true. The regard which one so situated would have to his own interest is considered sufficient security against falsehood. *Chadwick v Fournier* 69 N Y 404. In the same manner the admissions of a devisee are competent against the devisee, those of an intestate against his administrator and those of a testator against his executor. *Broaddus v James*, 13 Cal App 164. Thus in an action by an administrator

**S. 18** tritor against the widow of his intestate for the conversion of property, declarations of the intestate that his tenant was to pay no rent are admissible for the defendant *Mooney v Mooney*, 80 Conn 116, see also *Bishop of Meath v of Winchester*, 3 Bing N C 183, *Maddison v Nuttall*, 13 M & R 40, *Carr v Mostyn* 5 Ex R 369, *Doe v Cole*, 6 C & P 559. So also the admissions of a testator that his tenant was to pay no rent, are admissible against his executor *Cox v Band*, 11 N L J 105=19 Am Dec 386. And the declarations of an intestate are admissible against his administrator, or any other claiming in his right *Smith v Smith*, 3 Bing N C 29, *Heat v Finch*, 1 Taunt, 141. A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nana v Shanley*, 3 Bom L R 465.

**Life estate holder and remainder man** In applying the rule that a man's admissions are only evidence against himself and his privies, care must be taken to distinguish between the position of a tenant for life and that of a tenant in tail. A tenant for life cannot unless empowered by some statute, prejudice, by an admission the interest of a remainder man or reversioner, but a tenant in tail is regarded as representing the inheritance, and therefore, what he says or does will often be binding on the person entitled in remainder *Taylor* § 758. So the remainder man is bound by release of equity of redemption by a tenant in tail in possession *Reynoldson v Perlins* Amb 563, *Pendleton v Rooth*, Giff 40. It was held by then Lordships of the Privy Council in *Somlal v Kanhaiyalal*, 19 Ind Cas 291=17 C W N 605=35 A 227=40 I A 74, that Hindu reversioners derived their title through the last full owner and were not bound by the acknowledgments made by life estate holders. See also *Lakshmi v Venkata Rao* 82 Ind Cas 1052 86 Ind Cas 853. But by Act I of 1927 s 3 these declarations as regards acknowledgment have been made obsolete. The declarations of the tenant for life do not bound the remainder man, as there is no privity between them for a privy in estate is a successor to the same estate, not to a different estate in the same property, and the statements of the tenant for years are not admissible against the owner in fee *Hill v Roderick*, 4 Walls & S (Pa) 221.

**Landlord and tenant, Mortgagor and Mortgagee, etc** A similar relation of privity exists between landlord and tenant. Thus, parol declarations of a party showing a deed of real estate held by him to be void for fraud are admissible in evidence in an action of ejectment against his tenant, where such declarations were made while in possession of the property *Jackson v Meyers* 11 Wend (N Y) 533. When the relation of landlord and tenant is once established it attaches to all who may succeed the tenant immediately or remotely and the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own *Jackson v Davis*, 5 Cow (N Y) 123. But the declarations of the tenant are not admissible to affect the title of the landlord *Burr Jones* § 243.

The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee and evidence only in so far as they affect the estate mortgaged and are limited in point of time to those declarations made before the signing of the mortgage *Foot v Beecher* 78 N Y 155. An admission by the surviving daughter of a member of a joint Hindu family, that the children of her deceased sister were entitled to her father's share was held to be evidence of the existence of the title before the suit *Gour Lal v Mohesh* 14 W R 484.

**Vendor or Assignor of personalty** The same principle holds in regard to admissions made by the assignor of a personal contract or chattel, previous to the assignment, while he remained the sole proprietor and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer. In such case he is bound by the previous admissions of the assignor in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor, and assignee and such identity is deemed to exist not only where the latter is expressly the mere agent and representative of the former, but also where the

assignee has a title with actual notice of the true state of that of the assignor, and by the admissions in question, or where he has purchased a demand in any state, or otherwise infected with circumstances of suspicion *Harrison v Alliance* 1 Bin. 45, *Green v El* § 190, *Taylor* § 790 citing from *Green* § 190 Thus the declarations of a former holder of a promissory note, negotiated before it was overdue, showing that it was given without consideration, though made while he held the note are not admissible against the indorsee, for, as was subsequently observed by *Parle J* "the right of a person, holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title" *Barough v White*, 4 B & C 320 explained in *Woolway v Roue*, 1 Ad & El 114 116, *Shaw v Broom*, 4 D & R 730, *Beauchamp v Parry*, 1 B & Ald 89, *Haclett v Martin* 8 Greenl 77 So so far as choses in action are concerned, this is one exception to the general rule already stated Therefore declarations of a former owner of negotiable paper are not admissible against one who purchased for value before due *Roe v Jerome*, 18 Conn 133 But with this exception the same general principle stated in this section governs in respect to choses in action and the declarations of the assignor made while he is owner are admissible against the assignee and those claiming under him Thus this has often been illustrated in the case of negotiable paper transferred after it became due, where the declarations of former owners have been received to show payment or rights of set-off *Roe v Jerome* 18 Conn 133 But, in an action by the indorsee of a bill or note dishonoured before it was negotiated, the declarations of the indorser made while the interest was in him are admissible in evidence for the defendant. *Bayley on Bill*, 502, 503, *Pocock v Billings*, Ry & M 127

**Admissions of Insolvents** The admissions of an insolvent if made after the act of insolvency may be admissible against himself but they cannot furnish evidence against another insolvent or as against the official assignees *Iachme ram v Radha*, 34 C L J 107=49 C 93=66 Ind Cas 15 So also evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title *Jnanendra v The Official Assignee*, 30 C W N 316, *Re Brunner*, 19 Q B D 572, *In re Cooper* 19 Ch D 580 *Madharam v Official Assignee*, 27 C W N 611

## ILLUSTRATIVE CASES

## Admissible

In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement *Jogeswar v Alhoy*, 19 C L J 1=22 Ind Cas 714

Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants *Bhika v Purn* A I R 1923, Lah 123

Statements made by persons from whom the parties to a suit have derived their interest are admissible as admissions only when the admissions are of a date prior to the date of their deriving interest Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party claiming through them by title subsequent to the admission *Galslam v Mna* *Abid Hussam* 73 Ind Cas 428=10 O L J 263

## Inadmissible

An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim is not binding upon the vendee under section 18 of the Evidence Act. *Chandra Singh v Wasauca Singh* 25 Ind Cas 144=108 P W R 1914=202 P L R 1914

The statement as to the ownership of a piece of land given as boundary in a sale deed in a suit between the purchaser and a third person in which the ownership of that land so given as a boundary was in question is not an admission but it is a relevant piece of evidence as a statement against interest under s 32 (3) of the Evidence Act *Kanyah v Beni*, 34 Ind Cas 534

Section 18 of the Evidence Act does not make by itself relevant the admissions made by an agent of the

## S. 18.

## Admissible

A purchaser is not bound by an admission made by his vendor subsequent to the purchase by him. He is not representative in interest of his vendor, though he claims his title by virtue of the purchase through him. *Maung Aung v Maung Shue*, 73 Ind Cas 1039 = A. I. R. 1923 Rang 31.

Statements made by accused to a Police officer are admissible as admissions against the accused under ss 17 and 18 of the Evidence Act but not in his favour. *Izimmuddy v Emperor*, 44 C. L. J. 253 = A. I. R. 1927 Cal 17.

A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the trial as a statement made by a party to a proceeding under ss 18 and 21 of the Evidence Act. *Emperor v Kamnath* 28 Bom. L. R. 811 = 50 B. 111 = 93 Ind Cas 690.

A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting. *Chandreshwar v Bisheswar*, A. I. R. 1927 Pat 61 = 5 Pat 777.

A party is bound by admission made by his counsel on questions of fact, whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before the appellate Court. *Uchhi v Nallamati*, A. I. R. 1928 Mad 900, *Ghulam v Abdul*, A. I. R. 1928 Mad 779, *Nand Kishore v Ganesh*, A. I. R. 1929 All 446.

The admission of a party in a Divorce proceeding unsupported by other proof should be received with utmost circumspection and caution. *M. L. v W. L.*, A. I. R. 1928 Sind 55 = 105 Ind Cas 416.

A statement made by an agent to the effect that his principal was a bastard was admissible in evidence as an admission under section 18 of the Evidence Act. *Raj Fatch Singh v Baldeo Singh* 3 Luck. 416 = 109 Ind Cas 310 = A. I. R. 1928 Oudh 233.

An admission if gratuitous, can be withdrawn at any time and therefore

## Inadmissible

plaintiff's father when the plaintiff's father had already lost all rights in the property, in a suit in connection wherewith the admission is made. *Gulab v Tadali*, 68 Ind Cas 566.

A party is not bound by the statement or admission made by his Mukteer-in, unless it is shown to have been made within the scope of the authority conferred by the Mukteernama. *Sitaran v Gaya Prosad*, A. I. R. 1933 P 37.

An admission in a previous suit in favour of plaintiff pre-emptor by another pre-emptor not party to present suit is not admissible in a suit between plaintiff and the present vendee. *Ahmad v Jauhar*, 84 Ind Cas 94 = A. I. R. 1923 Lah 16.

A party cannot be bound by admission of his pleader as to law in as much as the parties must be presumed to know what is correct law. *Chandoo v Muladhar*, A. I. R. 1926 Oudh 311 = 13 O. L. J. 138 = 92 Ind Cas 137, *Fatch Ali v Ahmad Din*, A. I. R. 1921 Lah 284 = 100 Ind Cas 833, *Panyabai v Bhagwan* 31 Bom. L. R. 88 = A. I. R. 1928 Bom 89, *Muthia Chetti v Muthu*, A. I. R. 1927 Mad 832 = 96 M. L. W. 465 = 39 M. L. F. 240, *Uchhi v Nallamati*, A. I. R. 1928 Mad 90.

Recitals regarding the boundaries in a document not *inter partes* are statements made by third parties and cannot be admitted. *Savat Chandra v Sarala*, A. I. R. 1928 Cal 63 = 100 Ind Cas 6.

An admission or even a confession of judgment by one of several defendants in a suit is no evidence against the other defendants. *Narindar v M. King*, A. I. R. 1928 Lah 69, *Dunath v Sayan Habib*, A. I. R. 1929 Lah 129.

Neither the declaration of a donor nor the declaration of a donee made in their own favour can be admitted in evidence as against the person depositing the gift. *Mohammad v Motilal*, A. I. R. 1928 Oudh 414.

Where a creditor comes into Court with a claim which is capable of being regarded as a stale or time-barred claim it is to his interest to make allegations which would save the claim from the bar of limitation. Having this in view, the mere fact that the statement of receipt of interest is against



## Admissible

such a confession, though against the interest of the party making it, is of little value *Badhu Ram v. Itam Chand*, A I R 1928 Lah 726

A Bawara paper signed by the Partition Deputy Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of s 35 Evidence Act. It would also be evidence against the proprietors under ss 18 and 13, Evidence Act because they were made in their presence *Ram Sarup v. Ram Narain* A I R 1929 Pat 32=7 Pat. 85

The Bawara Khashi paper prepared by an Amin and not signed by any gazetted officer, cannot be held to be a public document under s 35 though on proper proof, it may be evidence either under s 18 or section 13 *Ram Sarup v. Ram Narain*, A I R 1929 Pat 32=7 Pat. 85

A recital in a mortgage bond as to the receipt of the consideration by the mortgagor is admissible as against a subsequent purchaser and if such purchaser challenges the passing of consideration, the initial onus is upon him *Jumuna v. Ta dar*, A I R 1929 Pat 251=10 P L T 183

A pleader has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the appellate stage *Bansilal v. Emperor*, A I R 1928 Bom 241=30 Bom L R 646

Where a certain fact was sought to be proved by the plaintiff by referring to an admission contained in a document and the defendant remained *ex parte*, the admission should be given effect to unless there is anything in the plaintiff's own evidence contradicting it *Gulab Rai v. Ganga Sarup*, 29 P L R 633

Statements made by accused to a Police Officer are admissible as admissions against the accused under section 18 of the Evidence Act, but not in his favour *Amrudy v. Emperor* 44 C L J 253=A I R 1927 Cal 17

## Inadmissible

the pecuniary interest of the person making the admission cannot be regarded as of great weight. Before the Court can hold that there were those payments of interest it must be satisfied that those payments were actually made *Immalthu v. Narayana* A I R 1928 Mad 509

S 19

## 19 Statements made by persons whose position or liability

Admissions by persons whose position must be proved as against party to suit it is necessary to prove as against any party to the suit, the admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit

## Admissible

aware had taken steps to cancel it or nullify its effect, the conduct of the executant from the moment that he became admittedly aware of the existence, purport and effect of the deed is not merely a relevant fact, but a very important fact in the case, and the evidence offered by the defendant as to statements made by the executant in the interval of the execution of the deed and his death expressing the view taken by him of the deed after he had known of its existence or the action which he had conceived himself to have taken regarding it, cannot be excluded as irrelevant but is admissible under the head of admissions under sections 18, 19 and 21 or section 11 of the Evidence Act. *Mir Syed v Tayyaba*, 26 Ind Cas 517=1 O L J 591

To allege in a plaint that the plaintiff landlord though entitled to the entire timber, claims only half share because the predecessors of the plaintiff had been getting only half for a long time is an admission in the defendant tenant's favour and does not amount to setting up a custom. *Janaki Kuar v Usman*, 63 Ind Ca 417, see also *Rameshwar v Basudeba*, 60 Ind Cas 521=6 P L J 127

An admission made by a person having a reversionary interest in the property at the time is evidence against another person claiming the reversionary interest under a title derived from the former. *Taramani v Charu Chandra*, 61 Ind Cas 334

## Inadmissible

by the mother in which she was described at the heading as the wife of her husband but in the body of which she stated she had been living with the alleged father for 10 or 12 years, even if admissible is of no weight for the reason that her statement does not amount to an admission that she was living in adultery. *Magbulan v Ahmad Hussain* 26 A 103 P C=8 C W N 241=6 Bom L R 233=31 I A 38

S 2

## 20 Statements made by persons to whom a party to the

Admissions by persons expressly referred to by party to suit  
 suit has expressly referred for information in reference to a matter in dispute the admissions

## Illustration

The question is whether a horse sold by A to B is sound. A says to B—“Go and ask C. C knows all about it.” C's statement is an admission.

Principle—If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement, and it becomes when made, the party's own. *Wigmore* § 1070. “If” said *Ellenborough L C J* in *Williams v Innes*, 1 Camp 361 “a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself.” It is somewhat like the case where a man refers to a document as containing the true account of a particular matter, thereby making it evidence in regard to the particulars for which he has so vouched its correctness.

20. *Bruchnell v Hulst*, 7 A & F 468 *Richards v Morgan*, 33 L J Q B 111, *Wills* Lr p 162

**Admission by persons expressly referred to by party to suit** It not infrequently happens that an informal reference is made over a disputed matter to a third person, not in the nature of a submission to arbitration, but rather is an aid to the settlement of the differences existing between the parties and to enable the parties themselves to effect a settlement on the information. In such case the party is bound by the declarations of the persons referred to in the same manner and to the same extent as if they were made by him. See *Burn Jones* § 263 *Soloman v Herne*, 2 Lj p 69, *Williams v Bridge* 2 Stark 42, *Kempland v Macaulay*, Peake's Cas 65. In such a case the admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. This species of admissions is well recognized, though not frequently available. In *Lloyd v Willan*, 1 E p 18 the defendant proposed to pay if the plaintiff's porter would make an affidavit of the delivery of the goods. The affidavit was made. The defendant was then precluded from going into any evidence whatever on the cause on the ground of *mala fides* and of unfurnishing in opposing evidence. In *Burt v Palmer*, 5 E p 140 on a demand being made from the defendant he said "you must apply to A and he will pay you." A's admission was received by the Court observing "Where a person is referred to, to settle and adjust the account or business, what he says, if it is connected with the business which is referred to him is evidence." In *Daniel v Pitt* 1 Camp 364 note, defendant said "If C will say that he did deliver the goods, I will pay for them." In the circumstances C's admission was held admissible. Similarly in *Brook v Kent*, 1 Camp (note) defendant desired the plaintiff to enquire of Jones about it. Jones being a person who had paid money Jones' statement was held admissible. In *Garrett v Ball* 3 Stark 160 which was in action of trover for a horse, the plaintiff held that if the defendant would take his oath that the horse was his he should keep him. The fact of the defendant's affidavit being made was received. In *Hood v Reeve*, 1 C & P 532 the defendant wrote, "I refer you to him thereon." Here by "him" he meant one H. Held that any thing which H said about the account was admissible. In *Sydney v White*, 1 M & W 433, which was a case of injury to a horse the defendant said if a miners' jury would say that the shaft where the horse was killed was his he would pay. The miners' verdict was received to charge the defendant because the jury are in the nature of an accredited agent. In *R v Mallory*, 13 Cox C 45 which was a case of knowingly receiving stolen goods by the accused, the accused referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did not know them and the next day the wife handed the police the list in his presence. The list was received, as an admission of the prices and dates. This admission by reference brings us indeed close to the principle of award by arbitrators for though the validity of the award rests on a contractual basis yet the process is one of reference to a third person's pronouncement. *Higginson* § 1070. Such statements which were in the nature of awards required no stamp even when in writing *Tay* § 701.

**What questions may be referred** In the application of this principle, it matters not whether the question referred be one of law or of fact whether the persons to whom reference is made have or have not any peculiar knowledge of the subject or whether the statements of the reference be adduced in evidence in an action on contract or in action for tort. Therefore where two parties had agreed to abide by the opinion of counsel upon the construction of a Statute the party against whom a interest the opinion operated was held bound to abide in a subsequent action. *Price v Hollis*, 1 M & S 105, *Douglas v Cooper*, Q B 236. On the same principle a disputed fact can be referred to a third party. *Sydney v White* 1 M & W 433, *Taylor* § 761.

**Reference must be express** This rule must not be understood as giving the force of an admission to statements made by a witness as against the party who calls him. *Gardner v Moutt*, 10 A & E 468, *R v Latchford*, 6 Q B 177.

577 *Bucknell v. Halse*, 7 A & L 456 There must be an express reference for information in order to make the statement an admission. Thus if A says "I will pay you, if B says I owe it to you" B's statement about "the matter" will be an admission as against A. *Cum Gr* p 134. If a vendor refers a purchaser to a third person for information in regard to the property to be sold the declarations of such third person on the subject are admissible [ *Gott v. Dunsmore* 111 Mass. 45 (1m)] but such reference does not make the person referred to an agent for the purpose of general admission. *Burr Jones* § 263. The declarations are not evidence unless strictly within the subject matter in relation to which the reference is made. *Dunat v. Coten haven* 4 Wend (N Y) 564, *Murphy v. Kullinger* 8 Will (L S) 480 (1m). Thus where a defendant stated that a book keeper would furnish whatever information was contained in the books the declarations of the book keeper to the effect that in his opinion certain entries in the book were false to the knowledge of the defendant, were held admissible. *Lumbert v. People* 76 N Y 220=32 Am Rep 293. Where a person refers generally to persons in the community as to the question of his general character without naming them this does not make their declarations evidence against him. *Hosenbury v. Angell*, 6 Mich 503, *Burr Jones* § 263. By express reference a party makes the referee his accredited agent for the purpose of giving such answer. *Fratt v. Hudson*, 97 Ark 265. If a party on motion before a Judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of his fact and that too although the person who made the affidavit is present in Court. *Buellet v. Hulse*, 7 A & L 454. *Bullen v. Rutlin* 2 Ex R 675 (679). *Pritchard v. Bugshan*, 11 Com B 459, *Johnson v. Ward* 6 Esp 17. *White v. Douling* 8 H L R 128. *Id* § 764.

**Death of referee.** The death of the person referred to does not affect the admissibility of the testimony in that if alive he is not a necessary witness. Once the reference is established the result of it is competent irrespective of the referee. *McGlue v. Troubridge*, 68 Hun 28=22 N Y Supp, 674 (1m), *Burr Jones* § 263.

**Effect of admissions by the referee.** In such cases, the party is bound by the declarations of the persons referred to in the same manner, and to the same extent, as if they were made by himself. *Stoman v. Henne* 2 Esp 695. *Williams v. Bridges* 2 Stark 42. *Kempland v. Wavulay*, Peake's case.

Whether the answer of the person says *Dr. Greenleaf* thus referred to is conclusive against the party, does not seem to have been settled. Where the plaintiff had offered to rest his claim upon the defendant's affidavit which was accordingly taken. *Lord Kenyon* held that he was conclusively bound even though the affidavit had been false, and he added that to make such a proposition and afterwards to recede from it was *mala fides* but that besides that, it might be turned to very improper purposes, such as to entrap the witness, to find out how far the party's case would go in support of his case. *Greenleaf* § 184, cited by *Taylor* in great part, vide *Taylor* § 765, *Stevens v. Thacker*, Peake's Ca., 187. *Lloyd v. Willan* 1 Esp 178, *Delesline v. Greenland* 1 Bay 155. *Bellon v. Pettiman* T Ry 153. In *Garnett v. Ball* 3 Stark 160. *Lord Tenterden* held that such admissions are not conclusive. "And certainly the opinion of *Lord Tenterden* indicated by what fell from him in this case more perfectly harmonizes with other parts of the law especially as it is offered to any further extension of the doctrine of estoppels, which sometimes precludes the investigation of truth. The purposes of justice and policy are sufficiently answered by throwing the burden of proof on the opposing party as in the case of an award and holding him bound unless he impeaches the test referred to by clear proof of fraud or mistake." *Greenleaf* Et § 184, cited in *Taylor* § 765, *Whitehead v. Tattersall*, 1 A & E 191. The statements of referee under the Indian Evidence Act are not conclusive (vide Section 31) but if the person making the reference can be shown to have caused another person to believe something to act upon that belief, he may as against that person be estopped under section 115 from denying it. *Cum Gr* p 134. Where parties to a proceeding agree to abide by the statement of a third person it is a statement within the meaning of section 20. It is true that ordinarily mere admissions are not conclusive as is provided in

20. section 31, but admissions of this kind must be taken to be admissions made in a suit by the nominee of a party thereto. Such admissions, therefore, are as conclusive and effectual as admissions made by the parties in their written or oral pleadings. The effect is to prevent each party from resiling from the statement made by such a nominee. *Gordhan v Husain*, A I R 1927 All 659=103 Ind Cas 31, *Ihmamchah Singh v Jatuar Singh*, A I R 1924 All 570=46 A 710=10 Ind Cas 16. *Muhammad v Imtia*, A W N (1898) 200, *Keshoram v Puri*, 71 Ind Cas 761, *China v Venkata* 12 M 625.

**Admission by interpreters.** To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words, but it will suffice if the party by his conduct has tacitly evidenced an intention to rely on the statements is correct. Therefore, where a party, on being questioned by means of an interpreter, gave his answers through the same medium, it has been held that the language of the interpreter should be considered as that of the party, and that consequently it might be proved by any person who heard it, without calling the interpreter himself. *Taylor* § 763, *Fabrigas v Mostyn* 20 How St Tr 122 123. An interpreter is the accredited agent of the one employing him, and the employment is admissible as original evidence and is in no sense hearsay, nor is it necessary to call the interpreter to prove such statements or that his interpretation was correct. *Cameron v Palmer* 10 Allen (Mass) 539. A wife's statement while acting as interpreter for her husband may be proved. *Schutter v Williams* 1 West L J (Ohio) 319. An interpreter who is selected by two persons speaking different languages is the medium of their communication with each other is regarded as their joint agent for that purpose, and the statements of what they say in the presence of each other are regarded as the statement of the persons themselves and like any other admission may be shown by the testimony of any person who heard them without calling the interpreter as a witness. *Kelly v Ning Yung Ben Assn* 2 Cal App 460 (Am). In *Commonwealth v Fox*, 157 Mass 393 (Am) *Knoulton J* said that when two persons who speak different languages and who cannot understand each other, converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy and make his language presumptively their own. Each acts upon the theory that the interpretation is correct. Each implicitly agrees that his language may be received through the interpreter. Interpretation under such circumstances is *prima facie* to be deemed correct. One who acts as interpreter during a trial is not the agent of the parties, but the officer of the Court. *Scheerer v Harber*, 36 Ind 536 (Am). His statements given on a former trial cannot be admitted as evidence unless his absence is satisfactorily explained. *People v Ah Yute* 56 Cal 119 (Am).

### ILLUSTRATIVE CASES

#### Admissible

The plaintiff and the defendant in a suit signed a written statement which stated 'it has been settled between the parties that G shall hear over whole affair and that we shall accept any statement that he may make before the Court.' G made a statement on oath against the plaintiff. Held that the statement of G must be taken to be an admission made in the suit by a nominee of a party thereto which was effectual as an admission by the party himself. *Ihmamchah v Jatuar* 80 Ind Cas 16=A I R 1924 All 570 see also *Gordhan v Husain* A I R 1927 All 659=103 Ind Cas 31. *Sita ram v Puri* 47 A 921. *Muhammad v Imtia*, A W N (1898) 200.

#### Inadmissible

A party to a litigation is not bound by the statement of the mukhtar of the opposite side who was cross-examined by the parties. *Mt Srimati Ausanbati v Ram Jas* 4 U P L R 9 (Rev)

## 21 Admissions are relevant and may be proved as against S 21.

Proof of admissions  
against persons  
making them and by  
or on their behalf

the person who makes them, or his representative in interest, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest,

except in the following cases —

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission

### Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine. B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged, but A cannot prove a statement by himself that the deed is genuine nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. A may prove these statements because they would be admissible between third parties, if he were dead under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post mark of that day.

The statement in the date of the letter is admissible, because if A were dead, it would be admissible under section 32 clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements though they are admissions because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

**Principle.** The rule of law with respect to self regarding evidence is that when in the self serving form it is not in general receivable but that in the self harming form it is with few exceptions receivable and is usually considered proof of a very satisfactory kind. *Best Ev* § 519. 'It would be manifestly unsafe to allow a person to make admissions or statements in his own favour which should affect his adversary where as we have a sufficient safe guard for admitting statements against interest from the assurance that according to

**S. 21** ordinary experience people do not speak untruths against themselves. Illustration (a) gives a double example showing how the same statements may be used against but not for the interest of the party making them. Note for Under this section admission is receivable in favour of the party making it in the three cases mentioned in this section. These are considered as exceptions to general rule that self regarding evidence is not receivable in general when in favour of the party making it. The principle under which the admissions under the three heads are receivable is discussed under each topic (*vide infra*).

**Admission against the person making it.** The primary rule in section 21 is that an admission is relevant and may be proved as against the person who makes it or his representative in interest. *Gulab v Fadli*, 68 Ind Cr 20. Every admission which a party makes is evidence against him. *Lochman v Bhagathi*, 90 Ind Cas 497. *Young Mya v Ma Tha*, U B R (1897-1901) Vol II 377. An admission by the accused may be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act. But an admission under that section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. *Jeremia v Jas*, 12 Ind Cas 961=10 M L T 506=(1911) 2 M W N 576. A statement whereby a man charges himself with the receipt of sums of money is in most cases an admission against his interest. *Appa Lu v Nanyappa*, 20 Ind Cas 792=11 M L T 117=25 M L J 329. Though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a confession against him if he is on his trial as an accused person yet it is acceptable in a civil suit as an admission under section 17, 18 and 21 of the Evidence Act. *Ishwendas v Bim Labhaya*, 32 Ind Cas 18-106 P R 191. A mere admission cannot create a title which was non-existent though it would have been binding upon the person making it if the title admitted had really existed. *Hannohan v Kailash Chandra*, 17 Ind Cas 983. A member of a Hindu joint family, whose house was at Lucknow practised as a pleader at Hardoi and made considerable savings from his professional earnings. He eventually became managing member but was all along entrusted with the management of the joint family property in Hardoi District. Throughout he kept the accounts of the joint property and of his own earnings in one account book. He purchased sundry properties out of the fund so entered in the name of his son in law B and stated that he made such purchases to provide for B. Held that as regards the purchases in the name of B, A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence. *Sunay Narain v Jatanlal*, 40 Ind Cas 988=21 C W N 1065=20 O C 211=19 Bom L R 737=15 A L J 684. A written agreement by a tenant to pay the *Suantaniam* or *Thanduraram* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect can not be discounted or neutralised on the ground that the admission is recent. *Kumarappa v Manohala*, 44 Ind Cas 699=23 M L J 44=14 M L J 104=41 M 374=1918 M W N 350 (F B). An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact, and may be proved at his trial under section 21 and therefore such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate. *Feroz v Emperor*, 45 Ind Cas 848=11 P R 1913 Cr=19 Cr L J 631. *Per Heyward J in Emperor v Maruti*, 54 Ind Cas 465=21 Bom L P 106=21 Cr L J 65 *contra Ier Shah J in Ibid*. The statement of an accused person as a witness in a previous case is admissible against him under the section to prove admission of relevant fact made by him in that statement. *Emperor v Banai*, 177 Ind Cas 829=22 A L J 144=46 A 254=27 Cr L J 177. An entry in the body of the bond that no further account is out taken against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interest. *Gurdulla v Nahu Bishah*, A I R 1926 Lah 391=93 Ind Cas 996. An admission made in a Court of law no doubt carries with it great weight but it is not conclusive and binding on the party making it unless it operates as an estoppel. The burden of proof however

rests upon the party and after him his heirs to show that the admissions were untrue *Bar Deoman v Rabishankar*, A I R 1929 Bom 147=31 Bom L R 109, see also *Hiranand v Umad*, 1923 Lah 608 Admissions and statements made by a soldier before a military Court of enquiry are admissible in evidence against him on a criminal charge in a *Civil Court* *R v Colpus*, (1917) 1 K B 574=86 L J K B 459

The rule laid down in section 21 of the Evidence Act, must be taken subject to the special provisions regarding confessions and statements of accused persons enacted in sections 24, 25 and 26 of the Evidence Act, and sections 164 and 364 of the Criminal Procedure Code. Were it otherwise, confessions and statements of accused persons not recorded in accordance with the requirements of sections 164 and 364 of the Code might be proved as admissions by the accused, and the wholesome provisions elaborately laid down in these two sections practically reduced to a nullity *Queen Empress v Bhauab*, 2 C W N 702. An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact and may be proved at his trial under section 21. Such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate *Forro v Emperor*, 45 Ind Cas 843=11 P R 1918 Cr=19 Cr L J 651, see also *Shere Singh v Empress*, 21 P R 1881 Cr *Buta v Empress*, 52 P R 1887 Cr, *Raylumar v Emperor* 9 Pat L 1 449=A I R 1928 Pat 473, *Madan Guru v Emperor*, 4 Pat L T 381=73 Ind Cas 963=24 Cr L J 723, *R v Croue*, 81 J P 288 (Eng). Statements of an accused cannot be used against his co accused *Emperor v Albar*, 34 B 599. An admission made by D to a Police officer may be accepted in a civil case against him *Bishen v Ram*, 106 P R 1915, *Ganpati v Emperor*, 8 Ind Cas 1181.

The general principle of law is that any statement made by a man on oath may be used as evidence against him as an admission. The only principle on which an exception can really be founded, is the principle that a man is not to incriminate himself. But this is a principle which is not open to an insolvent who, once he had been adjudicated, is bound because he has been adjudicated, to give information touching his conduct dealings and affairs, even though he incriminates himself thereby *In re Joseph Perry* 54 Ind Cas 478=46 C 996=21 Cr L J 78. An admission by a party is of considerable weight in evidence against him and may, if unexplained, be even decisive *Sunlarachariyya v Manali* 51 Ind Cas 876, *Tu Singh v Harnam*, 1 Lah 137=56 Ind Cas 191, But see *Rai Deo Mani v Rai Shamlai*, A I R 1929 Bom 147=31 Bom L R 109, where it is said that it is not conclusive unless it operates as an estoppel.

A return filed by a zaminder in the Collector's office under section 48 of Ben Reg VIII of 1793 and section 15(8) of Ben Reg VII of 1793 does not fall within the purview of section 35 of the Evidence Act. The legal effect of such a document or the weight to be attached to it would have to be determined by the application of such tests as have to be applied to all other statements. If it is sought to be used as an admission against the party making it, its probative value must be considerable. Where it is sought to be used in favour of the party who made it, it must fulfil the requirements of section 21(1) read with section 32 of the Evidence Act, or it must be relevant otherwise than as an admission. In either case its value would be slight *Tinal Chandra v Prosanna* 78 Ind Cas 719=28 C W N 679=39 C L J 389.

**Representative in interest** Whenever the admissions of an ancestor would be admissible against him if living they are admissible against an heir claiming under him by descent, and are receivable in evidence against him in the same manner as they would have been receivable against the ancestor *Green Et* § 189 *Davis v Nelson* 66 Iowa 715. Whenever the admissions of one having or claiming title to real estate would thus be competent against him, they are competent against persons subsequently deriving title through or from him *Burr Jones* § 242. An admission against her own interest by the predeceesor or in title of the defendant is relevant under ss 16 and 21 of the Evidence Act and though not conclusive is sufficient by itself to shift the burden of proof *Sakharant v Shriram*, 7 N L R 24=10 Ind Cas 700. The term "representative in interest" is wider than he



21. term "legal representative." The words "legal representative" in section 21 C P C cannot be taken to include any person who does not in law represent the estate of the deceased (*Chathakelam v Gound*, 17 M 186, see also *Badri Narain v Jai Krishen* 16 A 183 (187). It has already been stated that privies are of three kinds, namely (1) privies in blood, such as ancestors and heirs (*Wells v Buck* 69 L J 759) (2) privies in law, such as executor of a testator or administrator to an intestate, and (3) privies in estate or interest as vendor and purchaser grantor and grantee, donor and donee lessor and lessee etc (*Melbourne v Brougham* 9 App Cas 307) *Phillips* 4th Ed p 219. The term "representative in interest" is rather vague (*Ishan v Beni* 24 C 62-72) but it seems to include most of the privies in blood, law or estate. *See notes under section 15 Woodroffe Evidence* p 25. So a party is bound by the admissions of his father and other ancestors (*Woodroffe v Rauce*, 1 A & F 114 *Doe v Pittell*, 5 B & A 223, *Madison v Nuttall* 6 Bing 226 *Meath v Winchester*, 3 Bing N C 183, *Smith v Smith*, 3 Bing N C 29. So also a statement by a party's predecessors in interest is admissible against him *Doe v Lalin* 7 C & P 191. But such admission is not binding on the successor if the statement is made after he has parted with his interest *Doe v Webber* 1 A & L 740, *Pocock v Billing* 2 Bing 269. An auction purchaser in a money decree is a representative of the judgment debtor *Ram Coomai v McQueen*, 18 W R 166=1 A Sup Vol 40, *Unnopoorna Dass v Muffi Poddar* 21 W R 118, *Ishan v Beni* 24 C 67, *Kishore Lal v Ganga Ram* 13 A 28, *Harbhagat v Narayan* 1924 Nag 208 *Mahomed v Kishori* 22 C 909 *Bulal v Joykishore* 16 A 483, *Sundara v Venkataravudu* 17 M 228, but see contra *Manchar v Sumitra*, 19 A 26. A purchaser at an execution sale is in privity with, and the representative in interest of the judgment debtor within the meaning of section 21 of the Evidence Act so as to be bound by his admissions. Where therefore in a mortgage suit the mortgagor admits a prior mortgage the purchaser of the property in execution of the mortgage decree is bound by the prior mortgage *Harbhagat v Narayan* 78 Ind Cas 338. When the execution of a mortgage deed is admitted and the deed contains a definite admission by the executants regarding the passing of consideration the admission is evidence against the mortgagors and their representatives in interest under section 21 of the Evidence Act *Podam Kunai v Nahu Singh* 39 Ind Cas 63=1 P L W 413 *Rudha Nath v Jodoonath*, 7 W R 441, *Gadian v Veerappa* 26 Ind Cas 899=28 M L J 92 *Bulal v Bhanu* 76 Ind Cas 810 *Balshu v Laladhar* 35 A 353. A recital as to the passing of consideration in a mortgage bond is admissible in evidence against the transferee of the mortgagor under section 21 of the Evidence Act *Naram Singh v Bhukha Ram* 21 Ind Cas 841 *Nawal Kumari v Balhatai* 17 Ind Cas 644=10 A L J 390 *Bihari v Mahdum*, 18 Ind Cas 744=11 A L J 221=35 A 104. An admission made by one reversioner is not admissible against another reversioner since the latter does not derive interest through the former *Golab v Pundali* 68 Ind Cas 568.

**Admission cannot be proved in favour of the party making it.** Admissions are not admitted as to testimony of the declarant in respect of any facts in issue. *State v Willis* 71 Conn 293. P's carriage was driven against M's carriage whereby M's thigh was broken. On the trial of an action by M against P for recovery of damages for injury to a surgeon was called as a witness for M. M recovered £600 as damages against P. S afterwards brought in action against M for his services as a surgeon in attending M after his thigh was broken. The counsel of S proposed to go into evidence to show what S stated as to the amount of his charge for attendance on M in giving his evidence on the trial of the action by M against P. S's statement at the former trial was held to be inadmissible for him though it would have been admissible against him. *Sutherland v McLaughlin* Car & M 429, *Cum Ft* 137. Such statements are rejected because if a man might bring evidence to prove statements made by himself favourable to his own case nothing would be easier than for a party who had a weak case to strengthen it by making such statements before-hand or by suborning witnesses to speak to having heard him make such statements. A party in issue of

the most worthless evidence would thus be imported in the case *Cun Li p* 136. Moreover by admitting such evidence the principle of the rule excluding hearsay evidence would be violated. So the general rule is that statements made by a person can be proved only against the person making it or in other words in favour of his antagonist. Of course this section in clauses (1) to (3) lay down certain exceptions to this general rule. In all such cases statements made by a person is admissible in his favour because there exist some particular circumstances which give special probative force to these statements. A statement in a will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person making it or his representative. *Aalam v Mandavilli* 26 C W N 273 = A I R 1922 P C 102 *Bhagban v Ram* 22 C 843 (P C). In a suit by a lessee of a plot of land to recover possession of the plot from a third person the plaintiff sought to rely upon a recital in a deed of lease relating to an adjoining land granted by his lessor before the date of the plaintiff's own lease and at a time when there was no dispute about the land in suit stating that the land in suit belonged to the lessor. It was held that the recital was only an admission made by the plaintiff's lessor in his own favour and was consequently not admissible under any of the provisions contained in section 11 13 21 or 32 of the Evidence Act. *Radha v Sarbeswar* 86 Ind Cas 674 = 29 C W N 169 = A I R 1925 Cal 689.

**Exception** According to the English jurists a self-serving statement is not generally admitted in evidence. *Prof Best* says. The subject of self-serving evidence may therefore be despatched in a few words and indeed has been substantially considered under the title *res inter alios acta alteri nocere non debet* (things done between strangers ought not to injure a party). There are, however, some exceptions to the rule excluding it. The first is, that where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider and attach what weight they see fit to any self-serving statement it contains. This exception is founded on the plain principle of justice that, by using a man's statement against him you adopt that statement as evidence at least. Again, a person on his own trial may, at least if not defended by counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit. Care must likewise be taken not to confound the self-serving evidence with *res gestae*. The language of a party, accompanying an act which is evidence in itself may form part of the *res gestae*, and be received as such. *Best* § 520. The framers of the Indian Evidence Act in this section have specified the three cases in which an exception is permitted to the general rule and in those cases self-serving statements are admissible in evidence in favour of the party making it. The reason for these exceptions are thus given by *Cunningham* "This rule of admission cannot be proved in favour of the person on making it; however, if enacted without any relaxation of the rule, it is a hardship, as there are some statements which though they are in the interest of the person making them are yet from some particular circumstances deserving of special credit. Such for instance, are the statements made by a party in the presence of witnesses to which illustrations (b) and (c) refer. *Principle of the Act* is that the following exception is to let in a very large number of statements in a man's favour, and it is for the Judge to say what weight is to be given to them. *Cun Ev* 137. But such evidence will not be admitted if it is given in the presence of witnesses, in order to prevent the party from making a statement only against privies by title, but also against witnesses. *Ray v Ray* 10 C 689.

**Clause (1)** The securities which are given in the presence of witnesses, in order to prevent the party from making a statement only against privies by title, but also against witnesses. *Ray v Ray* 10 C 689.

5. 21. examination are the most important. In these the municipal laws of most countries have added a fourth, which consists in rendering false testimony an offence cognizable by penal justice. *Best* § 35. So in case of a statement of a witness who is publicly examined these are the guarantees which satisfy the Court that they are speaking the truth. So said *Ab Plumer* (later *V C*) while arguing in *Lord Melville's Trial*, 29 How St Tr 747. "It is a universal principle of the law of evidence that what one man says, does, or writes behind the back of another cannot be received in any criminal Court to affect anybody except, him. Every individual who stands upon his trial in a British Court of Justice has a clear right to have the witness brought in front of the Court, to be submitted to his cross-examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact." We have seen that this rule is not violated when an admission is received against a party making it. But the same principle is not available when the admission made by a party is received in his favour.

Under section 32 the declarations or statements of a person not called a witness are admissible under two distinct principles namely (1) the general principle of necessity or unavailability and (2) the principle of circumstantial guarantee of trustworthiness (*vide* s 32, and notes thereunder). The necessity principle implies that instead of losing the benefit of the evidence entirely it is better to accept it untested. But unless there be some guarantee for its trustworthiness it is not at all desirable to place the evidence before the jury in as much as a relevant fact must have some probative force. So in eight cases where such statements are made admissible by section 32, the circumstantial guarantee of trustworthiness has been shown. Clause (1) lays down that an admission by a person may be proved by, or in behalf of the person making it, when it is of such a nature that, if the person making it were dead it would be relevant as between third persons under section 32. So these statements are admissible as much as there is circumstantial guarantee of their trustworthiness. Therefore these admissions even when admitted in favour of a party making them are not devoid of probative force. Illustrations (b) and (c) refer to this clause. In both these cases there is circumstantial guarantee of their trustworthiness and as such there is no harm in placing such evidence before the jury. There is no apprehension of the Jurors being misled by such evidence nor by taking such evidence the time of the Court will be unnecessarily wasted. So on principle such admission is always admissible. Section 34 of the Indian Evidence Act enacts that entries in books of account regularly kept in the course of business shall be relevant evidence though not sufficient of themselves to charge any person with liability. *Jaswant v Sheo Narain* 16 A 157 (161) = 21 I A 6. The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act. But where the documents are not proved to be account books regularly kept in the course of business their admission is illegal, because proof of the entries therein would be in violation of section 21 of the Evidence Act. *Mukundam v Dayaram* 23 Ind Cas 893 = 10 A L R 44. The entries which a man makes in the regular course of his business are presumably truthful, and though they happen to be in his favour, he ought not to be debarred from proving them as part of his case. In like manner statements against proprietary interest, expressions of opinion as to a public right, custom or matter of public interest, made as provided in section 32 (4) expressions of opinion as described in section 32 (5) are provable as admissions on behalf of the persons making them, as well against them. *Cun E* 137. Entries of payments made by a creditor in the *sama das* book belonging to the debtor fall within the language and intention of section 32 of the Indian Evidence Act and although they are admissions in his own favour they are not excluded by section 21 of the Act. *Jellabai v Puthibai* 14 Bom L R 1020. A landlord purchased the holding of his tenant at a sale in execution of a decree for money obtained by him against the tenants. In the sale certificate the area of the holding was 20 bighas in all. Held, that the statement by the landlord that the tenant held under him 20 bighas of land was not a statement in his own favour but one against his proprietary interest, within the meaning of section 32 of the Evidence Act and covered by sub-clause (1) of section 21 of the Act, and that

the entry in the sale certificate might be used in evidence in favour of the land lord *Manil v Jagadindra* 24 Ind Cas 283 Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evidence under section 21 (1) read with section 32 (3) of the Evidence Act, if made by a person having special means of knowledge whether personal or hearsay *Rama nathan v Murugappa*, 33 Ind Cas 969=3 L W 216=(1916) 11 W N 208 When the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, held that a statement to that effect made by one of the plaintiffs, in a deposition given long ago before the controversy in suit arose, was admissible in evidence *Jadu Nath v Mahendra*, 12 C W N 266 A statement about the rent payable for a holding, as given in a sale certificate, obtained by a purchaser of the holding at a sale in execution of a decree against the former tenant must be taken to be in the nature of an admission by him or his predecessor in title, and it cannot be used as evidence as it does not come under any of the exceptions to section 21 *Raman v Mahanath* 31 C 380 So also a recital in a writ of attachment is not admissible in favour of maker of the statement and as against persons who claim under an independent title *Moheerruddin v Sumera*, 15 Ind Cas 540 On the question whether the Court below should or should not, have received in evidence the testimony of a witness who had been informed by the plaintiff before the adjudication that documents relating to land had then been deposited with him as security by the person who was afterwards insolvent and who was the first defendant in this suit, it was held that this being an admission by a party within section 21 of the Act, could not be used as evidence in the plaintiff's favour *A B Miller v Baboo Madho Das* 19 A 77 P C A landlord purchased the holding of his tenant at a sale in the execution of a decree for money obtained by him against the tenant In the sale certificate the area of the holding was 20 bighas in all The statement by the landlord that the tenant held under him 20 bighas of land was not a statement in his own favour but one against his proprietary interest, within the meaning of section 32 of the Evidence Act and covered by sub-clause (1) of section 21 of the Act, the entry as such in the sale certificate may be used in evidence in favour of the landlord *Manik Biswas v Jagadindra* 24 Ind Cas 283, see also *Tara v Prosonna*, 78 Ind Cas 719=28 C W N 679=39 C L J 389

Road cess return whether admissible in favour of a party making it Section 95 of the Bengal Cess Act of 1880 provides that every return filed by or on behalf of any person in pursuance of the provisions of the Statute shall be admissible in evidence against such person but shall not be admissible in his favour *Lachmi Prosad v Jag Mohan* 18 C L J 633 (636) But the provisions of section 95 of the Bengal Cess Act are not exhaustive They merely limit the application of section 21 of the Evidence Act and exclude road cess returns which are sought to be admitted in favour of the person by or on behalf of whom they have been filed *Mohendra v Ajodhya* 15 Ind Cas 284 *Promode v Binayah*, 27 C W N 548 *Seudeo v Ajodhya* 30 C 1005 Section 95 does not lay down expressly or by implication that such a return is not admissible in evidence against any person other than the maker thereof In fact a road-cess return may be admissible as against persons other than the one who has made the return *Chalho v Jharo* 39 C 995 A cess-return filed under the Road Cess Act can be used in evidence by a stranger against another *Imrit v Sirdhari* 15 C L J 7, *Sheikh Imtar v Dina Nath*, 43 C L J 425 The road cess return is also inadmissible in favour of any person who claims through him or may be deemed to be his representative in interest *Lachmi v Jag Mohan*, 18 C L J 633 (636); but see *Ramprosad v Lala Sham Narain*, 6 C L J 22, where it is ruled that section 95 of the Road Cess Act has no application to the case where the parties who tendered road cess returns in evidence were not the persons who filed them in pursuance of the provisions of the Act Road cess returns are admissible in evidence against the person by or on behalf of whom they are filed *Hem Chandra v Kali Prosonno*, 30 C 1033 P C =8 C W N 1 *Swarnamoy v Sourendra* 89 Ind. Cas 747=42 C L J 14 The effect of section 95 of the Cess Act is to prohibit the admissibility of return when

21. tendered in favour of filing it, and it has, and was intended to have no other effect whatever. Provided that such a return does not oppose against section 95, the return may be adduced in evidence if otherwise it is admissible under the Indian Evidence Act. *Per Page J in Sheikh Imtaz v Dina Nath*, 43 C L J 125. A road cess return signed by one of the plaintiff's vendors and the defendant, was filed by the plaintiff's vendors. It consists of two parts, in one of which the joint properties of the plaintiff's vendor and the defendant were set out and in the other the properties belonging to the defendant alone were mentioned. In a suit by the plaintiff for some land as being the joint property of his vendors and the defendant, the defendant put in the road cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. *Held* that the road-cess return was evidence against the plaintiff claiming through his vendor, and it is none the less evidence merely because by admitting it as evidence against the plaintiff it becomes evidence in favour of the defendant. *Benimadhab v Dina Bandhu*, 3 C W N 343. Section 95 is no bar to the reception of the road cess return in evidence if it is admissible in evidence under the provisions of the Evidence Act. Hence a road cess return filed by a Hindu widow is admissible in favour of the reversionary heir under section 32 clause (3) of the Evidence Act. *Lachmi v Jag Mohan* 18 C L J 633. But section 95 is absolute in its terms in declaring that a road cess return shall not be admissible in favour of the person or on whose behalf it was filed, and it is immaterial whether it was put in evidence directly to prove an admission or indirectly for some other purpose. *See Naram v Hara Varan*, A I R 1926 Cal 727 = 92 Ind Cas 104.

**Clause (2)** Clause (2) has received no illustration in the Act, probably because it has already been sufficiently treated in section 14, under the head of 'facts', showing the existence of any state of bodily feeling, and illustrations (l) and (m) thereto which together with the notes thereon should be here consulted. Section 14 merely declares that such facts are relevant. The present clause shows that such facts or statements may be proved on behalf of the person making them notwithstanding the general rule that person cannot make evidence for themselves by what they choose to say." *See* *Vol 1* *Et* 152

**Principle** It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. I think such evidence is admissible from the necessity of the case. *Denis J in Caldwell v Murphy*, 11 N Y 419 (Am). Similarly in *State v Davidson*, 30 Vt 383 (Am). *Redfield C J* said "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations and their effect." So declarations of present suffering are admitted from necessity. It would be impossible in most cases to know of the existence or extent or character of pain without them. The unstudied expressions of daily life, or the statement on which a medical adviser is expected to act, which if feigned he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion. *Grand Rapids v Huntley*, 38 Mich 543. The principle of necessity of admitting such admission in favour of the party is abundantly clear from the cases cited above. To guarantee the trustworthiness of such admission this section adds the following words "and is accompanied by conduct rendering its falsehood improbable. The general requirement (as the preceding quotation indicates) is merely that the statement shall be spontaneous and natural expressions of the pain or suffering. In some cases it seems to be required that the person be otherwise in an apparent condition of bodily ailment of which his statements are the natural product. *See Penn Mutual L J Co v Wile*, 100 Ind 103 (Am), *McMurray v Ragby*, 80 Ia 313 (Am). *Wigmore* §§ 1718 1719

**Kinds of fact narrated**—statements of past events and conditions excluded. It is obvious that both of the general principles involved—that of necessity and of circumstantial guarantee of trustworthiness—require the exclusion of statements dealing with certain kinds of facts. Statements of the external

circumstances causing the injury, namely, the events leading up to it, the immediate cause of it (e.g. that the person was knocked down by a horse), or the nature of the injury (e.g. that a leg was broken), do not satisfy the necessity principle, because they do not relate to an internal state, and thus other evidence is presumably available, moreover they have not the usual guarantee of trustworthiness, because they are not naturally called forth by the present pain or suffering (though this latter reason is rarely noticed) *Wigmore* § 1722 In *Gardner Peerage Case*, *Le Marchant's Rep* 170 (174) the woman's statement to her physician attending her at the time of her child birth of the date of the conception was excluded Similarly in *Amys v Barton*, (1912) 1 K B 40, which was a case of injury to a workman, his statement that a wasp stung him etc, was held inadmissible So 'the statement must be confined to contemporaneous symptoms, and nothing in the nature of the narrative is admissible as to who caused them or how they were caused' *R v Gloster*, 16 Cox Cr 471 (473) The rule is thus laid down by *Mitchell J* in *Cleveland C C & S R Co v Newell*, 104 Ind 269 (Am) 'Expressions of present existing pain and of its locality are admitted upon the ground of necessity as being the only means of determining whether pain or suffering is endured by another The rule is not to be extended beyond the necessity upon which it is founded' Strictly speaking past sufferings, pains or symptoms are not excluded by the necessity principle but on the principle of guarantee of trustworthiness, for they are not naturally caused by the existing pain or other symptoms but being deliberate accounts of past occurrences, are no better than statements of any other past events Expressions as to the duration of an illness are in effect statements of past feelings and symptoms, and should on principle as well as on the wording of this section be excluded in the same way *Wigmore* § 1722

Clause (3) "Clause (3) provides that a fact which is relevant under section 8, clause (1) and section 11, clause (1), as inconsistent with a relevant fact, e.g. the establishment of a prisoner's innocence by circumstances incompatible with the facts on which his guilt has been sought to be established, or under section 14, as evidence of intention, knowledge, or good faith, shall not be rejected simply because it assumes the form of admission by the party who made it. Illustrations (d) and (e) sufficiently exemplify this clause *Nort Fr* 152 So also a self serving admission when relevant under some other section, is relevant in favour of the party So spontaneous declarations (rule notes under section, 6) can be used in favour of the party making it, when it is relevant under some other section So also the recitals in a deed, admissible as a transaction by which a right was asserted, etc., would be admissible under section 13, though they will be excluded as admissions *Huronath v Attanand*, 10 B L R 263 So also care must likewise be taken not to confound self serving evidence with *res gestae* The language of a party accompanying act which is evidence in itself, may form part of the *res gestae* and be receivable as such *Best Fr* § 320 In *Bibi Gyannessa v Musamat Mobarat Unnessa*, 2 C W N 91=25 C 210 where the defendants Nos 2 and 4 sold a *jote* to defendant No 1 which they obtained under a partition, and subsequently colluded with the plaintiff and denied the said partition as well as the sale, the statement previously made by them which went to show that there had been a partition and they had changed their attitude could be proved against them and the statements were admissible evidence under sections 21 (3) and 11 (2) of the Evidence Act An admission may be proved on behalf of the person making it under section 21 clause (3) of the Evidence Act if it is relevant otherwise than as an admission In the case of a house said to have been built over half a century ago direct evidence as to who constructed it may not be easily available, and old documents mentioning by whom it was built may be admissible in evidence under section 11 clause (2) and section 13, clause (b) of the Evidence Act for what they are worth *Bughunath v Brindeshwari* I R 5 A. 231=82 Ind Cas. 582=1 I R 1924 All 526 A statement made by a person as to the circumstances under which he executed a document considerable time after the execution cannot be admitted to prove the facts stated by him *Vara samma v Dilli Kaur* 31 Ind Cas 513=25 M L J 637 The plaintiff brought a suit against his son for recovery of possession of land which stood in the name of the latter alleging that the same was ac-

**S 21.** quired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property was acquired, and produced a mortgage bond executed by him long before the date of purchase in which he described his father as dealer. It was held that the statement made by the plaintiff in the mortgage bond to which the defendant was not a party, might be admissible in evidence as against the latter either under section 21 clause (3) read with section 11 clause (2) of the Evidence Act, or under section 32 clause (5) or under section 137 of the Act. *Sayeruddin v Samiruddin* 72 Ind Cas 937 = A I R 1923 Cal 348. Self serving statements are admissible where they make relevant facts highly probable or improbable or they are *res gestae*. *Hirhar Prasad v Kesho Prasad* A I R 1925 Pat 68.

**Party can show mistake or fraud.** "There is no doubt that the express admissions of a party to the suit or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them unless another person has been induced by them to alter this condition in such a case the party is estopped from disputing their truth with respect to that person (and their claiming under him) and that transaction, but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers." *Per Bailey J in Heane v Rogers*, 9 B & C 586. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is nothing in the Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it. *Maung Mya v Ma Tha*, U B R (1897 1901) Vol II, 377. An erroneous admission does not bind the person making such admission. *Mangru v Shivanand*, A I R 1923 All 575. When in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dinabandhu v Mannulal*, 52 Ind Cas 443. Statements made by a party at a previous proceeding without any definite knowledge of his rights and liabilities do not operate as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court the party can show in a subsequent suit that the statement previously made was untrue. *Mahomed v Per Mahomed*, 65 Ind Cas 368 = A I R 1922 Nag 67.

**Statements Post Litem Motam.** If the analogies of other exceptions be followed [vide clause (5) section 32] all statements made *post litem motam* are to be rejected as untrustworthy. But it is questionable whether an absolute exclusion based on this distinction is either just or necessary. *Wignore* § 177.

## ILLUSTRATIVE CASES

### Admissible

Where in a suit for mortgage, the defendant admits the execution of the document he also admits the receipt of the consideration. *Seth Magannal v Dabborlal* 24 N L R 40 = 47 C L J 222 = 107 Ind Cas 113 = A I R 1928 P C 39.

The fact that a co defendant took part in certain *batuara* proceedings in which the land in dispute was measured and a map was prepared in which the

### Inadmissible

Under section 21 a Court is bound to receive in evidence admissions of a party but no such rule applies to denials. *Jani v Emperor* 49 A 437 = 25 A L J 327 = A I R 1927 All 381.

A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. *Chontri Mohan v Shri*

*Admissible*

plaintiff's title was admitted is admissible in evidence though it is not binding as an admission on the other defendants who claim under an independent title *1b ibid Hamid v Brojen* 90 Ind Cis 643=A I R (1926) Cid 296

Where a trying Magistrate examined the accused under s 342 Cr Pro Code prematurely at a time where no evidence sufficient to connect them with the crime, with the commission of which they are charged had been recorded against them, it was held that although the Magistrate was wrong in examining the accused under section 342 Criminal Procedure Code when it was impossible that they could have been questioned for the purpose of enabling them to explain any circumstances appearing in evidence against them still their statements actually made, cannot if apparently free and voluntarily given be rejected as inadmissible in evidence on account of this irregularity of procedure, and that *prima facie* as admissions the statements were relevant under section 21 of the Evidence Act *Queen Empress v Narayan Rat Un* Cr C 679=Cr Rg 45 of 1893

The statements of an accused person, from which his guilt may be inferred are admissions and may be proved under section 21 *Ray Mal v Empress* 3 P R 1830 C. *Melua v Crown*, 8 P W R 1907 Cr=5 Cr L J 182, *Hans v King Emperor* 8 O C 395=2 Cr L J 811, *Nya Po v King Emperor* 5 C L J 300

*Inadmissible*

*Ham A I R 1926 Cal 415=87 Ind Cis 512*

An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property *Maula Balsh v Jafar* 14 Lah L J 437

A respondent's admission in a Divorce suit is not evidence against a co-respondent *Gordon v Gordon*, 38 P R 1870

A party's income tax paper may be used against him but not in his favour *Shah v Emamun*, 9 W R 275

A party cannot sue in his own favour an admission by his predecessor or in his own interest *Byoy v Katipada* 20 Ind Cis 78=17 C W N 1013=18 C L J 247

## S 22

**22** Oral admissions as to the contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question

When oral admissions as to contents of documents are relevant

**Origin of the rule** In evidencing the contents of a document it has sometimes been thought that the opponents' admissions—at least his oral admissions—should not be received until the original had been accounted for as lost or otherwise unavailable. This view from time to time advanced in early English rulings was definitely repudiated in *Slater v Pooley* 6 M & W 669 in a forceful opinion by *Bacon P*. In that case in admitting such a statement *Parker B* said: "We entertained no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the document for which that mentioned in the libel although such a statement involved the content of a written instrument not produced until he was my *Lord Wm*



## THE INDIAN EVIDENCE ACT

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who was not present at the argument entirely concurs. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such oral statements are admissible, without notice to produce or accounting for the absence of the written instrument is that they are not open to the same objection that belongs to oral evidence from other sources, where the written evidence might have been produced for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld, whereas what a party himself admits to be true may reasonably be presumed to be so. The propriety of the rule however, has been much questioned on the ground that, though what a party himself admits has reasonably been presumed to be true, there is no such presumption in favour of the truthfulness by which such admission may be proved. *Per Channell B in Sanders v. Kinnell*, 1 F. & F. 356 (357), *Cum Es* 140. "I can not subscribe to what has been said by *Parle B* in that case (*Slatterie v. Pooley*) said *Pennfather C. J.* in *Laurens v. Quale*, 8 Ir. L.R. 382, 385. "The doctrine there laid down is a most dangerous proposition. By it a man might be deprived of an estate of £10,000 per annum derived from his ancestors by regular family deeds and conveyances, by producing a witness or by one or two conspirators who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed had mortgaged or otherwise incumbered it, and thus by this facility so given, the most open door would be given to fraud and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said, it is evidence against the person himself who made this admission and that there is no danger of untruth in what a man admits against himself. Supposing the admission to be proved is there no danger of mistake or misconception of the terms of a written instrument? It may be long and difficult, one part or clause may explain or qualify another, an unprofessional or ignorant man may be led to believe it may be so and so, whereas the real and true meaning may be the very reverse or something very different. But produce the deed or writing, *littera scripta manet*. On which side is the security and why depart from the rule that if you want to give evidence of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation when used against the party making the admission? That is the ground put by *Parle B* and in which I can not agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentations? And why, having taken that precaution, with such writing in hand and capable of being produced is the same to be laid aside and inferior and less satisfactory evidence resorted to? It has also been criticised by *Maule J.* in *Boulton v. Peplon* 9 C.B. 493, 501, where he said. It (*Slatterie v. Pooley*) is certainly not satisfactory in its reasons. What the party himself says is not before the jury but only the witness representations of what he says.

The proposition that production should be dispensed with says *Prof. Wigmore* where the opponent has already admitted the contents of a document to be as alleged is a plausible one and its denial seems at first sight a mere insistence on an unnecessary formality. Of the two arguments here offered in opposition the first amounts to little. The possibility of error in an opponent's own understanding of the terms of a document is not great and so if a mistake exists it can do little harm, because the opponent's extrajudicial admission is merely some evidence and not conclusive; he may still prove the contents as he knows them or may have the document produced. But the second argument—that it is easy to fabricate alleged oral admissions—the real and serious objection to the doctrine. It may be conceded that the opponent's admission of contents is satisfactory evidence, if he made such admission. But did he make it? Here we are left to choose between conflicting oral testimonies, and it does not seem undesirable to leave the matter to depend on the credibility of this or that other witness when an inspection of the document itself would speedily settle the controversy. The proper solution of the dilemma would be this. When an admission of the contents is testified to let production be dispensed with but if the fact of the admission is bona fide disputed by the opponent and so is

testimony to that effect is put in by him then let production be required or the document's absence be accounted for.' *Wignore* § 1255 S 22.

**English law** In the English Courts parol admissions have been received to prove a debt although the debt was based on a written agreement (*Neuchall v Holt* 6 M & W 662=9 L J Ex 293), to prove the contents of a deed (*Slatterie v Pooley* 6 M & W 664=10 L J Ex 8, *King v Cole*, 2 Ex 632) or the terms of a written lease (*Howard v Smith*, 3 M & G 254=10 L J C P 245), the embezzlement cases, the prisoner's election to office and the terms of his official bond (*Reg v Welch*, 1 Den C C 199), and the acts and conduct of the overseers of the poor in one parish have been held competent as constituting an admission of the contents of a certain certificate which was required to settle a paper in such parish *Reg v Basingstole*, 14 Q B 611, *Burr Jones* *Et* § 207 Taylor however in his work on Evidence questions the correctness of the reasoning on which the English doctrine rests, and calls attention to the fact that the Courts of Ireland where the subject has undergone much discussion have disapproved the English rule *Taylor on* *Et* 10th Ed § 411 *Best* gives the same account of the conflict but winds up an excellent support of the English opinion by saying "The value of self harming evidence, like that of every sort of evidence is for the jury, its admissibility is a question of law—the test of which is, to see if the evidence tendered is in its nature original and proximate, and it will scarcely be contended that the self harming statements of all kinds do not fulfil both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written, but that is a maxim which has been much misunderstood. The contents of a document could most unquestionably be proved by a chain of circumstantial evidence composed of acts, every link in which might be established by parol or verbal testimony.' *Best on Et* 11th Ed 512

**Scope of the section** This section departs from the English law as laid down in *Slatterie v Pooley*, 6 M & W 664. The views expressed in *Laurel v Queale* 8 Ir L R 382 has been adopted in the present Act. Oral admissions as to contents of a document save and except as provided in this section are excluded under the present section. Written admissions as to such matters, are however admissible under section 65 clause (b) *Cun Et* 140. So when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest, such written admission is admissible. *Section 65 clause (b)*. But written admission mentioned here must be distinguished from written admission made under section 58. This section does not exclude admissions which the parties or their agents agree to admit at the hearing under section 58. So a party's admission as to the contents of a document, not made in the pleadings but in a deposition is a secondary evidence, and cannot supply the place of document itself. *Sheikh Ibrahim v Parbat Hari* 8 B H C R A C J 163 (165). Oral admissions as to the contents of a document are admissible when the party is entitled to give secondary evidence of the contents of such document under sections 65 and 66 of the Act. Such admissions are also admissible when the genuineness of the document produced is in question. "Where the question is" says *Norton* "not what are the contents of a document, but whether the document itself is genuine—that is, in the handwriting of the party whose writing or signature is alleged to be, evidence may of course be given to prove or disprove the forgery. This may be affected in a variety of ways by the party, (sections 21, 70) by an attesting witness, (section 68), by the oath of witness acquainted with the handwriting, by experts (section 45), or by comparison of handwriting, (section 73) or unless the genuineness of the document produced is in question. The effect of the last clause of this section seems to be that if such a document is produced, the admission of the parties to it that it is or is not genuine, may be received. *Nort Et* 153

**Oral admissions of contents** In *Sheo Pershad v Juggernath*, 10 I A 79=13 C L R 271, their Lordships of the Judicial Committee of the Privy

- 23** Council observed: "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due without very clear evidence especially when there are other means of proving the case, if a true one." See also *Raghubar Dayal v. Bhulaya Lal*, 12 C. 69 (79). When money is lent on terms contained in a promissory note given at the time of the loan, the lender cannot recover the money so lent must prove the terms by the promissory note. If for any reason such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note. *Parshotam Narain v. Puley Singh*, 26 A. 178 (182) = A. W. N. (1903) 217. See also *Albar v. Sheikh Khan*, 7 C. 266, *Radha Kanta v. Alwar Charan* 8 C. 721. In the first named case *Alman Jin* 26 A. at p. 193. It appears to me that decisions which have held otherwise ignore the provisions of sections 91, 65 and 22 of the Evidence Act, and I do not think that it can be denied that these decisions condone and encourage evasion of the Stamp Act, see also *Damodar Jagannath v. Itanaram* 12 B. 443.

**Rule in the United States.** In the United States there is also a conflict on this point. In that country the conflict is irreconcilable. Some cases unqualifiedly approve the English rule others emphatically dissent. On the whole there is an overwhelming weight of authority in favour of the English rule. In the leading case sustaining the English doctrine the plaintiff was allowed to prove the admissions of the defendant to the effect that he had prosecuted to final judgment a former action against the defendant. The Court used the following language: "The admissions of a party are not open to the same objection which belongs to parol evidence from other source. A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus the statements of a party that certain land had been conveyed might be admitted though the conveyance must be by recorded deed. The general principle as to the production of written evidence as the best evidence does not apply to the admission of parties as what a party admits against himself may be reasonably taken to be true. The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury." *Smith v. Palmer* 6 Cuss. (Mass.) 513. So the admissions of a party have been received to prove the contents of letters and of a deed (*Loomis v. Wadhams & Gray* (Mass.) 200), the existence of a partnership based on a written contract (*Edward v. Traub* 62 Pa. 374), the terms of a letter in writing (*Taylor v. Pelt* 21 Gratt. (Va.) 11), and the contents of a telegram (*Williams v. Blueell* 37 Miss. 682). On the other hand there have been numerous decisions which have maintained the view that there is no principle in the Law of Evidence authorizing the substitution of the declarations of a party even as against himself for record or written evidence. They point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by the money so uncertain in character. They lay down the rule that admissions rank only with oral testimony and that unless made in open Court they are competent only where parol evidence would be admissible to establish the same fact. *Halliberton v. Fletcher* 22 Ark. 433, *Buens v. McIlroy* 11 Ark. 23, *Flannery v. Newton*, 8 Gr. 306, *Burn Jones* § 208.

- 23** In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

**Explanation**—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving

evidence of any matter of which he may be compelled to give S 23  
evidence under section 126

**Principle of exclusion** Admissions covered by this section are excluded on principles which are expressed differently by different Courts. But on examination it would be found that the explanations are more or less unsatisfactory. It would be better to examine the cases and to try to find out whether the principles laid down in them are really satisfactory.

**Principle analogous to that of privileged communication** When an admission has been made to the opposite side on the understanding that it is not to be used against the party making it it is privileged. *Wills Ex 2nd Ed 295*. Such admissions are commonly made in the course of negotiations between the parties or their agents with a view to the compromise of the claim which afterwards becomes the subject of litigation and the usual way by which the person making the admission secures the privilege is by stipulating that the communications are to be 'without prejudice'. *Ibid*. In *Dickinson v Dickinson* 9 Met C 471 (474) (1m) *Denby J* said 'The rule of evidence exclude to some extent and under certain circumstances, the declarations and admissions of a party. Thus the more fully to protect the rights of parties litigating, all their communications with counsel are held to be privileged. Evidence of this character has always been excluded and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration, with a view to a compromise of the matter in controversy. It must be permitted to men to endeavour to buy their peace without being prejudiced by a rejection of their offers. Hence evidence of such offers or proposals is irrelevant and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy and an admission of particular facts, connected with the case made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney excluding as testimony everything communicated in this relation which rule if applied here would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced excluding all admissions of the parties even admissions of particular facts when it appeared that they were expressly stated at the time to be made without prejudice. But the exception was soon introduced that the evidence was competent where it was the admission of a collateral fact. This theory is consistent enough with general theory of privileged communication (vide s 126 129) namely, that expeditious and extrajudicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them, and there is indeed a privilege for a party's statements to an official conciliator. In policy however, it may be doubted whether the recognition of such a privilege is in fact necessary in order to foster private settlement or whether in fact the good that might be done by the diminution of litigation under such a privilege would be greater than the justice that is effected by the free use of the evidence made available though denying the privilege. At any rate, whatever the arguments of policy the further and vital objection remains that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied. *Wigmore* § 1061 (a)

**Theory on the analogy of the notion of contract** Another theory resting apparently on some notion of contract is that in express reservation of secrecy (e.g. by the words 'without prejudice') assimilates the offer to a contractual offer so that if the terms are not accepted the offer is null and can have no evidential effect. *In re Ruer Steamer Co L R 6 Ch App 822 (832)* *Wells L J* said 'If a man says in his letter is "without prejudice" that is tantamount to saying, "I make you an offer which you may accept or not, as you like, but if you do not accept it the having made it is to have no effect at all." It appears to me not on the ground of bad faith, but on the construction of the document what when a man says in his letter it is to be without prejudice, he cannot be held to have

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entered into any contract by it if the offer contained in it is not accepted. Similarly *Lindley L J* in *Wallen v Wilsher*, L R 23 Q B D 330, said "What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one." This theory is not tenable on two distinct grounds namely (1) that admissions contained in an unaccepted offer if treated as admissions may nonetheless be used for its evidential value and (2) that offers of compromise which do not contain the express words 'without prejudice', may still be inadmissible in evidence and conversely' *Wigmore* § 1061 (b)

**Theory of Exclusion based on public policy** Confidential overtures of pacification, and any other offers or propositions between litigating parties expressly or impliedly made without prejudice, are excluded on grounds of public policy *Cory v Bretton*, 4 C & P 162, *Per Tindal C J*, *Herley v Thatcher* 8 C & P 388, *Taylor* § 795. For without this protective rule, it would often be difficult to take steps towards an amicable compromise or adjustment and as *Lord Mansfield* has observed, all men must be permitted to lay their peace without prejudice to them should the offer not succeed, such offer being made to stop litigation without regard to the question whether anything is due or not. *Taylor* § 795. "The essence of an offer to compromise," *Bayley J* in *Thomson v Austen*, 2 Drol & Ry 358, 361, is that the party making the offer is willing to submit to a sacrifice and to make a concession. "Money paid upon a complaint made," says *Cottenham L C J* in *Tennant v Hamilton*, 5 Cl & F 133, "paid merely to purchase peace is not proof that the demand is well founded that would be no evidence of the damage, if money paid to buy peace and to stop a complaint. It is very often a wise thing however unfounded a complaint may be for parties to pay a sum of money in order to quiet the party making the complaint." "Another class of matter of which proof is not allowed consists of statements and admissions made without prejudice. Such statements are invariably made in the course of negotiation for settlement of disputes. It is considered necessary to allow the parties to speak somewhat freely in attempting settlements and to disclose their case to each other to some extent. But it is clear that the necessary freedom of discussion could not well take place if all the statements or admissions made could be given in evidence after the negotiations for settlement had failed." *Cockle C J* *Ev* 53. "It is of great consequence that parties should be unfettered by correspondence entered into upon express understanding that it is to be without prejudice. And it would be hard indeed to hold that a letter which is stated to be written without prejudice is admissible in evidence because the same terms are not adopted in reply. When used in the letter containing the offer the words 'without prejudice' must cover the whole correspondence." *Per Tindal C J* in *Paddock v Forrester* 3 Scott N R 176 = 3 M & G 903. "It is of utmost importance that parties should have opportunity of free communication without prejudice." *Per Colman J* in *Ibid*. "The rule referred to is founded upon public policy and with a view of encouraging and facilitating the settlement of legal controversies by compromise which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions. The law therefore excludes such admissions as appear to have been made tentatively and hypothetically, but admits those only which concede the existence of a fact." *White v Old Dominion S S Co* 102 N Y 661 (Am). "Such communication made with a view to an amicable arrangement ought to be held very sacred, if parties were to be afterwards prejudiced by their efforts to compromise it would be impossible to attempt any amicable arrangement of difference." *Per Sir John Romilly* in *Hoghton v Hoghton* 15 Beav 278. Similarly in *Harrington v Lincoln* 1 Gray 563 567 *Thomas J* said "Peace is of so much worth that a reasonable man may well be presumed to seek after it even at the cost of his strict right and by an abatement from his just claim. The offer which a man makes to purchase it is to be taken, not as his judgment of it."

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he should receive at the end of litigation, but what he is willing to receive and avoid it. If the plaintiff had made the offer of compromise in open town meeting, proof of it would have been excluded.

By this theory, the offer is excluded because, as a matter of interpretation and inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication. *Higmore* § 1061 (c).

**True reason of the exclusion.** 'The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain and easily understood,—such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid of the controversy.' *Per Richardson C J* in *Sanborn v Nelson*, 4 H N 501 509. Similarly in *Hartford Bridge Co v Granger* 4 Conn 142 148 *Hosmer C J* said: 'The law on this subject has often been misconceived, and it is time that it should be firmly established. It is never the intentment of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, because it is a fact the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark it may be observed, that if A offer to B ten pounds, in satisfaction of his claim of an hundred pound—merely to prevent a suit, or purchase tranquillity this implies no admission that any sum is due and therefore, testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered is, what was the view and intention of the party in making the admission, whether it was to concede a fact hypothetically in order to effect a settlement or to declare a fact really to exist. There is no point of honour guarded by the Court, nor exclusion of evidence lest it should deter from a free conversation. But testimony of admissions or declarations taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good is not admissible, truth being the object of evidence. 'The preliminary question always is' says *Doe C J* in *Colburn v Groton*, 66 N H 151, 156 'not merely whether an admission of a fact was made during a settlement or negotiation but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. So it is apparent that the occasion of the utterance is not decisive, that is, it may or may not have been accompanied by a reservation or an injunction of secrecy and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement, whether it is hypothetical or absolute. If, making all implications from the context and the circumstances, the statement assumes the adversary's claim to be well grounded for the mere purpose of discussing a settlement which will avoid litigation, then nothing is actually admitted in any true sense and therefore the party making it is in none the worse condition for having omitted the phrase without prejudice nor for having offered the full amount of the claim without any pretence of compromise. If on the other hand, the statement is absolute, so far as appears, it is not saved by any evasive phrase, nor by its occurrence in the course of compromise negotiations, or in other words, a concession which is hypothetical only can never be treated as an assertion representing the party's actual belief and therefore cannot be an admission and conversely, a conditional assertion is receivable without any regard to the circumstances which accompany it. *Higmore* § 1061, See also *Cory v Betton* 4 C & P 462 where *Tindal C J* said "It is clearly a conditional statement

**Scope of the section.**—This section has application only in civil cases. It is not extended to criminal cases (*vide* section 29 *infra*). An admission made to a stranger, under whatever terms as to secrecy is not protected by the law from disclosure. *Re Corquodale v Bell* (1876) 1 C P D 471 (476), *Hecker v Le Marchant* (1881) 17 Ch D 675 (681, 682), *Hills Fr* 298. But an offer by a

23. party either verbal or in writing expressly stated on the understanding that it is not to be used against the party making it is not admissible in evidence. *Wallace v. Small* 1 M & M 119. So an offer to compromise, might be very well made without restriction as to confidence. *Ibid*. So also to pay money by way of compromise and with a view to buy peace is not evidence of a debt by way of a business. *Cory v. Becton* 1 C & P 462. *Gregory v. Howard* 3 F p 113. *Waldrup v. Kennon* 1 Esp 113. *Turner v. Tutton* 2 Esp 171. *Harris v. Vanhutton* 2 Vern 717. *Farton v. Benson* 1 P Wins 19. In *re Dantrey* (1893) 2 Q B 116 the question was whether a written notice sent by a debtor to one of his creditors that he had suspended or was about to suspend payment of his debt though expressed to be written 'without prejudice' was admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition. In admitting the written notice *Laughlan Williams J* said 'In our opinion the rule which excludes a document marked "without prejudice" has no application unless some person in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation and it seems to us that the Judge must necessarily be entitled to look at the document in order to determine whether the condition under which alone the rule applies exists. The rule is a rule adopted to enable disputant without prejudice to engage in discussion for the purpose of arriving at terms of peace and unless there is a dispute or negotiation and an offer the rule has no application. It seems to us that the Judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover we think that the rule has no application to a document which in its nature may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected but in our opinion the writer is not entitled to make this reservation in respect of a document which from its character may prejudice the person to whom it is addressed if he should reject the offer and for this reason also we think the Judge is entitled to look at the document to determine its character.' See also *Grove v. Dayton* 21 Sol Jour 61. But now the question is whether the same rule applies in India also. Such a question arose in a Bombay case but it was left undecided by the Appellate Court. *Madhabhai v. Gulabhai* 23 B 177. In that case the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt by the defendant. The alleged acknowledgment was written on a post card sent by the defendant by the plaintiff. It was in Gujarati and was as follows:— 'I was bound to send Rs 30 according to my *randu* (fixed time) but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over I will positively pay Rs 30 at *Shet Veruany*. You, Sir, should not entertain my anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same as long as there is life in me. This is indeed my earnest wish. After this God will be done. Therefore I will positively pay Rs 30.' The post card held that it was, therefore, inadmissible in evidence and consequently that the plaintiff's claim was barred and they dismissed the suit. On appeal the rule was discharged on the ground that even if the post card were admissible in evidence it did not amount to an acknowledgment of the debt claimed by the plaintiff which was therefore barred by limitation. *Candy J* however in delivering his judgment made the following observations at p 180 'I doubt whether the post card was inadmissible in evidence. To exclude it from evidence it would be necessary to hold that the word "without prejudice" amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible. The remark of *Laughlan J* in *re Dantrey* *supra* which the Subordinate Judge relied on in the Court of first instance quoted are not as the Subordinate Judge supposed *obiter dicta*. They state the fact that the rule which excludes a document marked without prejudice has no application unless some person in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation. That rule is to be found in many cases.

"Probably a person making a demand for the first time cannot prevent his demand being proved at the trial by stating that it is made without prejudice for until the claim is not admitted there is no dispute, and the rule is intended only to enable negotiations to be entered into to settle an existing dispute" *Powell* 293. A letter which is marked 'without prejudice' but which contains threats to infringe a patent right if the terms be not accepted, can be admitted in evidence to prove threat. *Kurtz v Spence*, 58 L T 438=57 L J Ch 238. In this connection *Ab Chitty* relates an anecdote of a young attorney who has been carrying on a correspondence with a young lady, in which he had always, as he thought expressed himself with great caution. Finding, however that he did not perform what he had led the lady to believe that he would, she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded—thus without prejudice, from yours faithfully C D. The Judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend any prejudice to the lady and the jury found accordingly. *Law and Lawyers Vol II, Wigmore, § 1061*, see also *Hicks v Thompson*, reported in the *Times* of the 19th January, 1857 and cited in *Woodroffe's Evidence Act* p 258. In *Walbridge v Kennison* 1 Esp 143 during a negotiation for settlement, the defendant being asked as to his hand writing on a bill admitted that it was his. *Lord Kenyon* admitted this for that purpose saying "any admission obtained while a treaty was depending, on the faith of it" was inadmissible, yet the indenture of the hand writing stood on a different foundation it was in no way connected with the merits of the cause and which was capable of being easily proved by other means. For the purpose of negotiation if correspondence be opened between the parties a letter written without prejudice prevents it being read at the trial (*Paddock v Forrester* 3 Man & G 903), it prevents also the reply to it (*Inre Harris*, 44 L J Bkcy 33) and indeed, all the rest of the correspondence being read (*Paddock v Forrester*, *supra*, *Walker v Wilsher* 23 Q B D 355). And a letter so headed has even been held to cover letters which had already passed, where the writer clearly expressed his will that the whole of the correspondence should be privileged. *Pearcock v Harper*, 26 W R 109, *Oliver v Nautilus Steamship Co* (1903) 2 K B 639, *Powell* 293. The same rule is applicable in the case of conversations. Unless there be a clear break between the conversation which is clearly without prejudice and subsequent conversation, no admission of a party in the latter part of the conversation can be given in evidence. *Thompson v Austen*, 2 Dowl & Ry 361. Correspondence marked "without prejudice" can be seen by the Judge only with the consent of the parties. *Walker v Wilsher* 23 Q B D 337. Such letters are not admissible even for awarding costs. *Ibid*. They are only available to the Court for seeing whether there are marked "without prejudice". *Inre Daintrey* (1893) 2 Q B 116, *Pearcock v Harper*, 26 W R 109. The evidence as to negotiations of compromise and the statements made during such negotiations are generally without prejudice. It is ordinarily against public policy to admit such evidence and statements. A conviction based on such admissions should be set aside. *Bhanya v King Emperor* 11 C W N 26 N see also *Abbas v Pedda* 25 C 736. In a dispute between two parties letters and negotiations between their respective solicitors which are written or declared to be without prejudice are inadmissible in evidence not only against the parties themselves but also against the solicitors. *La Roche v Armstrong* (1922) 1 K B 485=91 L J K B 342=126 L T 699.

The rule under consideration does not apply, where admissions are made not under condition of their being without prejudice (*Wallace v Small*, 1 M & M 416) or where an agreement, though purporting to be a compromise, has been finally concluded (as, where it has been signed by the parties and executed) *Froggell v Leicelyn* 9 Pr 122 123 see also *Mayan v Humuddin*, 20 C W N 1217. In *Healey v Thatcher* 9 C & P 383 *Gurney B* excluded a letter beginning with "without prejudice" and offering to accept satisfaction. See also *Paddock v Forrester* 3 Man & Gr 903 (919). In *Stone v Foxall* 15 B & C 488 *Romilly J* excluded "offers made without prejudice" as being merely an attempt to convert offers of compromise into admissions. See also *Williams v Thomas*,



23 2 D & Sm 29, 37 See also the observations of Lord St Leonards in *Jordan v Money*, 5 H L C 215, where he said "When an attorney goes to an adverse party with a view to a compromise or to an action you must look with very great care at his evidence of what then occurred" *Field F* 7th Ed 36 & also a statement made to the opponent's attorney with the object of obtaining a compromise is not admissible in evidence *Jardin v Sheridan*, 2 C & K 24

In cases where a party wronged has a choice of civil or criminal remedy and where accordingly it is held lawful to enter into a compromise of the criminal liability (*Ken v Leeman* 6 Q B 308 321, 9 Q B 395, *Fisher v Apollinaris Water Co* [1875] 10 Ch 297) there seems no reason why admissions should not be privileged on the same principle as in purely civil cases as above explained *Will Et* 300, see also *Bhanya v King Emperor*, 11 C W N 26 N, *Abbas v Pedda*, 25 C 736

"An offer of compromise the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession is rejected though nothing at the time was expressly said respecting its confidential character only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected" *Mahabir Singh v Dhupoo Singh*, 20 W R 172 *Mr Justice Mookherjee* commenting on the above passage said "In the above case, however of any express or strictly implied restrictions as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability, although as has been said it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim" *Mesyan v Alimudin* 44 C 130=20 C W N 1217=25 C L J 42

**Facts admitted before the arbitrators** Facts admitted before arbitrators can be proved by them *Gregory v Howard*, 3 Esp 113 The plaintiff said to the witness "he was so anxious to get out of the law that he would refer the question in dispute to the witness as arbitrator" and asked him to tell this to the defendant, to get him to compromise at the same time admitting the receipt of money on account, held, on the fact "not to have originated in any desire to compromise and therefore to be admissible" *Thomson v Austin* 2 Dowd & R 358 An admission before an arbitrator is admissible in evidence although it is free for the Court dealing with the facts to attach whatever weight it thinks proper to such admission The rule enunciated in section 23 of the Evidence Act does not apply to such admission *Punjab Singh v Ramautow* 52 Ind Cas 348=4 Pat L J 676=(1920) Pat 52

**Under circumstances from which the Court can infer, etc** This section as originally drafted contained the words infer that it was the intention of the parties that for the words infer that the parties agreed together that In England there has been some difference of judicial opinion as to whether admissions whether express or implied from the offer of concessions are privileged by the mere fact that they have been made in the course of negotiations for a settlement For the privilege *vide Jardine v Sheridan* (1846) 2 C & K 24 against the privilege *vide Nicholson v Smith* (1822) 3 St 128 *Wallace v Small* (1830) M & M 446 An intermediate position was taken by *Kenyon C* 1 in *Turner v Railton*, (1796) 1 Esp 474 see also *Gregory v Howard* (1800) 3 Esp 113 The true view says *Williams J* 'would seem to be that they are not privileged unless it can be implied from the language or conduct of the parties that they were not intended to be disclosed but that this inference will frequently be drawn almost as a matter of course from the nature and circumstances of the case' *Hills F* 299 This difficulty is further more obviated by the word used in the section

**Explanation** The explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment *Can Et* 141

ILLUSTRATIVE CASES

S. 24.

Admissible

Admissions to a person to whom the parties went for compromise are not inadmissible in evidence unless there was an express agreement that the evidence of the statements was not to be given *Firm Bulaki Ram v Bhagat Ram*, A. I. R. 1926 Lah 548=95 Ind Cas 363

An admission before arbitrators is admissible in evidence although it is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission *Punjab Singh v Ramautar*, 52 Ind Cas 348

Admission made by the tenant defendant before the pleder of the plaintiff landlord, to whom one of the defendants went before the suit for compromise is admissible in evidence in the absence of any express or strongly implied condition that evidence of the same would not be given *Meagan v Almuuddin Mean*, 20 C W N 1217 =44 C 130=34 I A 571

Inadmissible

The Court is precluded from making use of the admissions in a deed of compromise which was entered into and subsequently set aside on the ground that the agent of one of the parties was not empowered to enter into it *Ilaha v Vakkan*, 83 P R 1877

Where after a notification for the compulsory acquisition of land negotiations are started with the owner of the property by the Government expressly 'without prejudice' evidence of these offers is not admissible in an appeal by the owner from an award as to the price made by the District Judge *Ranxor v Secretary of State* A I R 1926 Lah 509=92 Ind Cas 319

24 A confession made by an accused person is irrelevant

Confession caused by inducement, threat, or promise, when relevant in criminal proceeding

in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a

person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

Confession—meaning of It has already been stated that confessions are merely one species of admissions, namely, that species which consists in a direct acknowledgment of guilt in a criminal charge. The acknowledgment must be in express words by the accused in a criminal case, of the truth of the guilty fact charged or some essential part of it *Wignore* § 821. So the question is what admissions do amount to confessions? The word confession "has not been defined in the Indian Evidence Act, says *Mahmood J* in *Queen Empress v Babu Lal*, 6 A 509 (F B) at p 539, "it, however, occurs under the category of admissions, and to make my meaning clear I adopt the definitions given by *Mr Justice Stephen* in Art 21 of his *Digest of the Law of Evidence* by saying 'confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime'. In *Queen Empress v Jagrup* 7 A 646 (647) *Straight J* although he refused to follow the definition given in the Digest on the ground that the Digest "was written in view of a proposal for preparing a Code of Evidence for England, and it can scarcely be regarded therefore as an authority to guide me in construing an Act passed by the Legislature of this country in 1872 yet adds "though I may add that I do not find anything in *Mr Justice Stephen's* definition at variance with

24. the view I take" According to him also the word confession must be construed as meaning the same in s 30 as in ss 24 25 and 26. In *Imperatrix v Pandharinath* 6 B 31 the definition of *Mr Stephen* was practically adopted and in *Queen Empress v Nana* 14 B 260 (F B) that definition was quoted with approval. In the last case the accused was charged, under s 411 of the Indian Penal Code, with dishonestly receiving stolen property. In the course of police investigation the accused was asked by the police where the property was. He replied that he had kept it, and could show. He said he had buried the property in the field. He then took the police to the spot where the property was concealed, and with his own hands disintered the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he buried the property there. The question was whether those statements amounted to confessions and as such excluded under s 25. Held that the above statements were clearly in the nature of a confession as they suggested the inference that the prisoner committed the crime and even if not intended by the accused as a confession of guilt they were an admission of a criminal act of the circumstance and would form a very important part of the evidence against the accused as showing that he had not come by the property honestly, and, therefore, properly within the rule of exclusion in regard to confession made by a person in custody of the police. But *Straight J* in *Queen Empress v Jagrup* 7 A 646 was of opinion that only statements which are direct acknowledgment of guilt should be called confessions. This view of *Straight J* was followed in *Emperor v Sautya Bandu*, 11 Bom L R 633 where at page 636, *Chandrasekhar J* said.

The Indian Evidence Act makes a clear distinction between an admission and a confession. It is only under s 30 of the Act that the confession of one of two or more accused persons jointly tried for the same offence, can be taken into consideration as against the rest. It must be a confession to be so admissible that is, it must affect both the person confessing and the other accused. Here the statements *Yeshuada* taken by themselves do not fall within that category. As held by the Allahabad High Court in *Emperor v Jogrup*, 7 A 646, the word 'confession' must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. Section 30 must be strictly construed. The learned Sessions Judge has construed the statement into a confession by a process of inferential reasoning which is not what the terms of section 30 countenance."

In *Queen v Mac Donald* 10 B L R App 2, *Phear J* observed that there is a distinction in the Evidence Act between admissions and confessions but the judgment contains no definition of the term. This case was followed by *Prinsep J* in *Empress v Dabee Parshad* 6 C 530 which also throws no light on the subject. So the question afterwards raised by *West J* in *Queen Empress v Thibhoran Manick Chand*, 9 B 131, 134 namely what are the particular kinds of statements which it is proposed to prove against an accused person to establish an offence or in other words what admissions do amount to confession remained unanswered in both the Calcutta cases. Neither in *Queen Empress v Mohr Ali Mullick*, 15 C 589, a subsequent Calcutta case *Wilson J* explained the exact meaning of the word confession, although he admitted this that there is difference between admission and confession. In *Queen Empress v Nilmadhu* 15 C 595, *Petharam C J* also said. If the contents of the document did not amount to a confession the document itself would be relevant as an admission under s 21 of the Evidence Act. So there also the learned Chief Justice admitted the existence of difference between admission and confession but did not give any definition of the word confession. The High Court of Madras is silent on this point. So neither the early reported Calcutta cases nor the reported Madras cases throw any light whether in interpreting the term 'confession' one should accept the strict definition given by *Straight J* in *Queen Empress v Jagrup* or follow the definition given by *Stephen J* in his Digest of the Law of Evidence namely that a 'confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. In *Emperor v Kangal Mah* 41 C 601 = 15 Cr L J 713 = 26 L C 161 it was held that confessions are statements either directly admitting the guilt of the accused or statements suggesting the inference that he committed the

crime with which he is charged. So the majority of Indian cases followed the definition of the term 'confession' given by *Stephen J* in his Digest of the Law of Evidence. "The confession is not defined in the Evidence Act, but it has been many times interpreted by judicial decision. It has been defined as an admission made at any time by a person charged with a crime stating or suggesting the inference, that he committed that crime. Therefore, not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements which although they fall short of being actual admissions of guilt, yet suggest an inference of guilt and from which an inference of guilt follows. The factor determining whether a statement amounts to a confession or not is not the motive of the party making it but the fact that it leads to an inference of guilt." *Mt Eun Tha v Emperor*, 5 L B R 131=4 Ind C 1028=11 Cr L J 153, *Rah Bahsh v Emperor*, 16 P R 1886 Cr, see also *Emperor v Haji Sher Mahomed* 75 Ind Cas 70=46 B 961=24 Cr L J 870, *Queen Empress v Pandharinath*, 6 B 34, *Queen Empress v Jave Charan*, 19 B 363, *Empress v Dabee Pershad*, 6 C 530. A confession is also an admission of fact as well as an admission of guilt. *Abbas Ali v Emperor*, 4 Cr L J 471=3 L B R 208 (F B). A confession is an admission, made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. *Haliman v King Emperor*, 51 P L R 1905=20 P R 1905 Cr.

In *Emperor v Mahomed*, 5 Bom L R 312, the accused was tried for the theft of a box, and a policeman gave evidence to the effect that he had seen him carrying the box at night, and that when challenged he had stated that the box was his own. The statement was found to be false, but it was nevertheless held by *Grove and Chandraraiakar, JJ*, to have been rightly admitted. "In order to determine" said the learned Judges "whether the statement is a confession of guilt or an admission of a criminating circumstance, we must look to the statement itself. Here the statement of the accused was merely that the box belonged to him, it was no admission whatever of criminating circumstances. It was, therefore, admissible. The statement held to be inadmissible in *Imperatrix v Pandharinath*, 6 B 34 was of a different character. There the accused's statement admitted possession of a cheque alleged to be forged. It was an admission of one of the criminating circumstances which went to make up the offence charged against the accused. In the present case the statement does not amount directly or indirectly, to an admission of any criminating circumstance and is therefore, outside the principle of the ruling cited." "In the result," says *Carnduff J* in *Barindra Kumar Ghose v Emperor*, 14 C W N 1114 at p 1197=37 C 467 "it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession." See also *Mulhu Kumar Suami v King Emperor*, 35 M 397, *Emperor v Cuna*, 22 Bom L R 1217. "By confession I understood not necessarily a full confession of guilt, but any statement made which being relevant to the issue, may be put in evidence against the person making it." Per the C J in *R v Wong Chin Kwai, Roscoe Cr Et* 37. Confessions of other crimes not relating to the charge, e g showing or admitting a general tendency even to the crime charged are inadmissible. *R v Cole* 1810, *Roscoe Cr Et* 37.

In *Smith v Emperor*, 43 Ind Cas 605, at p 611, *Phillips J* said "There is no definition of confession in the Evidence Act, but I take it that it must be something more than a mere admission. In *Emperor v Kangal Mah* 26 Ind Cas 161=15 Cr L J 713=41 C 601, when dealing with the admissibility of statements, it was said that a useful test was to ascertain the purpose to which they were put by the prosecution. If the prosecution relies on the statements of the accused as being true then they may and probably in many cases would be found to amount to confessions. Accepting both these propositions I would add that in order to make a statement a confession it appears to me to be necessary that the inference as to the criminality of the person making the statement should be gathered from the statement itself, for I think it is quite possible that in many cases a statement which by itself does not contain any inference of criminality may in the light of subsequent events or of subsequent

24. evidence strongly support such an inference. If the statement in itself is not incriminating I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession." See also *Pan Gong v Emperor*, 19 Cr L J 42, *Jasoda v Emperor*, 53 Ind Cas 691

An admission of all the ingredients required to constitute an offence is a confession. A statement of the following kind cannot be regarded as a confession of complicity in an offence "I told the other accused that, if they wanted to kill my husband, they were at liberty to do so and I would bring no case against them. But when they arrived at my husband's house on the fatal night I endeavoured to restrain them and was only prevented from doing so by their threats to kill me and my son if I interfered. I did neither take any part in the murder, nor did in any way assist the murderers after my husband was put to death." *Bhag Singh v Emperor*, 4 Ind Cas 429=24 P W R 1909 Cr = 153 P L R 1909. A statement of an accused to the effect that under threats of death, he was forced to sit outside the door of the house where a murder was being committed to warn the murderers of the approach of any body, and not to divulge the secret and to remain an impassive agent in the crime, and that he took no part in it on the other hand he vainly tried to dissuade the co-accused from committing the crime, does not amount to a confession of either murder or its abetment and consequently is also inadmissible in evidence under s. 1 of Act I of 1872 against the accused. *Gul Hossain v Crown*, 38 P W R Cr 1910=24 P R 1910=193 P L R 1910. A confession must be a confession of guilt or a confession of facts which constitute in law the offence charged. Mere admissions of incriminating facts will not amount to a confession, unless those facts and the necessary inferences from them amount to an offence. *Then v Crown*, 1 L B R 133.

Where the accused expresses his willingness to tender an apology to the complainant it is unfur for the Magistrate to treat the circumstance as an indication of the accused's guilt. *In re Abdul Rahman*, 4 L W 556=17 Cr L J 462=36 Ind Cas 142.

To constitute a confession' under the Evidence Act it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. *Smith v Emperor* 43 Ind. Cas 605=19 Cr L J 189.

The fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not always stated during the Police enquiry and any statement made to the Police to the effect that an article produced by suspected men really belonged to the deceased could amount not to a confession but to an admission. *Shua Din v Emperor*, 5 Lah L J 128.

Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent. The term confession is usually used in criminal Courts as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in a former case be regarded as confession at all. *Ambar Ali v Emperor*, A I R 1929 Cal 339.

**Confession—Principle of admission.** Confessions are merely one species of admissions, namely that species which is a direct acknowledgment of guilt in a criminal charge. For that particular sort the danger of untruthfulness exists and a special rule based on the general testimonial principle of trustworthiness of narration becomes applicable. That rule satisfied the confession occupies the status of ordinary admission, its relation to other rules of Evidence is then determined by its quality as an admission. For example as an extra-judicial statement it would ordinarily be obnoxious to the Hearsay rule but admissions are either not within the prohibition of that rule, or are an exception to it this being the ground for receiving admission in general, it suffices as to for confessions. *Wignmore* § 816. The principle on which a party's confession is admissible is thus stated by *Chief Baron Gilbert*. "As persons interested are utterly removed from giving evidence for want of integrity, so on the other side the voluntary confession of the party in interest is reckoned the best evidence."

if a man's swearing for his interest can give no credit, he must certainly be given most credit when he swears against it but then his confession must be voluntary and without compulsion, for our law in this differs from the civil law that it will not force any man to accuse himself pain and force may compel men to confess what is not truth of facts, and consequently such extorted confessions are not to be depended upon' *Gilbert Ev 6th Ed* (1801) p 123, *R v Warrell* (1783) 1 Leach, 263, *Doe v Hamwright* 8 A & E 691 (700), *Slatterie v Pooley* (1840) 6 M & W 664 669, *Wills v 2nd Ed* 150, *Taylor* § 865 The confessions of defendants are received on the same principle as that on which admissions in civil suits are received, viz., the presumption that a person will not make an untrue statement against his own interest. *Taylor* § 723, *Roscoe Cr Fr* 37 So it is clear that confessions could not have entered under the Hearsay exception for statements of fact against interest the accused not being a qualified witness, and could to day be so regarded where the accused, not being compellable, fails to take the stand. *Id* section 12 clause 4 and notes thereunder, *Wigmore* § 816 Foot note As in the case of admissions certain vicious admissions, i.e. those of agents and other persons are often receivable so also in the case of confessions the confessions of co accused co conspirators and others are also receivable *Wigmore* § 816

**Use of confessions in evidence—its History and development** Roughly speaking there are four distinct stages in the history of the law's use of confession From early time down to the times of the Tudors and Stuarts, all sorts of confessions are freely admitted During that period no doctrine was available for excluding confessions in the modern sense All narratives avowing guilt are accepted in evidence without discrimination and particularly without question as to their proceeding from hope of promise or from fear of threats even of torture In the 2nd stage which comprises the second half of the 1700s the matter begins to be considered, and it is recognised that some confessions should be rejected as being untrustworthy In *White's Trial*, 17 How St Tr 1095 which took place in 1741, the accused's examination before a magistrate being offered the clerk was asked whether it was voluntarily given *Mr Recorder* presiding said "That is an improper question unless the prisoner has insisted and made it part of his case that his confession was extorted by threats or drawn from him by promises in that case indeed it would have been proper for us to enquire by what means the confession was procured" In 1775 in *Rudd's Case*, 1 Leach Cr C 135, *Lord Mansfield* said "The instance has frequently happened of persons having made confessions under threats or promises the consequence as frequently has been that such examinations and confessions have not been made use of again then on their trial But his remarks were made as regards persons like apprentices who were drawn by promises and assurances to answer to an examination and to swear on oath and not of confessions in general *Wigmore* § 819 *But* in *Vores* 1 and *Elye* B in *Warrell's Case* 1 Leach Cr C 292 had left the modern rule that confessions which are obtained by threats or promises are inadmissible in evidence From this time onward the history of the law is merely a matter of narrowness or broadness of the exclusion rule *Wigmore* § 819 In the third stage comprising the 1800s, the principle is developed under certain influences to an abnormal extent and amount in *Wigmore* § 819 the rule admission the exception *Wigmore* § 817 By the beginning of 1850, there was a general suspicion of all confessions a prejudice against them as such, and an inclination to repudiate them upon the *Wigmore* § 817 *But* at that continued for half a century when an effort to harmonize the inconsistent precedents and the improvement of the law in this place in criminal procedure brought clearly before the profession the *Wigmore* § 820 "In the 4th stage" the law is in a position where a reversion sets in here and there but it is a reversion to the old law of *Wigmore* § 817 movement, and little is accomplished in the way of improvement in the practice *Wigmore* § 817

**What are not confessions** *Wigmore* § 817 *But* in *Wigmore* § 817 words by the accused in a crime which are not a confession of some essential part of it

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(539), *R v Nana*, 14 B 260 (263), *Wigmore* § 821, *R v Kangal Mah*, 41 C 1905, *Rampal v Emperor*, 20 A L J 128, *R v Pandharinath*, 6 B 34 (37) *R v Tribhuban*, 9 B 131 (134). Therefore the term "confession" does not include either (1) guilty conduct (2) exculpatory statements and (3) acknowledgments of subordinate facts colourless with reference to actual guilt *Wigmore* § 821

**Guilty conduct** It is clear that an accused's guilty conduct such as fleeing from arrest, concealing the traces of crime, fabricating false evidence, suppressing testimony and other behaviour indicative of guilty consciousness on the part of the accused do not amount to confession. In *State v Reinhardt*, 26 Or 494, 38 Pac 825 (Am) *Bean J* said "The defendant contends that, in as much as the only evidence tending to show the embezzlement is the false entries in the books of the firm kept by himself in the course of his employment, such entries are extra judicial statements in the nature of a confession, and not sufficient to convict him unless corroborated by other evidence. But we cannot concur in this position. A 'confession' in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred. The entries of the defendant in the books of account which he was required to keep are not confessions or admissions of guilt, but are perfectly innocent in themselves, and it is only because they are shown to be false and fraudulent that the inference is irresistible from the manner in which they were made, that they were intended to cover up his misappropriation."

**Exculpatory statements** All the declarations of an accused person are not confessions. Where the guilt is denied or attempt is made to explain circumstances which are calculated to excite suspicion, such declarations are not necessarily confessions. *State v Gilman* 51 Me 225 (Am). It is altogether a mistake to call this 'evidence of a confession by a prisoner'. It has nothing of that character. It was not an admission of his own guilt, but on the contrary an accusation of another person. That it was preferred on oath in no way detracts from the inference that may be drawn from it unfavourably to the prisoner, it being a false accusation against another and thus furnishing with other things an argument of his own will. Per *Ruffin C J* in *State v Broughton*, 7 Ind 101 (Am). So guilty consciousness cannot be proved by admitting exculpatory statements and then by showing them to be fabricated. *Wigmore* § 821, *R v Pandharinath*, 6 B 34 (37), *Ah Foong v Emperor* 22 C W N 831-98 C L J 105

**Acknowledgment of subordinate facts** An acknowledgment of subordinate fact, not directly involving guilt, or in other words not essential to the crime charged, is not a confession. In *Crossfield's Trial*, 26 How St Tr 71, *Eyre L C J* in charging the jury said "Gentlemen, those declarations relating to the invention of a deadly weapon and uttered before the deed charged have been as it seems to me improperly called 'confession', they are not properly 'confession' which import a particular charge first made and an acknowledgment of that charge. According to the rules of evidence, what a prisoner has said respecting a particular fact is admissible evidence, not in the nature of a confession, but as evidence of the particular fact." The distinction between a confession and an admission, as applied in criminal law is not a technical refinement but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition 'excludes an admission which, of itself as applied in criminal law, is a statement by the accused 'direct or implied' of facts pertinent to the issue and tending in connection with proof of other facts to prove his guilt, but of itself is insufficient to authorize a conviction." Per *Hollonay J* in *State v Gure*, Mont 485-186 Pac. 329

What are confessions or what are not confessions were very lucidly explained by *Holterton J* in *State v Porter*, 32 Or 135-49 Pac 964 (Am) where he said "We take it that the admission of a fact, or of a bundle of facts from which guilt is directly deducible or which within and of themselves import guilt may be designated a confession but not so with the admission of a

particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt, it is sufficient that the facts admitted involve a crime, and these import guilt, or as put by *Mr Warton*, 'I am guilty of this', and "this" imports the admission of all the acts constituting guilt. It is necessary, however, that the accused should speak with an *animus confitendi* or an intention to speak the truth touching the specific charge of guilt, and when he, with such intention, narrates facts constituting a crime, the guilt becomes a matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confession.

**Confessions—Division of** Confessions may be divided into two classes—*Judicial* and *Extra judicial*. *Roscoe Et 37* *Judicial*—Confessions are those which are made before the magistrates, or in Court in the due course of legal proceedings, and it is essential that they be made out of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to Statutes, and the plea of guilty made in open Court to an indictment. *Greenl Ev § 216* *Extra judicial* confessions are those which are made by the party elsewhere than before a magistrate, or in Court, this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied. All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury. *Greenl Ev § 216* A *Judicial* confession is sufficient in itself to support a conviction. It is, in other words, a plea of guilty. *Roscoe Ch Et 37*

**Extra judicial confessions—Proof of corpus Delicti as corroboration.** Whether extra judicial confessions uncorroborated by any other proof of the *corpus delicti* are of themselves sufficient to found a conviction of the prisoner, has been gravely doubted in England. In the Roman Law, such naked confessions amounted only to a *semi plena probatio* upon which alone no judgment could be founded and at most the party could only in proper cases be put to torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence and persisted in they were received as plenary proof. *Greenl Fr § 217* *Taylor § 863* In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found. *Ibid* In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction, and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases and it seems countenanced by approved writers on this branch of the law. *Greenl Ev § 217*, *Taylor Ev § 863* *Guilds Case*, 5 Halst 163 18, *Longs Case*, 1 Hayw 524, 2 Russ C & M 825, 826

**Weight of confession** 'The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crimes, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received. *Greenl Fr § 214*



24.

"It is true" says *Prof Wigmore* "that there exists a decided conflict of opinion at first sight inexplicable, as to the evidential value of confessions. On the one hand, we find writers and Judges of wide experience affirming the slender value of confessions which is merely the reproduction of a classical predecessor's language. On the other hand we find persons of equal authority offering in equally positive and unqualified language that confessions are the highest kind of evidence. There must be some key to this conflict. How plausible each side of the controversy is, and how forcible the impression its influence may produce for the moment appears when we see the same Judge,—*Sir William Scott* (*Lord Stouell*)—in almost the same year expressing opinions diametrically opposed." *Wigmore* § 866. In *Williams v Williams*, 1 Hagg Cons 304 *Sir William Scott* said "The Court must remember that confession is a species of evidence which though not inadmissible, is regarded with great distrust. There is a canon particularly pointed against them, which says, *Acc partium confessioni fides habetur*." But in the subsequent year the same learned Judge observed "I need not observe that confession generally ranks high, or I should say highest in the scale of evidence. '*Habemus confitentem reum*' is demonstration, unless indirect motives can be assigned." 2 Hagg Cons 315, see also 1 *Starkie* 52, *Swift* Er 133. Of course a partial explanation of this is thus given by Joy "It appears inaccurate to give all kinds of confessions the same confidence or to treat them alike with distrust. Like all other kinds of admissions they admit of all shades of certainty and probability from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, as pious, or doubtful expressions." *Joy Confessions* 109. But "the real explanation lies in the mixture of good and bad qualities likely to be present in all attempts to use confessions. We must separate (1) the confessions as a proved fact, from (2) the process of proving an alleged confession." *Wigmore* § 866.

When the making of a confession is completely proved, its authenticity is beyond dispute. Such a confession is "one of the surest proofs of guilt." *Starkie* Ev Vol I, 52. In such a case a voluntary and genuine confession is legal and sufficient proof of guilt. *Queen v Jhuree*, 7 W R Cr 41, *Queen v Ranyeer*, 6 W R Cr 73, *Queen v Hyder*, 6 W R Cr 83, *Sheo Prasad v Emperor*, 52 Ind Cas 520. *R v Dada*, 15 B 480. The confession of a crime is usually as much against a man's permanent interests as anything well can be and in *Mr Starkie's* phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. *Wigmore* § 866.

The only real difficulty is in the proof of the fact that an alleged extrajudicial confession has been made. Such a fact is proved by somebody's testimony. Such testimony is often furnished by paid informers, treacherous associates, angry victims and over zealous officers of law. As regards the testimony of these persons the suspicion of the Court is aroused and its caution is stimulated. So where the Judges advised the jury to take confession with caution they were thinking, not of the confession as evidence of the act, but to the testimony to the alleged confession. This is the real meaning of *Mr Justice Foster's* oft quoted passage that "confessions are the weakest and most suspicious of all evidence." *Foster's High Treason* c III, section 8. See also *Greenleaf* Li § 214, *Earle v Pfen* 5 C & P 542. *R v Simmons*, 6 C & P 540. That remark is applicable only to oral confessions and for the following reason: "Proof may be too easily procured words are often misreported—whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case" and they are extremely liable to misconstruction and without this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted. In other words the suspicion that he has found it necessary to entertain is directed entirely to the work of proving an alleged confession. "This is the reason above suggested as the real cause of the distrust, we are ready enough to trust the confession if there really was one, but we are going to doubt and suspect for a long time before we accept it as a fact." *Per Teller J in Damas v People* (1917) 62 Colo 418. *Mr J Earle* touched the kernel of the subject when he said "I am of opinion that when a confession is well proved it is the best evidence that can be produced." *R v Baldry* 2 Den Cr C 49.

This seems to be the simple explanation of the apparently contradictory views, if we distinguish the confession as evidence, from the evidence of the confession, we find that few have ever really doubted that the first is in itself of the highest value, while the second is always to be suspected *Wigmore* § 866

So the remarks that "confession should be received with great caution especially oral confession" (*U S v Mc Kenzie*, 35 Fed Rep 826) and that "the books are full of admonitions from the wisest and best Judges in this respect" (*Per Groier J in Teachout v People*, 41 N Y 7, 19) are applicable to the evidence of confession and not to the confession as evidence *Emperor v Pramatha nath* 30 C L J 503 The reason for this caution is that under the charge of a highly criminal offence, the mind must always be agitated and may be influenced by hopes or apprehension which it is difficult if not impossible, sometimes to comprehend *U S v Nott*, 1 Mc Lenn (*U S*) 499 Besides being satisfied that the witness who testified to the confession speaks truly the jury must be satisfied that the witness could not be, or was not mistaken in the substance of the confession *U S v Hughes*, 34 Fed Rep 732 In the last named case *Mc Cormick J* in charging the jury at p 736 said "For want of an exact representation of the tone of voice emphasis countenance, eye, manner, and action of the one who made the confession, how almost impossible it is to make third persons understand the exact state of mind and meaning of the one who made the confession"

But it is generally agreed that voluntary and deliberate confessions of guilt are among the most effectual proofs in law, on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless urged by the promptings of truth and conscience *Moore on Facts* § 1181, *Greenl Et* § 21.

**False confessions**—The reason of making False confessions are either intentional or the result of mistake Those made through mistakes are the result either of mistake of fact or of law Suppose a man mistakes a corpse for a robber, and belabours it under the impression On finding the body lifeless he imagines himself the cause of death and makes a confession Such a confession is made under a mistake of fact So also where a man makes a false confession under the hallucination, there is not any mistaken apprehension of facts correctly speaking, but the belief in a fact which has no existence A confession under mistake of law occurs when a man is conscious of moral guilt but does not know that legally he is not guilty In most cases false confessions are intentionally made to escape vexation, and this includes all those false confessions which are extorted from a prisoner by bodily or mental torture A second motive is a desire to stifle enquiry, which may be illustrated by the case of a man falsely accused of a comparatively trifling crime, hoping by a confession to throw off suspicion as to some crime of greater magnitude which he has already committed A third motive is *tedium vitæ* or weariness of life A fourth motive, originating in the relation of sexes, is thus described by *Bentham*, to whom we are originally indebted for the whole of this lucid disquisition — "In the relation between the sexes," says *Bentham*, when treating of the subject of false confessions, "may be found the source of the most natural exemplifications of this as of many other eccentric lights The female unmarried—punishment as for seduction hazarded, the imputation invited and submitted to for the purpose of keeping off rivals, and reconciling parents to the alliance The female married—the like imputation, even though unmerited 'invited' with a view to marriage through divorce A fifth motive is vanity *Best* takes the following extract from *Bentham* — "vanity, without the aid of any other motive has been known (the force of moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of man kind, under the notion of raising himself in that of another" A sixth motive is the desire to benefit others A seventh motive is the desire to injure others this is sought to be effected by accusing them as participators in the crime and cases are not infrequent in which parties, in their hatred and revenge have forged evidence against the objects of their passions, even at the expense of their own persons, by self inflicted wound, or even suicide *Nort Et* pp 157 158

24. Confession must be taken as a whole. When a confession is used against an accused person, the whole confession must be introduced. So where an accused person makes a confession, the confession is evidence in his favour as well as against him, and must be taken as a whole. *Queen Empress v Dada Nana*, 15 B 432, *Katun In re*, 88 Ind Cas 455=26 Cr L J 1142. This rule is founded upon justice to the accused person. It is merely common fairness in the case of the introduction of a confession to require that every thing that has been said by the accused in connection therewith, which may qualify or explain the confession, be introduced. *Berry v Com* 10 Bush (Ky) 15, *People v Gelabert* 39 Cal (1st) 663, *McAdony v State* 62 Ala 154, 160. So if evidence of a confession by an accused person is given on behalf of the prosecution the whole of the confession must be used, the prosecution must take the whole of it together, and cannot select one part and leave another. *R v Jones*, (1871) 1 C & P 629. But if part of a statement tend to show the guilt of the accused and part of it to show his innocence, the jury may, if they choose, believe the part which is against him and disbelieve that which is in his favour. *R v Higgins* (1829) 3 C & P 603, *R v Clewes* (1830) 1 C & P 221. *R v Steptoe* (1830) 4 C & P 397. *Halsbury Vol IX* p 398, *Taylor* § 870, *Kamod v Emperor* 46 Ind Cas 705. There were earlier rulings to the contrary. *P v Jones*, 2 C & P 629. *Bosanquet, Serjeant*, *R v Lloyd*, 1 Phill Ex (3rd Ed) 339. In determining whether the statement is true or not, the jury should consider whether it be probable or improbable in itself and whether it is consistent or inconsistent with the other circumstances of the case. *R v Steptoe, supra*, *R v Jones, supra*. Unless the prosecution can show that any part of the confession of an accused person, so far as it exculpates him, is untrue or violently improbable, it is not fair to act on it so much as to incriminate him, omitting all that which goes to explain his own conduct and diminish the gravity of his offence. The only fair measure is to take confession as a whole. *Maung Po Thin v Queen Empress*, L B R (1872 1892), 324, *Queen-Empress v Elght*, L B R (1872 1892), 311, *Crown v Sumundur* 4 P R 1872 Cr. *Queen v Bishoo*, 9 W R Cr 16, *Queen v Shaikh Boodhoo*, 8 W R Cr 38, *Queen v Chaka Khan*, 5 W R 70, *Queen v Sonoolah*, 25 W R Cr 23, *Goloke v Magistrate of Chittagang*, 25 W R Cr 15. So a prosecutor is not to be allowed to give in evidence part of a confession made by a prisoner, but it must be put in proof as a whole, so that the jury in one case and the Judge and the assessors in the other may have the full means of testing its accuracy and forming their opinion as to whether the whole or part, and what portion of it, can be believed. For example, if a passage in a statement made by a prisoner standing by itself amounts to an admission of guilt, it is not alone to be regarded if there are passages qualifying or contradicting it. A confession ought not to be rejected merely because there has been in the confession a false statement on a material point. *Empress v Mohoram*, A W N 1883, 148. *Waryam v Emperor* A I R. 1926 Lah 554. The ordinary rule of taking confession as a whole and giving the accused (in the absence of other evidence against him) the benefit of any circumstance that may appear in his favour therefrom cannot apply to confessions which are diametrically opposed to each other but only where the more favourable view is absolutely inconsistent with the general tenor of the confession. *Queen v Nityog Gopal*, 24 W R Cr 80. The mere fact that the accused has been interrupted, and therefore has not stated all that he might have stated does not however render what he has stated inadmissible as a confession. *Levison v State* 54 Ala 520. Nor does the fact that the witness overheard only a portion of a conversation, render what he heard inadmissible provided it was a complete confession of guilt. *Com v Pilsinger* 110 Mass 101. *McAdroy v State* 62 Ala 154 160. The evidence must be confined to his confession in regard to the particular offence of which he is indicted if it relates to another and distinct crime, it is inadmissible. *A v Bulter* 2 Car & Kir 221.

As in other cases the meaning and intention of the parties are collected from the whole writing taken together and all the instruments, executed at one time by the parties, and relating to the same matter, are equally resorted to for that purpose so here. This principle, in its application, has several detailed consequences (1) The prosecution must put in the whole of the accused's state-

ment, including the portions favourable to himself as well as those unfavourable. But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances, nor of such fragments of a connected statement as were alone heard or remembered by the witness. Moreover, the witness need not be able to give the exact words, provided he can give the substance (but see *Jagdeo v Emperor*, 38 Ind. Cas 740=15 A L J 15; *Aga Ba v Emperor*, 38 Ind. Cas 767; *Hasun v Emperor*, 53 Ind. Cas 145) (2) If one part of a conversation is relied on, as proof of a confession of a crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation, not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject matter of the issue (*Per Lord C J Abbott in the Queen's Case*, 2 B & B 297 298; *R v Paine* 5 Mod 165, Howk. P C b 2, C 46 § 5, *R v Jones* 2 C & P 629, *R v Higgins*, 3 C & P 603; *R v Hearne*, 4 C & P 215, *Brown's Case*, 9 Leigh 633, for as has been already observed respecting admission, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained) (3) But if, after the whole statement of the prisoner is given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another, for it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor nor improbable in itself, it will generally be believed by the jury, but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case (4) And if the confession implicates other persons by name, yet it must be proved as it was made, not omitting the names, but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it' *Greenl Ev* § 218

A Judge ought to decide the question of the admissibility of a confession first and if it is inadmissible it should be excluded from the record and its terms should be kept from the assessors. An inadmissible confession is inadmissible in its entirety. *Nga Ba v Emperor* 18 Cr L J 383=38 Ind Cas 767. The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken together. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. *Hasun v Emperor*, 53 Ind Cas 145=20 Cr L J 737, see also *Kamoda v Emperor*, 46 Ind Cas 705=19 Cr L J 785

After the entire statement of a prisoner has been given in evidence any part of it may be contradicted by the prosecution if they choose to do so and then the whole testimony is left open for consideration precisely as in other cases where one part of the evidence contradicts another. Even without such contradiction it is not supposed that all the parts of a confession are entitled to equal credit if sufficient grounds exist that part which charges the prisoner may be believed while that which is in his favour may be rejected. *Nirbhoy Nath v Emperor*, 3 O W N 800=98 Ind Cas 178=A I R 1926 Oudh 618

Uncorroborated confession, evidentiary value of.—If there is no reasonable doubt that a confession is voluntary and genuine it is legal and sufficient proof of guilt. *Queen v Jhurner*, 7-W R Cr 41. Under ordinary circumstances, a confession cannot be accepted as sufficient for a conviction, unless it is supported by material facts established independently of the confession itself. Experience shows that unfounded confessions are not infrequently made from one motive or another natural to humanity and that consequently the Courts have to be on their guard against being led astray by such deceptions. It is, therefore, the practice in general to require some support for a confession and reasonable consistency with the surrounding circumstances about which there is no doubt. *Nga Shue Tat v Queen Empress*, U B R (1897—1901), Vol I 152

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J L 445), or that a slight change in the phraseology of the alleged admission would destroy their significance of guilt *Ibid*, *Moore on Facts* § 1183

**Judicial Confessions** Judicial confessions indicate confessions which are made on a magisterial investigation, Section 164 of the Criminal Procedure contains the provisions for recording confessions by Magistrates. The evidence of witnesses who are sent up by the police for the purpose of having their statements recorded under s 164, Criminal Pro Code, and who have been presumably in police custody until their production before the Magistrate, should not be recorded by such Magistrate, unless he has some assurance that their attendance and statements were voluntary *King Emperor v Bhutnath*, 7 C W N 345. The proper course for a Magistrate to presume when an accused person is brought under the above section of the Code before him is to ask him if he wishes to make any statement or confession. If he says he does not, the Magistrate should not proceed to interrogate him. If he does, the Magistrate should write down the statement or confession (as the case may be) and ask the accused such questions as may be necessary to show clearly or ascertain clearly what his meaning is. The examination of the accused must not be made with a view to eliciting, by constant questions, the truth out of his mouth as though he were a witness *Empress v Baij*, 5 C P L R Cr 13, see also *Gaya Dist v Mohamed*, 5 C W N 864. A Magistrate must not put any question to the accused which tends to incriminate him. *In re Rayappan* 2 Weir 136.

It is neither expressed nor implied in section 164 that the statement of an accused person cannot be recorded unless it is a confession. The distinction made in the section is between statements that are confessions and statements that are not and not between the persons by whom statements of either character are made, the object being to prescribe different modes of recording. It is discretionary with a Magistrate to act under section 164 and prepare a record *Lala v Empress*, 2 P R 1893 Cr. Great care and circumspection are necessary in recording a confession under section 164 of the Criminal Pro Code. It is necessary to record the questions put to the accused to ascertain whether the confession was voluntary, to tell him that after his confession he will not have to go back to Police custody, to warn him of the consequence which will ensue if he falsely implicate himself in the hope of release and to ask him whether the Police or any other person has subjected him to any ill treatment. No hard and fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before a Magistrate for the recording of a confession under s 164 Cr Pro Code, but it is not sufficient to put one comprehensive question as to the nature of the confession or to make a note at the commencement of the record of the confession that the accused has been warned not to confess through any fear or inducement and that the Police of the Court have been removed from the Court. A Magistrate ought, by putting questions which occur to him to make himself conscientiously satisfied that the man is a free agent and the confession is voluntary and has not been procured by threats or inducements *Kandhai v Emperor*, 15 Cr L J 633 = 25 Ind Cas 833 see also *Kesho Singh v King Emperor*, 20 O C 136 = 18 Cr L J 42 *Empress v Kura* 1882 A W N 166 *Imperator v Masri*, 12 Ind Cas 111 *Shree v A E* 4 Cr L J 387, *Bahawal v Crown*, 26 Cr L J 1233 = 88 Ind Cas 183. Where a Magistrate asked a person who was charged with an offence "what offence are you going to confess", instead of ascertaining whether the accused wished to say anything at all, held that the Magistrate had not acted properly. *In re Chohal el Keya*, 2 Weir 307, *In re Rayappan* 2 Weir 136. *In re Pissari Tuarka* 2 Weir 137. A Magistrate should ascertain whether a confession statement was made voluntarily, at the beginning of the statement, and not at the end. *In re Rayappan*, 2 Weir 136 see also *Chedan v King Emperor* 7 O C 191. Where after the prisoner had made a long confessional statement he was told by the Magistrate that if he stated all that he knew he would then be examined as an approver and as a witness held that the conduct of the Magistrate was highly improper. *In re Kora Gorindan* 2 Weir 137. There is no provision for the admission in evidence of a confession made to a Magistrate unless it is recorded in the manner prescribed by law and even if such confession is made under special circumstances he proved otherwise where the confession is of the

accused is shown to have been made under the inducement, such fact deprives the evidence of its value *Nga Myat Kyau v Queen Empress*, U B R (1897—1903) Vol I, 41. Where a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under section 164 Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanah v Emperor*, 9 Ind Cas 148=12 Cr L J 15. *Queen Empress v Anga Valayan*, 23 M 15. *Empress v Jugri*, 8 C P L R Cr 6. *Banca Singh v Emperor*, 89 Ind Cas 1026.

Section 164 does not enable a Police officer, who has obtained a statement incriminating the accused made by some person to send such person to a Magistrate practically under custody, to have him examined and his statement recorded before a judicial enquiry or trial for fixing him down to that statement in the subsequent judicial proceeding *Q E v Jadub* 27 C 295=4 C W N 129.

Section 164 of the Criminal Procedure Code, absolutely prohibits the employment of a Police officer to take down the confession of an accused person. A Police officer cannot be employed even as a scribe to take down such a confession *Khudiram v Emperor*, 9 C L J 55.

Under section 164 in the course of a Police investigation, the Magistrate is entitled to record any voluntary statement made by the accused person, but he is not entitled to examine the accused person in respect of the facts of the case *Gya Singh v Mohamed*, 5 C W N 864. Under s 164 Cr Pro Code and s 24 Evidence Act a confession made under an inducement to confess is not a voluntary confession and as such, is inadmissible in evidence *Queen Empress v Aga Shue*, L B R (1893—1900) 52. Where the accused pleads not guilty, a conviction cannot be based on a confession which is not recorded in the manner prescribed in ss. 164 and 364 of the Cr Pro Code *Nga San Ya v Emperor*, 11 Cr L J 41=4 Ind Cas 759=U B R 1909 Vol I, Evidence 3. Confession made in simple narrative form without showing questions and answers may be allowed in evidence, where it appears that the accused had not been prejudiced by the failure to comply strictly with the law *Nga Po Sin v Queen Empress*, U B R (1897—1901) Vol I, 47, *Queen Empress v Kauri*, S C 102 Oudh.

Where there is no positive evidence that the precautions required by s 164 of the Criminal Pro Code were not taken and the certificate required by sub section (3) is duly appended to the record of the confession, the presumption is that the precautions described in the section were duly taken *Majhi v Emperor*, 23 Cr L J 807=104 Ind Cas 247=A I R 1927 Lah 682, *Kheman v Emperor*, 6 Lah 58=88 Ind Cas 18, *Pratap Singh v Emperor*, A I R 1925 Lah 60. The Code contains no provision as to a confession being made in open Court, and where it is of great length, a Magistrate may avoid its being recorded piecemeal, though in such a case the proper procedure is not to return the accused to the custody of the police until it is fully recorded *Nilmadhub v Emperor* 5 Pat 171=96 Ind Cas 509=27 Cr L J 957=A I R 1926 Pat 279 but see *King Emperor v Pramatha* 30 C L J 503=21 C L J 266, *Abdul Salam v Emperor*, 49 C 573 (598).

It would be going too far to say that a Magistrate recording a statement or a confession under s 164 cannot and should not ask a single question of the deponent *Hasan Ali v Emperor*, L R 6 A 197=88 Ind Cas 729=23 A L J 719=26 Cr L J 1209.

Where the appellant made a statement to a Magistrate which was substantially the same as the evidence given by the prosecution witnesses and the statement was objected to on the ground that it did not comply with the requirements of s 164 and that the deficiency in the formality prescribed by the section had not been cured on the recall of the Magistrate under the provisions of s 533 Cr Pro Code it was held inadmissible in evidence *Mussammatt Rao v Emperor* 26 P L R 172=7 Lah L J 170.

A statement made by an accused and not amounting to a confession is a "statement" within section 164 of the Cr Pro Code, which expression is not limited to a statement made by witness *Abdul v Emperor* 41 C L J 474=26 Cr L J 1279=88 Ind Cas 1075. A statement made by an accused person before

S 24 A Magistrate under section 164, which does not amount to a confession but is of an exculpatory nature is admissible as against him to prove a relevant fact. *Gulam v Emperor*, 4 Pat 327=6 Pat L T 598=86 Ind Cas 814. A statement recorded by a Magistrate is admissible in evidence under section 164 Cr Pro Code, whether taken on solemn affirmation or not. *Bahadur v Emperor*, 98 Cr L J 1063=88 Ind Cas 7=A I R 1925 Sind 289.

A confession recorded in answer to the only question put (after due warning) "do you want to say anything?" cannot be accepted as being in accordance with law in the absence of any indication as to what due warning was. *Mallu v Emperor* 2 Pat L T 129=59 Ind Cas 351=22 Cr L J 119. A confession not properly recorded in accordance with the provisions of section 164 Cr Pro Code is not admissible. *Gajadhar v Emperor*, 9 O L J 500. Where a Magistrate recorded a confession made to him in the course of a police investigation without questioning the person making it as to whether it was made voluntarily the defect is one of substance and is not cured by section 533 of the Criminal Procedure Code. *Fauz v Emperor* 2 Lah 325=65 Ind Cas 613=23 Cr L J 114, *Jehana v Emperor*, 73 Ind Cas 506=24 Cr L J 618=A I R 1923 Lah 340, *Gajadhar v D*, A I R 1923 Oudh 39. There is nothing in s 164 or of any provision of the Criminal Procedure Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement if proved to be voluntary is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. *Madan v Guru* 4 Pat L T 381=73 Ind Cas 963=24 Cr L J 173.

All that section 164 (3) requires is that the Magistrate on questioning the person making the confession shall have reason to believe that it was voluntarily made. No express form of question is prescribed and the extent to which a Magistrate should question the person making the confession must largely depend on the particular facts of each case. *Thibu v Emperor* 4 Pat L T 279=73 Ind Cas 569=24 Cr L J 649=A I R 1923 Pat 356. It is highly desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is a voluntary one or not. *Emperor v Dewan Kahan* 72 Ind Cas 961=24 Cr L J 497=4 Pat L T 146, *Neki v Emperor*, 25 Cr L J 116=76 Ind Cas 180. The evidence of a Magistrate recording a confession showing that he observed all the provisions of s 164 of the Criminal Procedure Code, is sufficient and the confession is admissible. *Raman v Emperor* 3 Pat 872. Magistrates recording confessions and thereon ordering remand of the persons making them should, on all occasions, be most careful to ascertain how long such persons have been under the influence of the police and, in recording their reasons for the remand, should set forth all the information they are able to obtain on the subject. *Empress v Madar*, A W N 1885 59 (F B). Section 164 of the Criminal Procedure Code does not apply to any statement of the accused taken by the Magistrate holding the enquiry. *Empress v Chatter*, A W N 1884 84.

The essential requirements of s 164 Crim Pro Code, are that the Magistrate should before recording the confession question the accused and upon questioning him form the belief that the confession to be recorded is made voluntarily and that the record made by the Magistrate should contain a full and true account of the statement made by the accused. *Aga H. v King-Emperor*, 2 L B R 317. When the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused was under no inducement or threat at the time he made the confession and he was informed that if he confessed he would get a pardon. Held that the confession was inadmissible in evidence. *Mahipat v Emperor*, 103 Ind Cas 800=28 Cr L J 752=1 Luck 223.

Section 364 of the Criminal Procedure Code.—The rules laid down in section 364 of the Criminal Procedure Code are applicable to the examination of the accused under section 342. *Emp v Nagar* 4 Bom L R 461. All that a Court has a right to do under s 364 Criminal Procedure Code is to ask the accused person to explain the circumstances which appear in evidence against him. *Tufani v King-Emperor*, 15 C L J 323=14 Ind Cas 667=13 Cr L J 283. In examining an accused person under section 364 of the Code it is

improper to ask him such a question as, 'If you did not commit the murder who did?' *Chedan v King-Emperor*, 7 O C 191. The signature of an accused person to a statement recorded under s 364 should be made in the immediate presence and under the control of the Magistrate himself. *Queen Empress v Bhika*, Rat Un Cr C 687 = Cr Rg 8 of 1891. The signing of a confessional statement by a prisoner in the form of a mark is sufficient under s 364. *In re Majji Chendamma*, 2 Weir 197. Where the Magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law. *Hasni v Emperor*, 103 Ind Cas 847 = 28 Cr L J 767 = A I R 1927 Lah 650. If the prisoner is not prejudiced in any way by the omission, the absence of the questions put to him does not make the confession inadmissible. Similarly the taking down of the record in a language other than that in which it was made does not matter if the accused has not been injured in any way in his defence by this defect. *Nauab v Emperor*, 28 Cr L J 341 = 100 Ind Cas 821 = A I R 1927 Lah 285. The rules laid down in section 364 should be strictly observed and they are applicable alike to confessions taken before enquiry or trial under s 164 and examinations of accused under section 342. *Empress v Gajadhar* A W N 1883, 243. It is sufficient if the certificate attesting the statement of an accused person, under section 364 of the Criminal Procedure Code is signed by the presiding officer of the Court. The whole of it need not be in the Court's handwriting. *Empress v Riaz Ali*, A W N 1900, 203. The recording of confessions should be made by Magistrates with their own hands. *Criminal Cr Memo No 7 of 1873*. But a confession recorded by a clerk, under s 164 of the Code in the presence of a Magistrate, in the form of a narrative and without the questions being recorded, would not be illegal, if the accused was not prejudiced by it. *Feloo v Empress*, 14 C 539.

**Section 533 of the Criminal Procedure Code** Section 533 of the Code of Criminal Procedure lays down that "if any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made that statement recorded and, notwithstanding anything contained in the Indian Evidence Act, 1872, s 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits." Section 533, Cr Pro Code, is intended to apply to all cases in which the directions of the law have not been complied with, without any distinction between omissions to comply with the law and infractions of it. Under that section if the record of a confession is inadmissible owing to failure to comply with the law such as omission to obtain the signature or mark of the person confessing to the document, parol evidence, notwithstanding anything contained in s 91, Evidence Act, may be given of the terms of the confession, and those terms, if and when proved may be admitted and used as evidence in the case, if the defect is such that it has not affected the merits of the defence. *Queen Empress v Raghu*, 23 B 221. Section 533 is to be interpreted liberally and though a confession recorded by a Magistrate was in the first instance and by itself inadmissible as not being in the form of question and answer, not being recorded in the vernacular of the accused and not bearing the signature or mark of the accused, it will become admissible by the taking of the evidence of the Magistrate that the accused duly made the statement recorded. *Empress v Tularam*, 8 C P L R Cr 21. A confession made not to a Police officer and not improperly obtained as laid down in section 24 of the Evidence Act is always admissible against an accused. *Harbans v King Emperor*, 8 O C 395 = 2 Cr L J 811. Where a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under s 164, Cr Pro Code, the defect may be cured by the evidence of the Magistrate. *Ram Sanchi v Emperor*, 9 Ind Cas 148 = 12 Cr L J 15, see also *Khudiram v Emperor* 9 C L J 55. The Sessions Judge, who tried a dacoity case admitted in evidence statements in the nature of confessions recorded in English by a Joint Magistrate under the provisions of s 164 Cr Pro Code. There was no evidence that it was not practicable to record them in the



**S 24** language in which they were made, and the Joint Magistrate was not examined as a witness, nor was evidence taken that the accused duly made the statement so recorded. *Held* that as it could not be presumed without some evidence that the statements had to be recorded in English as they could not be recorded in the language in which they were made there was no justification for their being recorded in English, and no presumption under section 80 of the Evidence Act could be made in respect of the record made in English and as no evidence was taken to prove that the accused had actually made those statements, the Session Judge was wrong in admitting such a record of the statements against the accused. *Baua v King Emperor*, 10 O C 112=6 Cr L J 94, but see *Baua v Queen Empress*, S C 277 Oudh.

A defect in the certificate to be appended to the examination of an accused person by a Magistrate cannot be rectified by examining a witness to prove that the confession was in the handwriting of the Magistrate. Section 533 Cr Pro Code, provides that, in such a case, evidence shall be taken that the accused person 'duly made the statement recorded', and the proper course is to examine either the Magistrate himself or some other person who was present when the statement was recorded. *Empress v Mussammatt Jugri*, 8 C P L R Cr 6 Q E v *Anga* 23 M 15=2 Weir 705, *Nga Nyi v Queen Empress*, U B R (1892-1896) Vol I, 205. A Magistrate, who recorded a confession under the Cr Pro Code did not question the accused under s 164(3) as to whether he was confessing voluntarily. The confession was subsequently retracted. *Held*, that the confession was inadmissible in evidence and that the defect could not, under s 533 be cured by the evidence of the Magistrate that the confession was voluntarily made. *Ma On Nyun v King Emperor*, 1 U B R (1902-1903) Cr Pro Code, 13.

This section has no application to a case where no record whatever has been made of a confession. *King Emperor v Gulabu*, 11 A L J 286=14 Cr L J 211=19 Ind Cas 307=35 A 260. Though section 164 lays down that the Magistrate shall record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, still, it is not where laid down that the Magistrate shall record any note showing what questions he has put to the person and how he has satisfied himself that the confession is made voluntarily. But it is advisable that the Magistrate should always record a memorandum showing that he has by questioning the person making it, satisfied himself that the confession is made voluntarily. *Khemani v Emperor* 6 Lah 78=88 Ind Cas 18=26 Cr L J 1074=26 P L R 346=A I R 1935 Lah 315. *Baua v Emperor* 7 Lah L J 264=89 Ind Cas 1029=26 P L R 549=26 Cr L J 1458=A I R 1925 Lah 448. Under section 533, Cr Pro Code, 1882 when a confession or other statement of an accused person is duly made in accordance with the provisions of the law, but in the recording of which those provisions have not been fully complied with oral evidence is admissible to prove that the confession or other statement was duly made. *Queen Empress v Dharrab* 2 C W N 702.

**Section 80 of the Evidence Act and confession.** So far as section 80 of the Evidence Act is concerned the Court is bound to make the presumptions provided in that section in respect of the document purporting to be a confession of the accused. *San Bau v Crown*, 1 L B R 340 F B. Both the memorandum and the certificate required by s 164 should be attached to the confessions. The effect of these is to afford proof of the accuracy of the record, of the presence of the Magistrate, and of the voluntary nature of the confession. *Rog v Shree* 1 B 219.

**Principle underlying section 24.** The value of confessions depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the prompting of truth and conscience. Such confessions, so made by a prisoner to any person at any moment of time, and in any place subsequent to the perpetration of the crime and previous to the examination before the Magistrate are at common law received in evidence as among proofs of guilt. *Greenleaf* Fr § 215. *Taylor* § 665, *Best* Ev § 521, 11 L J

*Ev* § 102 When a confession is made under influence of a promise of benefit, or a threat of harm, it is untrustworthy because it has been associated with an attraction too strong to reject. In general then, the position of the confessing person which causes our distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity—*Wignore* § 824. 'The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed' *Per Lattledale J in R v Court*, 7 C & P 486, *R v Holmes*, C & K 248. "I think in every case it is for the Judge to decide whether the words were used in such a manner and under such circumstances as to induce the prisoner to make a confession of guilt whether such confessions were true or no."

**Scope of section 24** Section 24 of the Evidence Act provides that a confession of an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, having reference to the charge against the accused person, proceeding from a person in authority. *Fatehchand v Emperor*, 86 Ind C 1001 = 26 Cr L J 937 = L R 6 A 89 Cr. In dealing with the question of the admissibility of a confession the Judge is not concerned with the truth or falsity of the confession, that is a matter entirely for the jury. The Judge is only concerned with the question as to whether the confession is admissible in evidence. If the confession is voluntary it is admissible. If *prima facie* it is false inconsistent, improper or absurd that might suggest that it is not voluntary. *Emperor v Panchari Dutt* 86 Ind Cas 414 = 29 C W N 300 = 52 C 67 = 26 Cr L J 782 = A I R 1925 Cal 587. 'Voluntariness, being the warrant for veracity, was then regarded as the *sine qua non* of confessions. This was the condition precedent which had to be complied with before confessions could be admitted in evidence. The meaning of this position apparently is that confessions were presumed to be false till the presumption was rebutted by proof of voluntariness' 2 Bom L R J 228. The reason for rejection of confessions are thus stated by *Eyre C B*. "A confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt that no credit ought to be given to it and therefore, it is rejected" *Wanell shall's Case*, 1 Leach C C 263. But a different view is taken in *Reg v William* 2 Den C C 474. There the counsel for the prisoner urged "It is gathered from this that if any inducement—of the slightest description—whereby any worldly advantage to himself as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue" *Pollock C B* interrupted him observing "You are overestimating it. The law does not presume it is untrue, but rather that it is uncertain whether a statement so made is true" *Lord Campbell C J* added "I doubt whether the rule excluding confessions made in consequence of an inducement held out proceeds upon the presumption that the confession is untrue but rather that it could be dangerous to receive such evidence, and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury." In delivering the judgment in the same case *Pollock C B* said "There is no presumption of law one way or other. There is no presumption that it is false, or that the law considers that such a statement cannot be relied upon, but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury" 2 Bom L R J 229. In *R v Mansfield*, 14 Cox Cr 639 *Williams J* said "It is not because the law is afraid of having truth elicited that these confessions are excluded, but the law is jealous of not having the truth." Similarly in *Scott's Case* 1 D & B 58 *Campbell L C J* reiterated "It is a trite maxim that the confession of a crime, to be admissible against the party confessing must be voluntary, but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession can not be safely acted upon." "The principle upon which all this class of cases is found is that by inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully

S. 24 dealt with if he confesses and that he may therefore be induced to confess to him self guilty of an offence he never committed' *Editors Note*, 6 Carr & Payne 373. The Anglo American law on the subject is thus summarised by *Prof Wigmore*. The ground of distrust of confessions made in certain circumstances is in a rough and indefinite way, experience enough have been resorted to to fortify the conclusion based on ordinary observation of human conduct that under certain stress a person, especially one of defective mentality or peculiar temperament may falsely acknowledge guilt. This possibility arises whenever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose, that is he chooses any risk that may be involved in acknowledging guilt, in preference to some worse alternative such as silence. What are the circumstances which may make such an acknowledgment preferable? The law cannot attempt to weigh testimony before even it is probable to be false. The circumstances which thus call for the rejection of a confession are usually described as involving either a promise or a threat. A promise of certain pardon when attached to a confession may even make a confession irrespective of its truth seem more desirable than with its contingencies or a threat of instant hanging by a mob, unless a confession is forthcoming may conceivably make the contingencies of a confession more desirable than the certain consequences of silence. *Hume* 4. But the law on this subject is to be interpreted in accordance with section 24 of the Indian Evidence Act. Section 24 contains an absolute rule which is relaxed by the proviso made for a different purpose in section 27. When the legislature wished to make an exception to the absolute rule it did so by a separate section namely s. 28 which declares under what circumstances a confession rendered irrelevant by section 24 may become relevant. Statements rendered irrelevant under one section of the Act may be relevant under another section of the Act. No confession made under inducement, threat or promise is relevant except in the circumstances provided for by section 28. *King Emperor v. Aisling Meehan* 21 B R 118. *Aga Sayyid Ali Khan v. Emperor*, 1 B L 19. *Queen v. Dyer* 10 Cr L J 11-1. *Ind. Cas.* 79 but see *Queen v. Dyer* 10 Cr L J 11-1. A confession to be admitted as evidence must be proved to have been made voluntarily, and when it is admitted in evidence it has to be dealt with like any other piece of evidence and only if it is proved to be true. *Queen Empress v. Lalga Dinda* 11 B L 11.

That section must be fairly construed according to its language and this is done it seems to us impossible to contend that the law in India is the same as the law in England as explained in *Queen v. Thomson* L R 11 Q B 112 and the cases then referred to. The question which arises is whether a statement on the admissibility of a confession is to be determined by the circumstances in which it was made. It may be that this section does not require positive proof of voluntariness but it does require that the confession be made voluntarily. The case of the well known Indian case it may be argued that the confession was made voluntarily if proof had been given that the confession was a particular case fairly to say that it was proved that it had been unlawfully obtained and that it was not a confession. The case of the well known Indian case it may be argued that the confession was made voluntarily if proof had been given that the confession was a particular case fairly to say that it was proved that it had been unlawfully obtained and that it was not a confession. The case of the well known Indian case it may be argued that the confession was made voluntarily if proof had been given that the confession was a particular case fairly to say that it was proved that it had been unlawfully obtained and that it was not a confession.

record This is no doubt the correct principle in theory, and owing to the comparatively simple and straight forward methods of the English Police would not in England necessarily present any very serious difficulties in practice But in common with such Indian decisions as there are, supporting an exactly contrary principle, this valuable pronouncement is subject to obvious limitations The statute law in India enacts that a confession is irrelevant if it appears to the Judge to have been improperly induced and that he has thereby been brought to confess What may or may not satisfy a Judge on this point is obviously beyond the reach of precedent or rule In each case it is question of fact, and as such has to be answered upon evidence of the same kind as that relating to any other relevant fact in issue In so far as it is question of fact it may appear to fall properly within the sphere of a Judge's duties The word used in the section is 'Court', but since the voluntariness or otherwise of a confession is a condition precedent to its admissibility, and therefore to its coming within the knowledge of the Jury at all, we prefer to think that the determination rests with the Judge alone To say that the Judge can be controlled on such a point by any precedent or rule of law is as plainly absurd as to say that precedents can decide what degree of proof ought to convince a Court of dacoity or murder Looked at from another point of view however namely that of procedure, the Subordinate Courts can be bound by authority Thus the rule in England as now stated fixes burden of proof on the prosecution no unimportant matter In Bombay it has long been generally supposed that what rule of law there is, is directly the reverse of that, and imposes the burden of proof on the prisoner For many years past Bombay Courts have been in the habit of referring to an old decision of a Division Bench delivered by *Nanabhai Haridas J* (vide *Reg v Bulwant*, 11 B H C 137) as an authority for the proposition that the prisoner alleging undue influence must prove it We venture to think after a careful study of that case and a protracted examination of the whole question that the authority is indifferent and the rule worse Any patient and unprejudiced enquirer will assuredly agree that the judgment in question is not very profoundly reasoned and that whatever finality may have been attached unthinkingly to its conclusion, that conclusion is the result of very superficial and imperfect analysis What the learned Judge said was that a confession was not to be presumed to have been improperly induced, merely because the prisoner alleged that it had been Strictly speaking 'presumption' one way or the other hardly enters into the question The Judge is to be satisfied That is to say, if from the prisoner's plea and the attendant circumstances of the case the confession appears to have been improperly induced, it lies upon the Crown to satisfy the Judge that this was not so before he can admit it And he can hardly be satisfied except upon proof or upon process of reasoned induction But the phrase used does no doubt lend colour to the assertion that what the Judge meant was that on such an allegation being made the *onus probandi* lay on the prisoner This as a general rule of law may very well be demurred to, and we have seen that the highest judicial functionaries in the world vehemently dissent from it The argument that whatever may be the law in England the Bombay High Court has rightly interpreted the Indian law, hardly deserves consideration The rulings are on a point of principle which is admittedly common to both systems of law and necessarily must be whenever such systems are the out growth of English legal principles The words of the Indian Statute do not in any degree alter or modify that fundamental principle By what methods of procedure it is best safeguarded, and the most vigorous effect can be given to its benevolent energy, is a point upon which the Statute Law is silent, and for light upon which the public naturally turns to the most eminent jurists The public then have now to decide between the value of *Mr Justice Nanabhai Haridas's* opinion and that of the *Lord Chief Justice* of England with whom *Justices Havelins* and *Mathews* agreed We have said that we thought the Bombay rule bad, and we support that opinion by one powerful consideration In practice the result of applying *Mr Justice Nanabhai's* rule has undoubtedly been to admit promiscuously confessions which are said to have been extorted Obviously the prisoner has no means of proving that he was tortured The only witnesses in 999 cases out of 1000 are the torturers and they are not likely to incriminate themselves If,

S 24. therefore, on every such occasion the prisoner is put to proof, the invariable reply is that he has none to offer, and the confession goes as a matter of course upon the record' *See*

But in another article in 2 Bom L R J 216 at p 227 another learned writer said "There is nothing in this section to indicate that a voluntary statement avowedly and manifestly false is inadmissible except perhaps the word 'confession' which at least implies a professedly true account. But be that as it may this section does not make voluntariness the basis of admissibility. It only lays down the rule of admission. For the origin, development or reason of this rule we must search the pages of history. That history is quite clear and throws a flood of light on the true object of the rule, which is entirely intended to augment the assurance of truth and minimize the chances of falsehood in a confession of guilt. Such being the case, a voluntary statement avowedly or manifestly known to be false could not be justifiably admitted on the strength of this section. Its admission would completely frustrate the object of this section." In *Sheikh Abdul v Emperor*, 85 Ind Cas 830=26 Cr L J 606 in a recent Calcutta case, *M Justice Moolerji* observed "Under section 293 (1) (2) Cr Pro Code it is the duty of the Judge to decide on the admissibility of the evidence and this duty he has got to discharge irrespective of the question whether objection has or has not been taken to the evidence by the parties themselves. He has therefore, to decide whether the confessions are admissible in evidence or not that is to say, he has to consider whether they have been duly recorded and whether they are free from the infirmities mentioned in s 24 of the Indian Evidence Act. In dealing with the question of their admissibility he has obviously to determine whether they are voluntary or not. Under section 299 Cr Pro Code the Jury have to weigh and value the evidence admitted by the Judge, and in order to do so they also must themselves go into the question as to whether they were made voluntarily. To judge of the truth or falsity of a statement one must endeavour to find out whether it was voluntarily made for a free and voluntary statement is some guarantee of its truth. It was not right therefore to take away entirely from the Jury the consideration of the question as to whether the confessions are voluntary or not and it was clearly the duty of the learned Judge to place before them the facts and circumstances, *pro et contra*, and ask them to form their own conclusions as to the character of confession."

A plea of guilty, no less than confession, must be regarded with caution. *Crown v Zoolfoo* 47 P R 1866 Cr. When proof in a case is limited to a confession, it is essential that too much stress should not be laid upon it. *Crown v Oomra* 31 P R 1867 Cr. A Judge who is to decide whether a confession is admissible in evidence or should be rejected, should exercise all necessary caution and vigilance, before admitting as voluntary, any confession tendered in evidence. But in coming to a decision on this point a Court should govern itself by the law and principles which regulate the procedure and adjudication in a Court of Justice and should not be influenced by conjecture or preconceived prejudice in recording what should be a decision based upon reasoned conclusion from the evidence adduced. *Nga Shue v Queen Empress* L B R (1893-1900) 145.

A confession by an accused person is not made irrelevant if otherwise relevant, merely because the accused person has been sworn or affirmed. *Regina v Empress*, 3 P R 1880 Cr. An oral confession by an accused person, no being open to exception under s 24, 25 or 26 of the Evidence Act is as an admission by an accused person, a relevant fact and may be proved at his trial under section 21 and therefore such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate. *Feroz v Emperor* 11 L R Cr 1918=45 Ind Cas 843=19 Cr L J 651, but see *Emperor v Maruti* 11 Bom L R 1065. Section 27 of the Evidence Act qualifies not only sections 24 and 26 but also section 21 all three of which lay down general rules excluding confessions and the same broad grounds underlie all the three. *Amerndia v Emperor* 45 C 557=22 C W N 213=27 C L J 148=44 Ind Cas 371=19 Cr L J 305 but see *Emperor v Nga Aung* 35 Ind Cas 962=17 Cr L J 102=U B R (1916) Vol. II 114, *Tara Singh v Emperor* 29 Ind Cas. 81=11 P R 1915 Cr =16 Cr L J 545.

Evidence is inadmissible to prove a confession made while an accused person is in Police custody, except in so far as any fact is discovered in consequence of the information so received from him *Fazt ullah v Emperor*, 22 Ind Cas 150=8 P W R 1914 Cr=38 P L R 1914=15 Cr L J 6

A confession made voluntarily in the sense that it was made spontaneously and without any inducement is admissible in evidence under s 24 of the Evidence Act. *Khetat v Emperor*, 45 A 300=21 A L J 143=73 Ind Cas 62=24 Cr L J 326

If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates, and the person confessing has no longer any hope of gaining anything from the authorities by making confession *Fateh Chand v Emperor*, 26 Cr L J 937=86 Ind Cas 1001=A. I R 1925 All 606

Where the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused was under no inducement or threat at the time he made the confession and he was informed that if he confessed he would not get a pardon *Held* that the confession was admissible in evidence *Mahpat v Emperor*, 103 Ind Cas 800=28 Cr L J 772=8 A I C K 416

The mere fact of a person being in custody cannot be a good basis for a presumption that any confession he may make is caused by an inducement, threat or promise having reference to the charge against him proceeding from some Police officer and sufficient to make him believe that he would be benefited in the trial by making it *Dadi Lodhi v Emperor*, 95 Ind Cas 59=27 Cr L J 731=A. I R 1926 Nag 368

If pressure exercised by a Police officer is sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporary nature, the confession would not only be weak in nature but wholly irrelevant under s 24 Evidence Act *Dip Singh v Emperor* 27 Cr L J 158=91 Ind Cas 894=A I R 1926 All 246

Confession was made by the accused against himself to a witness. The Judge did not disbelieve it but rejected it because he thought that it was made by the accused under the belief that it would be to his advantage *Public Prosecutor v Chandaya*, A I R 1929 Mad 92

Whether any threat or inducement was offered or not in a particular case is a question of fact and has to be decided with reference to the circumstances of that case and it is not safe to make any generalisations merely on the ground that a certain set of words used in a particular case has been held to be in the nature of an inducement *Kunya Subudhi v Emperor*, A I R 1929 Pat 275 Where there is veiled threat as well as inducement, a confession so obtained is invalid *Kunya v Emperor* A I R 1929 Pat 275

Made A confession made to one person by the accused is irrelevant even where the inducement, threat or promise is held out by a different person if the latter be a person in authority *Reg v Nairn*, 9 B H C R 416 But undoubtedly the fact that the person who obtained a confession by the use of a promise or a threat did not possess the power and authority to carry either into effect if known to the prisoner at the time of making the confession would nullify the effect intended to be produced upon his mind and the confession would be regarded as his free act *Commonwealth v Truderman*, 10 Gray (Mass) 173 190 The result of the cases seems to be that a confession is not inadmissible although made after an exhortation or admonition or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension prosecution or examination of the prisoner for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent' 3 Russ Cr p 393

Confessions made by signs or gestures Under this head we may group direct admissions of guilt in the form of affirmative gestures, nods or signs

**S. 24.** made in response to leading questions or to questions which assume the guilt of the person addressed. An affirmative nod in response to a direct accusation of crime is no less a confession than an oral statement. If the accusation is coupled with a threat or a promise evidence of the nod or gesture should be rejected as an attempt to accomplish by indirection what cannot be done directly. Acts speak louder than words. Express gestures often manifest more clearly the emotion of the mind than the most forcible and vehement language. A direct confession by an act is therefore inadmissible whenever the spoken or written word would be excluded. *Underhill Cr. Ev.* § 141

**Accused person.** The words 'accused person' in sections 24 and 25 include any person who subsequently becomes accused, provided that at the time of making the statement criminal proceedings were in progress. *Smith v. Emperor*, 43 Ind. Cas. 605 = 19 Cr. L. J. 189. Section 24 of the Evidence Act would apply even if the person who is said to have made the confession was not an accused person at the time when he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. *Per Shah J. in Emperor v. Cunna*, 22 Bom. L. R. 1247 = 59 Ind. Cas. 324. Formal accusation or custody is unnecessary. *In the matter of Huan Mya alias Abdool Wahid*, T. C. L. R. 21. The test which has to be applied in deciding whether this section applies, is the position of the person at the time when it is proposed to prove the admission not his position at the time when he is alleged to have made it. A confession therefore, made to a Police officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. *Saifuddin Ali v. Emperor*, 13 Cr. L. J. 465 = 15 Ind. Cas. 305 = 5 Bur. L. T. 92. The incriminating statements of a third person that he committed the crime for which the accused is on trial are hearsay. Such persons must be produced as witnesses. *Rhea v. State*, 10 Yerg. (Tenn). Accordingly evidence on a trial for homicide that a person who was present when the deceased was killed, then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness. *Selby v. Commonwealth (Ky)* 80 S. W. 221. The prisoner may, of course, disprove his guilt by proving the guilt of some other person. But he cannot do that by introducing the extra-judicial confession or declaration of that person that he intended to commit, or that he had committed the crime. The extra-judicial declaration is never conclusive upon the declarant. He may if he be subsequently indicted because of this so-called confession, demonstrate its falsity and absolve himself. To receive such statements is exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured. *Underhill Cr. Ev.* § 145.

**If it appears.** "The words lend some colour to the argument that the confession ought to be made to appear to the Judge to have been improperly induced—in other words that the *onus probandi* is in the first instance on the prisoner. I do not accede to that argument. A confession may appear to the Judge to have been the result of inducement on the face of it and apart from any proof at all. In every case I contend, where a prisoner says he has been forced to confess, the Judge is put upon judicial enquiry, and as I ended before I end now that enquiry should precede the admission of the confession and any examination into its truth. *Lex*, 2 Bom. L. R. (Journal) 163. 'A confession to be admitted at all in evidence must be proved to have been made voluntarily and not to have been caused by any of the means mentioned in section 24 of the Indian Evidence Act read with sections 28 and 29 of the same Act. When admitted it is to be dealt with like any other piece of evidence, and acted on only if it is believed to be true.' *Per Parsons J. in Queen Empress v. Baiya Dayadin*, cited in 2 Bom. L. R. (Journal) 163. But *Fullon J. in Queen Empress v. Basuanta*, 25 B. L. R. 761 (765) dissenting from the above case said "The use of the word 'appears' indicates, it may be argued, a lesser degree of probability than would be necessary if proof has been required. A Court might perhaps in a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appearance

to it to have been the case" It is not possible for a Court to say that the making of a confession appears to have been caused by any inducement, threat or promise except upon evidence before it. The inference may be suggested by the confession itself or by the evidence of the prosecution or by evidence adduced by the accused person or by the surrounding circumstances which the Court is always bound to take into consideration but the conclusion cannot be reached on surmise or conjecture. Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case. *Budhoo v Emperor*, A I R 1925 Lah 676=29 Cr L J 385=108 Ind Cas 387. If in the circumstances of a case it appears to the Court that there is reason to suspect that a confession was obtained by inducement so as to bring it under the provisions of section 24 of the Evidence Act, the prosecution to make the confession admissible in evidence against the accused must show that it was freely made. *Ashutosh v Emperor*, 68 Ind Cas 413=26 C W N 64=23 Cr L J 573. It is not possible for a Court to say that the making of the confession 'appears' to it to have been caused by any inducement, threat, or promise, except upon evidence which is before the Court. The inference may be suggested by the confession itself, or by the evidence of the prosecution, or by the evidence adduced by the accused person, or by surrounding circumstances which the Court is always bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture. *Emperor v Dewan Kahan*, 4 Pat L F 186=72 Ind Cas 961=24 Cr L J 497=A I R 1923 P 13. When the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under section 24, the trial Judge must make up his mind upon this issue and decide the question of admissibility before relying upon the contents of the confession. *Fatil Chand v Emperor*, L R 6 A 89 C=26 Cr L J 937=86 Ind Cas 1091=A I R 1925 All 606.

In *Emperor v Panchani Dutt* 29 C W N 300=52 C 67=86 Ind Cas 414=26 Cr L J 782=A I R 1925 Cal 587, *Mr Justice Mookerjee* said "There are words and expressions in this section to which one must pointedly direct his attention in order to construe the section. There occurs the word 'appears', the 'inducement threat or promise having reference to the charge against the accused person' must proceed from a person in authority, but nothing is said as to the person to whom it is to be directed, it is enough if such inducement, threat or promise would in the opinion of the Court be sufficient to give the accused person grounds which would appear to the accused person (and not the Court) reasonable for supposing that by making the confessions he would gain an advantage or avoid an evil of the nature contemplated in the section. It will be seen therefore that the mentality of the accused has to be judged rather than that of the person in authority. That being so not merely actual words, but words accompanied by acts or conduct as well on the part of the person in authority, which may be construed by the accused person situated as he then is, as amounting to an inducement, threat or promise will have to be taken into account. A perfectly innocent expression, coupled with acts and conduct on the part of the person in authority together with the surrounding circumstances may amount to inducement, threat or promise. In scrutinising a case from the point of view of section 24 of the Evidence Act the Court will have to perform a three fold function. It will have as a Court, to determine the sufficiency of the inducement threat or promise as affording certain grounds, it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section. Lastly it will have to judge as a Court if the confession appears to have been caused in consequence of the inducement, threat or promise. The use of these vague expressions has been deliberately made with the object of securing absolute fairness in the matter of admitting confessions in judicial proceedings. It is indeed very difficult to lay down a hard and fast rule as to the sufficiency of the circumstances which would make the confession irrelevant under the provisions of this section. Reported decisions afford us little help in this direction. A study of the cases, bearing upon the question, which are too



**S-24.** numerous to mention, would show that anything ranging between the barest suspicion on the one hand and absolute certainty on the other has been held to be sufficient to satisfy the requirements of the section. In this connection reference may be made to *Reg v Balwant*, 11 B H C R 137, *Queen Empress v De L Ana* 15 B 452 *Emperor v Mulhau Kumar*, 1 C L R 275 (281), *Queen Empress v Ghanya*, 19 B 728 (731), *Emperor v Bhagi*, 8 Bom L R 93 *Ghatu Pramanik v King Emperor*, 28 C 613 at 617 and *Ashutosh Dutt v King Emperor*, 26 C W N 54. The true view seems to have been taken in the case of *Queen Empress v Basanta*, 25 B 168, where it was said that the section does not require positive proof (as defined in section 3 of the Act) of improper inducement to justify the rejection of the confession, the word 'appears' indicating a lesser degree of probability than would be necessary if 'proof' had been required. There is some diversity of judicial opinion on the question regarding the quantum of proof as to the voluntary character of a confession viz., whether the prosecution will have to prove affirmatively that it was voluntarily made or they should do so only in the event of a doubt arising in the mind of the trial Judge (see for instance the observations of *Parke B* in *R v Warringham*, 2 Den C C 44 and of *Cave J* in *R v Thompson*, (1893) 2 Q B p 13 at p 17). It is unnecessary to go into this matter, with regard to which there was for some time a diversity of judicial opinion in this country as well, for having regard to the words of section 24 of the Indian Evidence Act and also to the presumption attaching to certain recorded confessions, and arising under section 80 of the Act the true and generally recognized view is that a confession duly recorded by a Magistrate with the proper certificate appended to it will be admitted in evidence subject to the provisions and restrictions contained in section 24, that under the latter section a well grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession because it would be idle to expect the accused to prove the inducement, threat or promise, for in most cases such proof cannot be available. To reject a confession it is not necessary that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion, etc. Anything from the barest suspicion as to positive evidence would be sufficient for a confession being discarded. *Raghu v Emperor*, 23 A L J 821=89 Ind Cas 903=L R 6 All Cr 161=26 Cr L J 1431=A I R 1925 All 627 P C.

**Burden of proof.** The cases are not harmonious upon the question whether the prosecution has the burden of proof to show the free and voluntary character of the confession. Many of the cases sustain the affirmative of this proposition, and require the prosecutor to show before the confession is received in evidence, by some evidence that it was freely and voluntarily made. *People v Soto*, 49 Cal 67 (*Am*), other authorities sustain at least in the absence of evidence to the contrary, the very reasonable theory that a confession-like most of the acts and utterances which are the result of human agency, is presumed to have been voluntary until the contrary is shown. *Rufer v State*, 25 Ohio St 464, *State v Patterson* 73 Mo 695. This view casts the burden of proving that the confession was involuntary upon the accused. In any case it is his right to show by primary evidence that the confession was not voluntary and it is the duty of the Court, in determining the competency of the confession, not only to consider the evidence for the prosecution showing that the confession was voluntary, but the evidence elicited by the accused to prove the contrary in his favour as well. *Ex v Fildment* 35 Iowa 541. When a confession is offered by the prosecution in a criminal case it is the right of the counsel of the prisoner before it is admitted to cross-examine the witness who purposes to testify to it as to circumstances surrounding the making of it, and the defence may also call, at the same time independent witnesses and examine them going thoroughly into the whole matter as to how the confession came to be made the parties present, the physical condition and state of mind of the prisoner at the time it was made and then the Court with all these facts before it, is to pass upon its admission. *State v Hill*, 60 N J L 626=47 Atl 814. In *Willis v State* 43 Neb 102=61 N W 2d on page 255 the Court said "In the trial of a criminal case, where the state calls a witness for the purpose of proving a confession made by the prisoner before the trial, it is allowed to defend such information it is the privilege of defendant's counsel to

the better practice, to cross-examine the witness as to the circumstances under which the confession proposed to be detailed was given. *Counsel cannot wait until the witness has answered and then move to strike the statement from the record if the answer is responsive to the enquiry*." So a refusal before the confession is admitted to allow counsel for the prisoner to cross-examine the witness as to the voluntary character of the confession, or to allow the accused to testify, and to explain his mental condition when it was made or to show by the evidence of others that it was improperly obtained is reversible error. *Underhill Cr. E.* § 127

**Section criticised.** "The maxim of the English Courts is that law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner. 2 *Stark E.* 36. But the Indian Act places the responsibility of gauging the force on Indian Judges who have acted upon it. In *Reg. v. Navory Dada bhai* 9 B H C R 367, *Sargent J.* said 'Section 24 leaves it entirely to the Court to form its own opinion as to whether the inducement threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit, or avoid some evil of a temporal nature by confessing.' We have thus as many stands as there are Judges—*Quot judices tot sententiae*,—an obviously objectionable practice. But the greatest culprit in the section is the word 'appears'. Thereby the very spirit of English law is abandoned, and it has consequently led to the admission of evidence which would be rejected in England without a moment's hesitation." 2 *Bom. L. R. J.* 227

Was the inducement sufficient by possibility to elicit an untrue confession of guilt? While no one seems to have questioned the fundamental principle of exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle. It has been seen that the reason for distrusting a confession arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irrespective of its truth or falsity) has become the more desirable of two alternatives between which the person was obliged to choose. Thus the essential features of the situation are, first, the fact that the alternative is presented between present silence (or assertion of innocence) and some other prospect held out by and associated indispensably with the confession of guilt, and secondly, the relative advantage of this confession, with its consequences certain or contingent, over silence with its consequences certain or contingent. The exact situation is perhaps apt to be obscured by the ordinary phrase designating "a promise of benefit or a threat of harm" as the circumstances availing to exclude. The truth is that this duplicate form of statement is not essential, it indicates merely superficial features and the situation is always reducible to the single form above stated. Thus, where a promise (for example of pardon) is the inducement for a confession, its effect is to make the certain freedom which will accompany false confession more attractive at the moment than the mere possibilities of freedom, coupled with temporary restraint, which attends silence. Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death. Thus in both cases—a promise and a threat—the confession is untrustworthy because it has been associated with an attraction too strong to resist. In general, then, the position of the confessing person which causes distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity. Each instance presented may be thus stated. What were the prospects attending confession (irrespective of its truth) to be weighed by him against the prospects of non-confession? The test of exclusion thus would be: Human nature being what it is, were the prospects attending confession (involving the equalization or averaging of the benefit of realizing the promise or the benefit of escaping from the threat, against the drawbacks, moral and legal, of furnishing damaging evidence) as weighed at the time against the prospects attending non-confession (involving a similar averaging) such as to have created in any considerable degree a risk that a false confession would be made. Putting it more briefly and roughly was the inducement such that there was any fair risk of a false confession? *Wigmore* § 824

24. **Person in authority** "It is an expression well known to English law on question of this nature and although all rules of evidence which were in force at the passing of the Act are repealed, the English decisions on the subject can scarcely be regarded as authorities they may still serve as valuable things. *R v Warup* 9 B H C R 358 (469) An inducement or threat, in order to vitiate a confession, must come from a person in authority, and must have some relation to the crime charged. Since the inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to non-confession, it is obvious that the various situations can be best grouped according to the nature of the inducement. But the strength of the inducement depends more or less upon the power of the person offering it the rule of law must first specify the kinds of persons from whose mouths the inducements may be regarded as having any value. *Wigmore* § 821 Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or promise, there is no reason for treating the inducement as likely to produce an untrue confession. It is in such a case not due to the inducement but to the confessor's own discretion, for he has no real alternative to choose between. *Wigmore* § 823 So by a "person in authority" is meant some one who has the right or power to fulfil the promise or to carry out the threat. The Court cannot undertake to examine into all the collateral circumstances surrounding a confession. A person may be persuaded by friend, by a religious advisor or by an attorney to make a statement of the facts which may amount to a confession and such statement, if not privileged by reason of the relation between the accused and the party to whom it is made may be used. For example X, who is charged with the murder of A is induced by the chaplain of the jail to confess his sins. He accordingly confesses the crime with which he is charged. It has been held that such a confession is voluntary. *Reg v Gilham*, 1 Moody, Crown Cr. 186, but see *R v Radford*, tried at Exeter Summer Assizes, 1823 where a clergyman had prevailed on the prisoner to confess a murder by dwelling on the heinousness of the crime, and the denunciations of scriptures against it, without giving him any caution that it could be used against him, and *Best C J* refused to allow the clergyman to state the confession on the ground that it was improper in the clergyman to violate the confidence reposed in him by the prisoner and expressed a strong opinion to that effect. *R v Sparles* cited *Perke*, 78 *Williams v Williams*, (1798) 1 Hagg (cons.) 514.

On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute. *Wigmore* § 829 In England the older and more usual view was that inducement to exclude must come from a person who has legal interest or authority in the arrest and prosecution. *R v Rou*, R & R 153 *R v Gibbons*, 1 C & P 94 *R v Taylor*, 8 C & P 734. In 1839 *Lewin* in his note to his 2 *Lew Cr C* 17, said "The cases seem to establish the principle that where a confession is obtained through the medium of a suggestion made by a person from whom the prisoner can have nothing to hope or to fear it ought to be received." But in *R v Dunn* *R v Staughter*, 4 C & P 543, *Bosanquet J* said "Any person telling a prisoner that it will be better for him to confess will always exclude any confession made to him." See also *R v Spencer* 7 C & P 116. Finally in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test—not the mere existence of actual control or influence growing out of social or commercial relation of the persons. *Wigmore* § 829. In connection with an inducement held out by master and mistress, *Parke B* in *R v Moore* 2 Den Cr C 520 said. Perhaps it would have been better to have held (when it was determined that the Judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out, together not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, if the threat or inducement is held out, actually or constructively, by a person in authority it cannot be received, however slight the threat or inducement. And

the prosecutor, Magistrate, or constable, is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. But it is only where the offence concerns the master or mistress that their holding out the threat or the promise renders the confession inadmissible. In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house, she was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence." In England a confession to a constable's wife was excluded *R v Harduel*, 1 C & P 98 note. But a confession made to a by-stander was admitted *R v Gibbons*, 1 C & P 97, see also *R v Taylor* 8 C & P 733. A confession made to the mother of the prosecutor's wife, in the latter's presence was excluded *R v Simpson*, 1 Moody Cr C 410. So also when it was made to the prosecutor's wife who helped to manage the business. In *R v Taylor*, 8 C & P 302 the wife of the prosecutor and mistress of the accused was held to be a person in authority over the prisoner. So also is an attorney endeavouring to find evidence for a prosecution *R v Gwynon* 2 Cox Cr C 67. A confession made to a medical man in the presence of prosecutrix and the accused's husband could not be admitted *R v Garner* 1 Den Cr C 731. A confession made to a fellow prisoner is not excluded *R v Shaw*, 6 C & P 372 but it is so excluded when it is made in the presence of the arresting constable *R v Milton*, 3 Cox Cr C 507.

"So the result of the cases seems to be that a confession is not inadmissible although made after an exhortation or admonition or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution or examination of the prisoner for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent." *Russ Cr* 2164.

In a case of murder a surgeon stated that he held out no threat or promise to induce the prisoner to confess, but a woman who was present said that she had told the prisoner she had better tell all, and then the prisoner made a certain confession to the surgeon. *Parl J* after consulting *Hullock B* admitted the confession, holding that if the promise had been held out by a person having any office or authority, as the prosecutor, constable, etc. the case would be different. *Wignore* § 829, *Russ Cr* 2164, *R v Taylor*, 8 C & P 734. The prisoner was indicted for placing a piece of iron on a railway and a platelayer in the service of the company but who was not employed by any of his superiors to see the prisoner, had told him that it would be a good deal better for him if he owned it. The prisoner knew that the platelayer worked on the line. *Cresswell J* said "I am disposed to think the statement of the prisoner is receivable the witness not being a person having any authority to make any promise, still he was in a position that might reasonably lead the prisoner to believe he had, and thereupon the counsel for the prosecution declined to ask as to the statement of the prisoner." *R v Fievin* 6 Cox 530, *Russ Cr* 2165. *Phipson* defines a person in authority to be some one who is engaged in the arrest, detention, examination or prosecution or some one acting in the presence and without the dissent of such a person. *Phip Li* 250, *h v Moore*, *supra*. *R v Luchurst* 1853 *Roscoe Cr Li* 44. "In *R v Kingston*, 4 C & P 387 *Parl J* after conferring with *Littledale J* held that an inducement held out by a surgeon called in professionally was sufficient to exclude a confession—apparently the only decision on the point. In *R v Garner*, 1848, the inducement was held out by the surgeon and the confession was made to him but the master and mistress were present. In *R v Sleeman*, it was held that the daughter of the master of the house who had the maid servant in her custody for a temporary purpose was not a person in authority. A paid female searcher was held to be a person in authority, and when a defendant on being searched said "If I tell the truth shall I be hung?" and she replied "No, nonsense. Who told you so?" Statement after that was rejected. *R v Hensor* 4 T & F 360 1864. In as much as any one may, on reasonable suspicion, apprehend any one suspected of felony a person in no way connected with the charge may put himself in the position of one in authority. *R v Parat*, 4 C & P 570, 1831. A sailor was charged with robbing another of

S. 24 the crew The master said, 'If you do not tell me who your partner was I will commit you to prison', and he thereupon confessed *Alderson B* held the confession inadmissible *Parke B* explained this case in *R v Moore* <sup>supra</sup> on the ground that the master had threatened to take part in the prosecution And it appears from *R v Fitz Laugher*, C & K 225 (1816), *R v Luelhurst*, <sup>supra</sup> and *R v Garner*, 1818, that even if the person in authority be silent, he will be presumed to acquiesce in the inducement" *Roscoe Cr F* 44, see also *Hobbs* Vol 9, *Confession*, para 763

In *Reg v Navroji Dadabhai*, 9 B H C R 358 (368) W, a travelling auditor in the service of the G I P Railway Company, having discovered defalcations in the account of the prisoner who was a booking clerk of the Company, went to him and told him that 'he had better pay the money than go to jail,' and added that it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager, in whose presence he signed a receipt for, and admitted having received a sum of Rs 826 8 Held, that the words used by W, the travelling auditor, constituted an inducement to the prisoner to confess and that W was a person in authority within the meaning of s 24 of the Indian Evidence Act, and that the receipt signed by the prisoner was therefore not admissible in evidence on his trial In delivering the Judgment, *Sargent C J* after discussing various English Cases said 'He (W) would clearly be so (ie a person in authority), I think, according to English authorities The test would seem to be had the person in authority to interfere with the matter? and any concern or interest in it would appear to be held sufficient to give him that authority as in *Queen v Warrington*, 2 Den C C 447 N, where *Parke Baron* held that the wife of one of the prosecutors who was concerned in the management of their business, was a person in authority, and we find the rule so laid down in *Archbold's Criminal Practice* The words 'person in authority' include the prosecutor *Ashutosh Dutt v The King Emperor*, 26 C W N 51 'The expression 'person in authority' has, I think, always been widely interpreted The rule is the same in India as in England where it has been held to include not only the prosecutor, but also the wife of the prosecutor, or one of prosecutors and even, in some circumstances, relations of the same, vide, *R v Warrington* 2 Den C C 447 N, and *R v Taylor*, 8 C & P 733 An attorney engaged in an endeavour to get up a prosecution has also been treated as a person in authority *R v Croydon* 2 Cox. C C 67 For authority in India I may refer to the remarks of *Sargent C J* in *Reg v Navroji Dadabhai*, 9 B H C R 358 Mr Barton has quoted, on the other side, *Emperor v Mahomed bul sh Karimbal sh* 8 Bom L R 507=4 Cr L J 49, but in that case the prisoner offering the inducement, while the superior officer of the accused had absolutely nothing to do with the proceedings against them and it was on this ground that the confession was admitted *Per Aylmer J* in *Smith v Emperor*, 43 Ind C 605=19 Cr L J 189 A village Magistrate is a person in authority *Thanday v Emperor*, 26 M 38=2 Weir 733, but the son of a village Magistrate is not a person in authority In *re Kuppa Thachan*, 2 Weir 733 A travelling auditor of a Railway is a person in authority so far as a Railway clerk is concerned *Reg v Navroji* 9 B H C R 358 Where the matter before a *Panchayat* was, whether or not the accused had by their acts disqualified themselves from further social intercourse with the rest of the brotherhood, and the accused made statement admitting that they were guilty of murder held that the provisions of section 24 of the Evidence Act, could not be pleaded against their admissibility, for the members of the *Panchayat* were not in authority over them within the meaning of the section nor was there any threat, inducement or promise made with reference to any charge against the accused *R v Mohan Lal*, 4 A 46=A W N 18-1 But where a *Panchayat* was assuming an authority as was leading the accused to believe that he had that authority held that a Court would be justified in holding that he was 'a person in authority' within the meaning of section 24 *Na v Emperor* 9 C W N 474=2 Cr L J 256 *Emperor v Josha*, 11 C W N 44 But a member of the Punch is not a person in authority *Emperor v Philip* 4 Bom L R 785 A jildar is a person in authority *Mutsaddi v Crown*, 2 P L R. 1911=12 Ind Cas 642=12 Cr L J 554, *Karam v Emperor* 31 P L R. 1911=12 Ind Cas 642=12 Cr L J 554, *Nya Kya Thun v Emperor* 15 Cr L J 681=26 Ind. Cas 129 A zamindar is a person in authority

*Imperator v Dabul*, 4 S L R 209=9 Ind Cas 718=12 Cr L J 119 A president of a *panchayat* is a person in authority *King Emperor v Aushu Bibi*, 20 C W N 512=23 C L J 477=17 Cr L J 188=33 Ind Cas 828 Zamindars *qua* Zamindars are not persons in authority under section 24 of the Evidence Act *Crown v Long*, 10 S L R 110 But wherever Zamindars are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of s 24 of the Indian Evidence Act *Crown v Long*, 10 S L R 140 A headman is a person in authority *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 311=10 Bur L T 270 A confession made to a police patel is invalid *Emperor v Ramadhan*, 31 Ind Cas 349=17 Bom L R 898=16 Cr L J 740 A Lambardar is a person in authority *Muhammudar v Crown*, 4 Lah L J 235=A I R 1922 Lah 263 *Panchayatdars* are not persons in authority *Mulmayandi In re*, 45 M L J 815

The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, 'has the person authority to interfere in the matter' and any concern or interest in it is sufficient to give him authority *Smith v Emperor*, 43 Ind Cas 605=19 Cr L J 189 The mere fact that the accused thought that the persons whom he addressed were persons in authority would not be sufficient to justify the Court in holding that they were persons in authority *Emperor v Ganesh* 50 C 127=74 Ind Cas 264 A collecting *panchayat* and an assistant *panchayat* who have taken part in holding the enquiry into the circumstances under which the offence has been committed constitute 'persons in authority' *Ibid* A pleader's clerk is not a person in authority *Emperor v Ram Audh*, 88 Ind Cas 514=2 O W N 393=26 Cr L J 1151 *Zaladar* serving under a great State is a person in authority *Taule v Emperor*, A I R 1929 Oudh 272 An *Inamdar*, who is in a position inferior to that of an *ilqaadar* cannot be treated as a person in authority *Ghulam Muhammad v Emperor*, A I R 1929 Lah 558 The *Mukha* of a village is a person in authority *Emperor v Ali Har Puri* 7 L R 156 Cr =97 Ind Cas 44=A I R 1926 All 737

**Confession when caused by inducement, threat or promise** The terms of the inducement constantly involve both threat and promise, a threat of prosecution if disclosure is not made a promise of forgiveness if it is (*Hills Ex 2nd Ed 302*) But it is difficult to lay down any hard and fast rule as to what constitutes inducement The question is one for the discretion of the Judge, and its decision will vary in each particular case *Nort Ex 161* The inducement need not be expressed but may be implied (*R v Gilles* 11 Cox 69), it need not be made to the accused directly if it is intended to come and does come to his knowledge *R v Thompson*, (1893) 2 Q B at p 17, *Pouell Ex 106* 'Before a confession, either judicial or extra judicial, can be received as such, it must first be shown that it was in every respect freely and voluntarily made This means that the confession must not be obtained by any sort of threat or violence nor by any promise, either direct or implied, however slight the hope or fear produced thereby, nor the exertion of any influence And while circumstances are usually invoked to determine whether the confession is voluntary, yet as a safe general rule it may be said that the statement will be presumed to be voluntary, unless it appears that it was inspired by a threat or a menace or procured by promises or inducements or the expectation of some hope or benefit *Underhill Cr Ex § 126* 'The term a promise or a threat', as well as the term 'voluntary', are also misleading in another way says *Prof Wigmore* "for they obscure the fact that (even when threats are used) the situation is always one of choice between two alternatives—either one disagreeable to be sure but still subject to a choice As between the risk and a false confession the latter would usually be considered the less disagreeable but it is none the less voluntarily chosen The term 'voluntary', then, as describing the absence of the vicious element which excludes a confession, is, in ultimate exactness unsound All conscious verbal utterances are and must be voluntary and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions The choice of false confession is associated with a prospect (namely, of escape from present alarm) so tempting that it is not human nature to resist it' *Wigmore § 824*

S 24

The material inquiry therefore, is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind. But this, after all, is merely one of several tests or rules, which have been employed as representing a general principle underlying these differently phrased tests. The foundation of all rules upon this subject rests upon an inquiry to exclude confessions that are not voluntary because such are probably untrue." *Withers v J in State v Taigneur*, 5 Rich L 400 "The ground, said *Chief Justice Shaw in Com v Morey*, 1 Gray 162, 'on which confessions made by a party accused, under promises of favour or threats of injury, are excluded is incompetent is not because any wrong is done to the accused in using them but because he may be induced by pressure of hope or fear, to admit facts unfavourable to him, without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted.' This being the general underlying principle—the risk of a false confession of guilt, under the inducement of powerful considerations,—various tests or rules of thumb have obtained more or less currency in the application of the principle to the different kinds of influences that have operated to induce the confession. The only sound and satisfactory test, judged by the above principle, is one which is unfortunately found only in frequent use. "The only proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one." *R v Thomas*, 7 C & P 346, *R v Holmes*, 1 C & K 248, *R v Horabrook* 1 Cox Cr 51, *R v Garner*, 1 Den Cr C 331, *R v Reason*, 12 Cox Cr 229. The controlling inquiry is whether there had been any threat of such a nature that from fear of it the prisoner was likely to have told an untruth. If so, the confessions should not be admitted. Its exclusion rests on the connection with the inducement, they stand to each other in the relation of cause and effect. If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence." *Williams v State*, 63 Ark 51, *Greenl Ev* § 219 (a).

It is much more common to state the test without any reference to the probability of the inducement's causing an untrue confession of guilt, i.e. to state that a confession is inadmissible if made under the influence of a promise or threat or (taking the subjective point of view to express a similar notion) if it is made through fear (of harm threatened) or through hope (of benefit promised), and this has been distinctly taken by many Courts to include any sort of threat or promise whatever. *R v Moore*, 2 Den Cr C 325, *State v Long Haywood* 45, *Bonner v State*, 55 Ala 245, *Greenl Ev* § 219 (a). Another test, quite as early, historically, and quite as common as the preceding one is whether the confession was 'voluntary'. But this phrase, as it has already been shown is so indefinite that it is of little service in itself, and is usually found in combination with the preceding one, called in as a subordinate test. *Thomson's Cr* 1 *Teach Cr C* 293, *R v Fennel*, 7 Q B D 150 *R v Thompson* (1893) 2 Q B 17, *State v Jones* 54 Mo 479, *Greenl Ev* § 219 (a).

A confession induced by a false allegation is irrelevant even if it is true. *Queen Empress v Chintaman*, Rat Un Cr C 153. When the statements made by the accused amount to saying that the other accused were really guilty, and any share they had in the offence was owing to compulsion they are not confession which can be used against the other accused. *Queen v Aiso*, 7 W R 8.

Confession was made by the accused against himself to a witness. The Judge did not disbelieve it but rejected it because he thought that it was made by the accused under the belief that it would be to his advantage. It is held that this was not a confession made by promise of reward or by fear and therefore is not invalid. *Public Prosecutor v Chandaya* A I R (1929) Mad 92.

The question whether or not a statement is to be regarded as admissible as being a confession or not usually arises in the case of a statement made to a Police officer or in the case of a statement made to a man while in custody of the police. *Imbar Ali v Emperor* A I R 1929 Cal 539.

If a threat by the Magistrate to come under this section it must be such as to give the accused grounds for supposing that, by making the confession he would gain an advantage. In this case, before the accused confessed, the

Magistrate said to him "It is no use your trying to get out of it. You were seen with the pair of shoes." *Held* that though the language used might be considered to overcome the mind of an uneducated and inexperienced boy yet, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession, and that it therefore did not invalidate the confession. *Mukherji v Queen Empress*, U B R (1897-1901) Vol I, 147

A *punchayat* is not a Police officer, but only a person in authority within the meaning of section 24 of the Evidence Act. Therefore a confession made by an accused before a *Panchayat* is admissible in evidence, if the *Panchayat* does not make use of any inducement to admit his guilt. *Emperor v Jasha Beua*, 11 C W N 904=6 Cr L J 154. But where an inducement to confess a crime proceeds from a member of the *Panch*, the confession made in virtue of such inducement is not bad under s 24 of the Evidence Act, the member of the *Panch* not being a person in authority. *Emperor v Philip Juez Fernandez*, 4 Bom L R 785

Admissions made by the accused to the *zaidar* were not held admissible in evidence in as much as it appeared that the *zaidar* had told the accused, before the statements were made, that they would get some benefit from Government if they spoke the truth. *Mutsaddi v Crown*, 221 P L R 1911=12 Ind Cas 642=12 Cr L J 554

The suggestion that accused persons should for the ends of justice, be encouraged to confess by the knowledge that if they do so they will receive lenient punishment is one which is likely to convey an entirely wrong impression and to be extremely mischievous. *Nga Kyaw v King Emperor*, U B R (1916) 2nd Cr p 113=17 Cr L J 402=35 Ind Cas 962

Even in cases where certain words used by the Police officer to the accused amounted to a threat that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence. *Emperor v Tilak*, 17 Cr L J 33=32 Ind Cas 321

Section 24 of the Evidence Act precludes the admission of a confession made by an accused to a Headman as a result of the latter telling him to speak the truth because if the other side called witnesses the case against him would not come out. *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L T 270

In the absence of any threat, inducement or promise the confession to the Superintendent of the Excise is not shut out under s 24 of the Evidence Act in a prosecution for illicit possession of opium. *Rukmal v Emperor*, 22 C W N 451=45 Ind Cas 284=19 Cr L J 524. When a confession was made after Police custody for several days and protracted consultation between the accused and the investigating Police officers and was subsequently retracted. *Held* that the confession was made under circumstances which exclude its admissibility. *Mohar Ali v Emperor* 23 C W N 886=53 Ind Cas 929, *Emperor v Piamatha*, 30 C L J 503. *Rusna Tel v Emperor*, 54 Ind Cas 881=21 Cr L J 177

Where the Magistrate in whose presence the confession was made was called as a witness and sworn that the statements made before him were made freely, that the accused willingly, signed the statements when drawn up, that at the time the confession was made no police man was present that the hand cuffs upon the accused were removed and that he told the accused that he was a Magistrate and that only the truth should be stated, *held* that the confession made by the appellant was not otherwise than voluntary and truthful. *Daulat Ram v Emperor*, 2 Lah L J 653. But a confession made by an accused person under fear which was encouraged by a Police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate is inadmissible in evidence. *Emperor v Anant*, 32 C L J 201

A person while undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied implication of the petitioner in the matter. The statement made to the Magistrate was



**S 24.** thereupon admitted in evidence and the accused was convicted *Held*, that the statement was not admissible in evidence *Bijai Khan v Emperor*, 18 A L J 87=54 Ind Cas 893, see also *Emperor v Cunnah*, 59 Ind Cas 324=22 Bom L R 1217=22 Cr L J 68

As soon as an accused person, whose confession is being recorded informs the Magistrate that he is making the confession under inducement, it becomes unlawful to record the confession and such a confession if recorded, is inadmissible in evidence and not to be allowed to go to the jury. It makes no difference whether there actually was any inducement or not *Dinanath v Emperor*, 60 Ind Cas 106=23 Bom L R 338=22 Cr L J 318 Delay in producing before the Magistrate prisoners who are willing to have their confessions recorded affects the value of the confession *Emperor v Panchcori*, 29 C W N 300=32 C 67=56 Ind Cas 414=26 Cr L J 782=A I R 1925 Cal 587

**Circumstances under which confession becomes involuntary** It is very difficult, if not impossible, to lay down any general rule by which the amount or degree of duress or improper influence which will destroy the voluntary character of a confession can be regulated or measured. In *Hopt v People*, 110 U S 342, the Court observed "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all the cases, as the question is necessarily addressed in the first instance to the Judge and since his discretion must be controlled by all attendant circumstances, the Courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." It is very difficult to ascertain what language used to the prisoner would, under the particular circumstances of each case, constitute such a threat or promise. The sex, age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in determining whether the confession was or was not free and voluntary. *Williams v State*, 15 Ala 33. For it is well known that a determined, courageous and experienced man is not so susceptible to threats or to promise of immunity as a feeble woman or a person of weak intellect or will power. *Biscoe v State*, 67 Md 6, 7, *Underhill Cr Er* § 128

**Inducement at an end** "If the impression produced by the promise or threat is clearly shown to have been removed, e.g. by lapse of time or by intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement a confession subsequently made will be strictly received *Phipps* 252 *R v Clewys*, 4 C & P 224 *R v Howes*, 6 C & P 404, *R v Richards*, 5 C & P 318, section *infra*

**Having reference to the charge against the accused** The charge here means a criminal charge, or a charge of an offence in a criminal proceeding. The words "having reference to the charge against the accused" read with the words "in a criminal proceeding" antecedent, and the words "in reference to the proceedings against him" following imply that the inducement (threat or promise) must be with reference to the charge of an offence in the Criminal Courts of the country and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings begun at the time of the confession. In other words the object of the person using the "illegitimate pressure" must be to obtain a confession of having committed an offence which at the time or which will be the subject of a charge and proceedings in the Criminal Courts, with the intent that the confession may be used in the subsequent criminal proceedings. In this view it is difficult to understand, *Queen v Hicks*, 10 B L R App 1 5 M L J Art p 26 The inducement must have reference to any charge against the accused person. *R v Mohan Lal* 4 A 45 *R v Garner*, 2 C & K 920 A promise or threat to render a confession irrelevant must relate to the charge—i.e. must reasonably imply what the prisoner's position with reference to it will be made better or worse according as he confesses or not *Phipps* *Er* 4th Ed 244 *Will. Er* 2nd Ed 210 302 An inducement to confess regarding one crime will not invalidate a confession as to another and different one. *R v Garner* 3 Russ Cr 6th Ed 489 (n). But this rule is not

applicable where the two offences are so blended together as to form in fact but one transaction *R v Hearn*, 1 C & M 109, *Tayl. Ev* § 891. Where a confession has been obtained by an inducement having no connection with the charge it is not inadmissible *Philp. Ev* 4th Ed 244, *R v Green* 6 C & P 655, *R v Lloyd*, 6 C & P 393, *R v Sexton*, cited in *Joy on Confessions*, 17 19. Where a threat was held out—that if defendant did not tell, he would be given in charge—without the charge being stated though subsequently it was stated, and thereupon a confession was made it was held to be inadmissible *R v Lockhurst*, 1 D & P 245=6 Cox C C 243. A confession will not be excluded which has been obtained from the accused by an inducement relating to some collateral matter unconnected with the charge *Roscoe Cr Ev* 43.

**Sufficient in the opinion of the Court.** The rule laid down in this section appears to be worded in accordance with the wordings of *Parke B* in *R v Hannah More*, 2 Den Cr C 522 where he said “Perhaps it would have been better to have held that in all cases he was to decide that point upon his own view of all the circumstances including the nature of the threat or inducement, and the character of the person holding it out together—not necessarily excluding the confession on account of the character of the person holding out the inducement or threat.” So also section 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose he would derive some benefit or avoid some evil of a temporal nature by confessing *Per Sargent C J* in *Reg v Nairn*, 9 B H C R 358 (367), see also *Per Earle J* in *R v Garner*, 2 C & K 920.

**Sufficient to give accused grounds to avoid any evil.**—The Courts have construed these words liberally in favour of prisoners. Considering the ignorance of the people of this country and their dread of persons in authority the course adopted by the Court is a very salutary one. The question what would amount to inducement, threat or promise sufficient to give an accused grounds, which would appear to him reasonable that he would by confessing gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him will no doubt be answered with reference to the English decisions—owing to absence in the Act itself of any indication of what the Legislature has deemed sufficient *Reg v Nairn*, 9 B H C R 358, 5 M L J J 28.

**Of a temporal nature.** The word ‘temporal’ is opposed to spiritual or religious. A confession induced by holding out a hope of forgiveness from God would therefore be admissible in evidence. In *Empress v Mohan Lal* 4 A 46, the threat employed was ex-communication from caste for life. This was an evil probably temporal. 5 M L J J 29.

**Influence of a religious or of a moral nature.** In *R v Radford*, 1 Mood Cr C 192, a clergy man had ‘dwelt on the heinousness of the crime charged and the denunciations of the scripture against it, and a confession was obtained thereby. But *Best C J* disallowed the confession on the ground that “it would be dangerous, after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced” to receive the confession. But “it seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would therefore confess himself guilty of a crime of which he was not guilty, or that a man under a strong sense of his spiritual relation with God could hope to please God by a falsehood that a ‘confidence created between him and his pastor or the being thrown off his guard by his confidence, should induce him not to confess (that it might naturally do if he were guilty) but induce him to confess falsely. Such spiritual convictions or spiritual exhortations, seem from the nature of religion the most likely of all motive to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hope exists, they may lead to falsehood. Spiritual hope can lead to nothing but truth.” *Joy Confessions* 51, *R v Gilham* 1 Mood Cr C 186. *R v Gibney* Jebb Cr C 15. *R v Wild* 1 Mood Cr C 452. *R v, Sleeman*, 6 Cox. Cr 245. So also merely moral exhortation to tell the truth by



12 P W R 1907 Cr = 5 Cr L J 437; see also *Abdul Karim v K F*, 1 A L J 110 = 1 Cr L J 211, *Mahommed Shafi v Empress* 1 P R 1899 Cr, *Crown v Radha Kissen*, 9 P R 1869 Cr, *R v Ashgar*, 2 A 260, *Aga Po v Queen Empress*, L B R (1872 1892), 396, *Fara v Emperor*, 45 A 633, *Emperor v Anant*, 32 C L J 204 = 60 Ind Cas. 417 = 22 Cr L J 225 In *R v Gullis*, 11 Cox Cr 69, *O Hogan J* said "I think the question must be put thus: Was the prisoner induced by a person in authority to make the informations criminating himself by the hope of obtaining the immunity of an approver? I think he was. He became a Crown witness in a reasonable expectation that he would escape punishment as a return for his accepted services in bringing offenders to justice." Where a promise of safety was made by a Police officer, to whom the accused confessed, which confession was repeated before the committing Magistrate and the accused also made a confession, although different in some respects, before a Sessions Judge, held that the confession before the Magistrate was irrelevant. *Queen v Hussamat*, 5 N W P 86

Inducements involving a higher punishment, mild treatment in prison, or a reward of money "It is scarcely conceivable," says *Prof Wigmore* " (except in a case of extraordinary circumstances producing the blackest and most hopeless case against the accused) that an innocent man would confess falsely upon the inducement of a mere diminution of punishment. But a few Courts have reached that result, and it in all probability everywhere be followed. *Wigmore* § 835

The suggestion that accused persons for the ends of justice be encouraged to confess by the knowledge that if they do so they will receive lenient punishment is one which is likely to convey an entirely wrong impression and to be extremely mischievous. *Aga Khan v King Emperor*, U B R (1916) 2nd Cr p 113 = 17 Cr L J 402 = 35 Ind Cas 962, see also *Sorenson v U S*, 143 Fed 520, *People v Johnson*, 41 Cal 153 *Smith v State* 125 Ga 252. But difference in treatment while in confinement cannot be an effective inducement to make a false confession. *R v Green*, 6 C & P 655, *Com v Dillon*, 4 Dril 116. Although it is difficult to imagine that liberty or life would be voluntarily bartered by an innocent person in lieu of money reward, yet this result has sometimes been reached. *Idie R v Horner*, 1 Cox Cr 364, *R v Blackburn*, 6 Cox Cr 337. "It is of course true," says *Prof Wigmore* "that the lesser offences are often committed by persons lacking food and shelter in order to be housed and fed for a time in the jail, and doubtless instances of the false confession of such offences for such a purpose have occurred. But that is no reason for assuming that ordinarily, or in even an appreciable proportion of cases, there is such force in the offer of a loaf of bread or of a sum of money as to cause us to distrust and to reject absolutely a confession so induced. Where the circumstances of a case show that a false confession was probably thus induced, let it be excluded. But to erect a fixed and invariable rule on the basis of so unusual a contingency is to eliminate rationality from the law of Evidence." *Wigmore* § 835

Promise of cessation of prosecution, release from arrest, etc. A promise in any way implying a cessation of prosecution or a release from arrest has usually been held to exclude the confession thus induced. *Case*, case 1 Leach Cr L 3rd ed 328 (notes). In that case the prosecutor said to the accused "If you will tell me where my goods are, I will be favourable to you." *Gould J* in disallowing the admission observed "The slightest hopes of mercy are sufficient to invalidate a confession." In *R v Jones*, R & R 152 the prosecutor said "If the prisoner only gave him his money, he might go to the devil if he pleased." An admission thus obtained was held inadmissible. See also *R v Simpson*, 1 Moody Cr C 410. In *R v Cooper* 5 C & P 555 the admission was disallowed as it was obtained by the promise of a Magistrate that he would do all he could. Similarly in *R v Patridge* the confession was also disallowed because there the prosecutor said "if you will not tell me of course can do nothing for you." In *R v Upchurch*, 1 Moody Cr C 465, the inducement was to this effect "if you are guilty do confess it will perhaps save your neck." But ten Judges decided the confession to be inadmissible. So also an implied promise of forgiveness by the prosecutor makes the confession inadmissible. *R v Mansfield*, 14 Cox Cr 639 see also *Broughton v Case*, 6 Cr App 9, *Stanton v Case* 6 Cr

**S 24** App 198 Similarly a threat to arrest has been held sufficient threat to exclude confession *R v Pratt* 1 C & P 570, *Thomson's Case* 1 Leach Cr L 3rd ed. 325, *R v Richards*, 5 C & P 318, *R v Luchurst*, 6 Cox Cr 243

**Assurance that 'what you say will be used for you' or "used against you"** The advice of one in authority, promising that "what you say will be used for you" was regarded in many cases as excluding a confession. As regards confessions thus obtained *Coleridge* 1 said "I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial." *R v Dreie*, 8 C & P 140. The learned Judge reiterated his opinion in *R v Hornbrook*, 1 Cox Cr 5, where he observed "(The principle is) has anything been said to the party to induce him to state that which is not true, under a hope that he shall thereby benefit himself? Now in *Dreie's* case the man is told that what he says will be used for him, is this not raising a hope that if he told his story, whether true or false it might benefit him?" See also *R v Morton* 2 Moo & Rob 514 *R v Arnold* 1 b C & P 622. But the earlier rulings were repudiated in *R v Baldry* 2 Den Cr C 430 by Lord Campbell C J, Pollock, C B, Parke B Parke and Williams JJ. But in *R v Moore* 2 Den Cr C 522, Parke B for the eight Judges maintained that "however slight the threat or inducement" it could exclude a confession, *Wignore* § 837.

**Assurance that "you had better confess"** The phrases "it would be worse for him if he did not confess or better for him if he did" (1st Pl Cr 2, 641 *R v Kingston*, 4 C & P 387, *R v Wakeley*, 6 C & P 175) "it will be better for you to tell and worse for you if you do not" (*R v Simpson* 1 Mooly Cr C 410) "you had better split and not suffer for all of them" (*R v Thomas*, 6 C & P 338) "you had better not add lie to the crime of theft" (*R v Shepherd*, 7 C & P 579), "If any other person had to do in the case, it is better you should tell" (*R v Moody*, 2 Cr & D 317) "you may as well tell me" (*R v Croydon*, 2 Cox Cr 67) "because it would save him the shame of a search warrant" (*R v Collins* 3 Cox Cr 57) "it would be best for him if he would tell how it was transacted" (*R v Warringham* 2 Den Cr C 447, "if you do not tell, it would be worse for you" (*R v Cheverton*, 2 F & F 833, *R v Coley*, 10 Cox Cr 536) and "it will be right thing for M to make a clean breast of it" [*R v Thompson* (1843) 2 Q. B. 12, 18] were held to be vitiating inducement. "In a given case," says *Prof Wignore* "the exclusion may occasionally not be improper under all the circumstances but that such a phrase or its equivalent, should in itself and in a rule operate to vitiate the confession is wholly bad on principle and in common sense" *Wignore* § 838.

**Proceedings** Proceedings mean criminal proceedings. 5 M L J Art 79 1 L B R 133 (135). The phrase in reference to the proceedings against him must be read as qualifying the words "advantage and evil." *Ibid*, *Reg v Navory*, 9 B H C R 358. The advantage held out or the evil threatened, must be with reference to the proceedings against the prisoner as for instance that by confessing he will not be sent to jail (*Reg v Navory* 9 B H C R 358) that nothing will happen to him (*Queen v Luchoo* 5 N W P 86) that he will get off (*Empress v Rama*, 3 B 12), that he will be pardoned (*Empress v Ashgar Ali*, 10 260) that he will receive a more lenient sentence, that he will in consequence of confessing become crown evidence and the like—5 M L J Art p 29.

**Retracted confession—Corroboration of** To use a confession as evidence against the accused the Court must be satisfied (1) that it is voluntary, and (2) that it is substantially true. Moreover, it is a general rule of practice not to rest upon retracted confessions unless they are corroborated on material points by credible independent evidence. *Crown v Motan* 2 S L R Cr 34=10 Cr L J 200 *Muhammad v Crown* 5 P L R 1915=3 P W R 1915 Cr=16 Cr L J 157=17 Ind Cas 221 *Harprosad v Emperor* 36 Ind Cas 133=17 Cr L J 453, *Sher Khan v Crown*, 2 P W R 1917 Cr=75 P L R 1917 Cr. It is a recognised rule of the Law of evidence, that a retracted confession may be used against the person making it but not against other accused jointly with him. *Chet Singh v Crown* 28 P W R 1907=7 Cr L J 227 *Yasin v Emperor* 2 C 683. A Judge should in the first instance see whether a retracted confession

is voluntary or has been improperly induced. The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession or explains having made it by allegation of police torture, is enough in itself to put a Judge upon enquiry. And he, then, has to decide before admitting the confession at all, or allowing it to be looked at, whether it has been improperly induced. That is a question for the Court, i. e., the Judge to answer *in limine*. If upon weighing all the circumstances the prisoner's denial and probabilities appear to the Judge that the confession has been improperly induced no matter how true it may be he is bound to exclude it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way. *Emperor v. Bhagi Iedu* 8 Bom L R 697=1 Cr L J 332, *King Emperor v. Durga* 3 Bom L R 441 *Myth v. Emperor*, A I R 1927 Lah 682=104 Ind Cas 247, *Bihari v. Emperor*, 60 Ind Cas 769 *Queen Empress v. Lana* A. W. N 1893, 69, *Empress v. Mandan* A. W. N 1835, 59 (F B), *Empress v. Ramanand*, A. W. N 1885 221. A confession duly recorded and certified under s 164 of the Cr. Pro. Code, is admissible in evidence against a person making it unless shut out by the provisions of s 24 of the Evidence Act. In India the law relating to the admissibility of a confession is contained in section 24 of the Evidence Act. The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in that section. The mere subsequent retraction of a confession which has been duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unduly induced. *Queen Empress v. Basant*, 25 B 163=2 Bom L R 761.

In the absence of any corroboration by credible and independent evidence it is unsafe in the majority of cases to found a conviction on a retracted confession. A retracted deposition does not of itself afford a sufficient corroboration of a retracted confession. *Empress v. Chulia*, 13 C P L R 107, *Queen Empress v. Dharmappa*, 12 M 123=2 Weir 376, *Empress v. Tila Ram*, A. W. N 1886, 22 *Queen Empress v. Rang* 10 M 295=2 Weir 361 *Queen Empress v. Ram* 19 M 482=2 Weir 715.

Where the statement of a person in the capacity of an approver had been made under a condition not fulfilled, i. e., that he should be examined at the trial if the prosecution was not prepared to treat him as a witness, preferring to deal with him as a co-accused, his retracted confession would be irrelevant under s 24 notwithstanding the special provisions of cl 2 of s 339 of the Criminal Procedure Code. *Mahammad v. Empress*, 1 P R 1890 Cr, *Crown v. Radha Kishen*, 9 P R 1869 Cr, *Yasin v. King Emperor*, 28 C 689=5 C W N 670.

Where a confession was made before a Magistrate under circumstances not liable to suspicion and to all appearances, fulfils the requirements of the law, the fact that it is retracted in the Sessions Court does not negative the presumption of the genuineness of the confession. *Queen Empress v. Binda*, A. W. N 1890 173.

A confession before the Magistrate, though afterwards retracted in the Sessions Court, is evidence against the party making it. *Queen v. Jema*, 8 W R Cr 40, *Chit Sun v. Crown*, 1 L B R 238 *R v. Kaman*, 17 W R Cr 49, *R v. Gharya*, 19 B 728, *R v. Gambia*, 23 B 216, *R v. Markulal* 20 A 133, *R v. Kelie*, 29 A 434 *R v. Raman*, 21 M 83. So it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt, without independent corroborative evidence. The weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally given, and the circumstances under which it was retracted including the reason given by the prisoner for his retraction. *Sayad Hussain v. Emperor* 16 P R 1903 Cr =153 P L R 1903, *Emperor v. Bireswar Dey*, 26 C W N 1010, *Palan Priya v. Queen Empress*, L B R (1872 1892) 423.

A confession though made voluntarily by an accused person before a Magistrate, if subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it. *Queen Empress v. Balya Rat* Un Cr C 952, *Q E v. Mahadu Rat* Un Cr C 842 *Nga Tha v. Queen Empress*, L B R (1872 1892), 497 *Gul Hassan v. Crown*, 38 P W R Cr 1910=24 P R 1910=8 Ind Cas 250.

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The net result of the authorities on the value of confession seems to be this (i) That it is not illegal to base a conviction upon the uncorroborated confession of an accused person provided the Court is satisfied that the confession was voluntary and is true in fact, (ii) that from the point of view of legality pure and simple the fact that a confession has been retracted is immaterial, (iii) that the use to be made by the Court of a confession, whether retracted or not is a matter rather of prudence than of law, the business of the Court being to make up its mind in accordance with the dictates of common sense, whether it is safe to believe the confession or not (iv) that experience and common sense show that in the absence of corroboration in material particulars it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent of the retraction there remains a high degree of certainty that the confession not withstanding it having been resiled from is genuine, (v) that when it is a question of using a confession against a co accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also, unmistakably, connects the said co accused with the crime *Jagan v Emperor* 261 P L R 1914=15 Cr L J 626=30 P R 1914 Cr=2; *Ind. Cas.* 634=5 P W R 1914 Cr, see also *Pat Than v Queen Empress*, L B R (1-93-1900) 642 *Chitson v Crown* 1 L B R 238 It can not be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and under which it was retracted including the reasons given by the prisoner for his retraction. A confession, in itself reasonable and probable must if repeated more than once and retracted only at a late stage in the proceedings has greater weight attached to it than a confession made only once and retracted after a short interval. The question which should be put to the Jury regarding such confessions is not whether they are corroborated by independent evidence, but whether having regard to the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true. An omission on the part of the Judge to put this question to the Jury amounts to a misdirection. *Queen Empress v Raman* 21 M 83=2 Weir 333 *Queen Empress v Bhagi* Rat Un Cr C 242, *Queen Empress v Gharya* 19 B 728 If a Judge believes that a confession made by a prisoner although subsequently withdrawn, contains a true account of that prisoner's crime, the Judge is bound to act, so far as the prisoner is concerned, on that confession, which he believes to be true. When a confession is not supported by the evidence of witnesses a Judge must examine carefully to see whether it gives detail which indicates that it is a natural narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed and is not merely a parrot like repetition of a story put into the man's mouth. *Queen Empress v Mailu Lal* 20 A 133=22 W N 1897 224 *Queen Empress v Mahabin* 18 A 78=A W N 1895 227, *Bipat v Queen Empress* Supp 1 O C 13 *R v Jadur Dass* 4 C W N 129=27 C 295

Where an approver who had accepted a conditional pardon, made a confession implicating the accused, but afterwards retracted it held, that the accused was not liable to be convicted on the confession alone. *Queen v Hudco*, N W P 217

In capital cases the jury should often refrain from convicting on retracted confessions. *Queen Empress v Ruppia* Rat Un Cr C 245=Cr Rg 17 of 1886 Where the only evidence in a criminal case was the confession of the accused made before the Magistrate but subsequently retracted and where it was found that the police misconducted themselves in the search of the houses of the prisoners who confessed the High Court set aside the conviction. *In re Joffe* *rudern* 2 C L R 132 Where a confession was taken by a Magistrate in jail with a police officer in the next room and was subsequently retracted such a confession could not be acted upon unless supported by very good corroboration. *Sheikh Soluli v King Emperor* 11 C I-J 273

Where a confession is retracted by the accused on the ground that it was induced by torture and especially when the confession, after admission, is to be taken into consideration against the co-accused under s 30, Evidence Act and the accused has marks of violence on his body, it may be the proper course for the Judge to take evidence about the circumstances before admitting the confession in evidence *Queen Empress v Ballappa*, Rat Un Cr C 730 = Cr Rg 58 of 1894

Where a prisoner, a young girl of 15 years of age who was suddenly charged with a serious offence and was kept in police custody for some time, made a confession to a Magistrate, after being beaten by the police with a view to forcing her to make it, which she subsequently retracted, held that it could not be relied upon especially, when it was inconsistent with the evidence given in the case by the prosecution witnesses *Motyan Bibee v Crown*, 6 C W N 380

If the accused was examined in a language which the Magistrate understood and was able to write, then the record of the examination, if made in another language, is inadmissible and no evidence can be admitted to prove what statement was made by the accused. It is not the practice to base a conviction upon a retracted confession unless it is corroborated. That a person, who is being tried, is the same as the person who made the confession must be proved *Queen Empress v Ramzan Ali*, L B R (1893 1900) 70

Where the accused, who made a detailed confession before the committing Magistrate retracted it, on his examination being read over to him in conformity with s 205 Cr Pro Code it was held that it did not amount to a confession *Reg v Garbad Bechar* 9 B H C R 344

The practice of the High Court of Bombay has been to deal with confessions in connection with all the facts of the particular case, and while not ignoring the difficulties that surround retracted confessions it has not avoided these difficulties by applying any stringent rule. There is no rule of law that requires a duly proved confession to be corroborated *Queen Empress v Dayji*, Rat Un Cr C 719

A confession made before the Magistrate, though afterwards retracted, is evidence against the party making it and the statement of an accused made after accepting a pardon is not inadmissible in evidence by reason of the person making it having retracted it before the committing Magistrate *Sahib v Empress*, P L R 1900, 19 Cr

There is nothing in section 30 of the Evidence Act which would exclude as against persons being jointly tried for the same offence, a confession made by one of the accused duly proved simply because at the trial, the confession is withdrawn or denied *Aung Thin v Crown*, 1 L B R 133

Certain accused persons made confessions which led to the arrest of certain other persons. The confessions were subsequently retracted, but were corroborated by the evidence of the approver. Held that the retracted confessions taken behind the back of the accused who had no opportunity of cross-examining the persons who made them were not sufficient corroboration of the approver's evidence and no conviction should be based on them *Debi Dayal v King Emperor*, 11 A L J 73 = 18 Ind Cas 672 = 14 Cr L J 112

C was convicted of causing the death of J by fracturing her skull. C made a confession before a Magistrate which she retracted in the Court of the trying Magistrate. Except the evidence of one witness, who said he saw the two women quarrelling, there was no proof whatever to show that C committed the crime. Held, that it was not safe to convict the accused person on his retracted confession standing by itself uncorroborated. Held also that production by an accused person while in the hands of the Police, of a thing unconnected with the commission of the evidence is not admissible in evidence against him *Alt Chandan v Crown*, 3 P W R 1907 Cr

Evidence brought in under s 288 cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the sessions trial, especially when that confession was not fairly obtained and was not voluntary *Queen Empress v Jadub*, 27 C 295 = 4 C W N 129. But a retracted confession where a confession was recorded under section 164 Cr Pro Code, can be relied on when it was corroborated in material particulars by the evidence of an accomplice



**S. 24** *King Emperor v. Mohuddin*, 25 M 113=2 Weir 800 A confession which is made under the influence of an offer of pardon and was recorded under section 164 of the Criminal Procedure Code cannot be relied on if retracted afterwards. *Aqa Thin v. Queen Empress*, L B R (1893-1900) 8

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars. *Emperor v. Mussamat Jahan* 70 P L R 1918=19 P W R Cr 1918=11 Ind Cas 179=19 Cr L J 273. *Har Prosad v. Emperor*, 36 Ind Cas 133=17 Cr L J 153, *Bihari v. Emperor* 60 Ind Cas 789=22 Cr L J 293

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. *Emperor v. Alak*, 2 Ind Cas 321=2 O L J 168=17 Cr L J 33 In the absence of corroboration in material particulars it is not safe to convict on a retracted confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been retracted from its genuine. *Akshu v. Emperor*, 31 Ind Cas 831=16 Cr L J 815 But it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of the plaintiff without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case, the Court, in a position to come to the unhesitating conclusion that the confession is true, that is to say usually, unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker. *Emperor v. Biseswar* 71 Ind Cas 497=23 C W N 117=24 Cr L J 145=A I R 1923 Cal 217, *Bassuiddi v. Emperor*, 45 M L J 613=18 L W 607=33 M L T 1 H C 37, *Manna Lal v. Emperor* 9 O & A L P 947, *Moti Ram v. Emperor* 75 Ind Cas 152=24 Cr L J 204

The duty of a Judge presiding over the trial by Jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. In considering whether certain confessions are admissible or not he is not confined to the grounds of confessions as contained in the retraction or to the objections as to the admissibility by the accused, but he should look into all the circumstances in order to judge whether the confession is admissible or not. A Judge is not concerned with the truth or falsity of a confession. That is a matter entirely for the jury. He is concerned only with the question of admissibility. They will be admitted only if they are voluntary. If the Judge is satisfied as to the truth of a confession but doubts its voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from the Court. *Emperor v. Panchhari Dutta* 29 C W N 300=52 C 67=88 Ind Cas 414=26 Cr L J 782=A I R 1925 Cal 587

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of guilt without independent corroborative evidence. In every case the credibility of a confession is a matter to be decided by the Court in the circumstances of each particular case. *Manna Lal v. Emperor* A I R 1925 Oudh 1 In deciding whether a retracted confession is to be admitted in evidence it is necessary to examine not only the statement of the prisoner as to how he came to make it but all the circumstances of the case. There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted. *Partab Singh v. Emperor*, 6 Lah 415=7 Lah L J 42=A I R 1925 Lah 605 *Mohor Singh v. Emperor* 96 Ind Cas 647=27 Cr L J 982 Confession made by an adult man who understood what he was doing though retracted is sufficient for the conviction of the person making it, even though certain parts of it are not found to be true provided that there was a detailed confession and it was made voluntarily and in spite of the fact that he explained the consequences of making it. *Nauab v. Emperor*, A I R 1929 Oudh.

381 Conviction based on retracted confession which was voluntary and was sufficiently corroborated is legal *Iqbal v Emperor*, 103 Ind Cas 112=28 Cr L J 606 S 25

When accused is made an approver Necessarily in every case where an accused is made an approver it must be ascertained whether he is willing to tell the truth or not. No analogy exists between the case of a confession obtained from an accused person by any inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible. *Ismail v Emperor*, 88 Ind Cas 283=26 Cr L J 1115

Confession to police officer \* shall be proved as against a person accused of any offence  
 Confession not to be proved

Difference between English and Indian Law Sections 25, 26 and 27 differ widely from the law of England and were inserted in the Act of 1861 (from which they have been taken) in order to prevent the practice of torture by the police for the purpose of extracting confession. *Steph Introduction*, 165. In England confession to a police officer is admissible in evidence in the absence of threat or promise. *R v Kerr*, 8 C & P 176. *h v Berryman*, (1854) cited in *Roscoe Cr Ev* 49. *R v Best* (1909) 1 K B 692, *R v Man* 17 Cox C C 689. *R v Kershaw* 18 T L R 357, *R v Douglas* 67 J P 325, *R v Leibling*, 2 Cr A R 315. *R v Hurst* 18 Cox C C 374. *R v Histed*, 19 Cox C C 16. In *Leuis v Harris*, 24 Cox C C 66, *Darling J* said: "The true rule is that nothing must be done to induce or threaten but short of that, if the person is not in custody it is certainly not the law that the constable may not make enquiries which may lead to his getting evidence from a person which he may use against the person. But a constable has no right to elicit admissions from those he suspects." *R v Mathews* 14 Cr A R 23 see also *R v Forsin* (1918) cited in *Roscoe Cr Ev* 51. *Ibrahim v R* 1914 A C 599=18 C W N 705 P C, *R v Gardner*, (1915) 85 L J K B 206.

Reason of the Rule This law is applicable only in India. The following extract from the First Report of the Indian Law Commissioners shows the reasons which prompted the Legislature in enacting ss 25 and 26. "The Police in the province of Bengal are armed with very extensive powers. They are prohibited from enquiring into cases of a petty nature, but complaints in cases of the most serious offences are usually laid before the police *daroga* who is authorized to examine the complainant to issue process of arrest to summon witnesses to examine the accused and forward the case to the Magistrate or to submit a report of his proceedings according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committee on Indian affairs during the Sessions of 1852 and 1853 and other papers which have been brought to our notice abundantly shows that the powers of the police are often abused for purposes of extortion and oppression and we have considered whether the powers now exercised by the police might not be greatly abridged. We have arrived at the conclusion that considering the extensive jurisdiction of the Magistrate, the facilities which exist for the escape of parties concerned in serious crime, and the necessity for the immediate adoption in many cases of the most prompt and energetic measures it is requisite to arm the police with some such powers as they now possess and we have accordingly adopted many of the provisions of the Bengal Code on this head. In one material point we propose a change in the duties of the police. By the existing law the *daroga* or other police officer presiding at an enquiry into a crime committed within his division is required, upon the apprehension of the accused, to question him fully regarding the whole of the circumstances of the case and the persons concerned in the commission of the crime and, if any property may have been stolen or plundered the person in possession of such property or the place where it has been deposited (*vide s 19 of Regulation XX 1817*) In the event of

\* In Upper Burma insert "who is not a Magistrate" see s 4(?) (c) of the Burma Laws Act, 1893 (13 of 1893)

**S. 25.** the accused making a free and voluntary confession, it is to be immediately written down. Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort a confession or procure information. But we are informed and this information is corroborated by the evidence we have examined, that in spite of this qualification as to the character of the confession, confessions are frequently extorted or fabricated. A police officer on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions and when this step is once taken there is of course, impunity for the real offenders, and a great encouragement to crime. The *daroga* is henceforth committed to the direction he has given to the case, and it is his object to prevent a discovery of the truth and the apprehension of the guilty parties, who so far as the police is concerned, are now perfectly safe. We are now persuaded that any provisions to correct the exercise of this power by the police will be futile and we accordingly propose to remedy the evil, as far as possible by the adoption of a rule prohibiting any examination whatever of any accused party by the police, the result of which is to constitute a written document. This of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him but the police will not be permitted to put upon record any statement made by a party accused of an offence.

As regards sections 25, 26 and 27 *Mahmood J* observed in *Queen Empress v. Babu Lal*, 6 A 509 at p 521. "I have stated these facts as introductory to the observations which I am about to make, that the rules contained in sections 25, 26 and 27 of the Evidence Act were not originally treated in British India as strictly speaking rules of evidence, but rather as rules governing the action of police officers and as matters of criminal procedure. I may take it that no such rules existed either in the Muhammad Law or in the English rule of evidence, the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters." Then after making mention of previous legislation on the subject he added "These legislative provisions leave no doubt in my mind that the Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to be given credit by juries in convictions and that these malpractices went to the length of positive torture, nor do I doubt that the Legislature, in laying down such stringent rules regarding the evidence of police officers as untrustworthy and the object of the rules was to put a stop to the extortion for confession by taking away from the police officer the advantage of proving such extorted confessions during the trial of accused persons." Section 25 of the Evidence Act is enacted to guard prisoners accused of offences against unfair practices on the part of the police. *Solam v. Empress* 43 Ind Cr 111=19 Cr L J 79 see also per *Garth C J* in *Queen v. Horrobin* 1 C 217 *In re Huan Miya* 1 C L R 21 *R v. Pancham*, 4 A 198 (201). The reason why the law in ss 25 and 26 jealously excludes a confession made by an accused, whilst in the custody of a police officer unless it be made in the immediate presence of a Magistrate is that there is room for apprehension that a police officer who is armed with large powers over accused persons, may unwillingly excite terror in their minds and extort false and involuntary confessions. It is his duty to investigate criminal cases and to detect offenders and bring them to justice may make him feel tempted to obtain confessions from accused persons by threat, promise, or other improper influence. *Queen Empress v. Bijn* 1 C W N 71.

**Origin of the section.** As far back as the year 1817 the Legislature, repealing the older rules upon the subject, passed Regulation XX of that year which *inter alia* had for its object the consolidation of the rules for the guidance of police officers. Clause (1) of s 19 of the Regulation laid down that "whenever a person may be apprehended and brought before a *darogah*, or other police officer under the provisions of this Regulation, the examination of the prisoner shall be taken, without oath in the presence of three or more credible witnesses who are

to attest the examination, and the police officer presiding at the inquiry shall question the prisoner fully regarding the whole of the circumstances of the case, the persons concerned in the commission of the crime, and, if any property may have been stolen or plundered, the persons in possession of such property, or the place where it has been deposited. In the event of the prisoners' making free and voluntary confession, it shall be immediately written down, if practicable, in the language best understood by the person confessing, and in the presence of three or more credible witnesses, who can sign their names, and are not officers of the police or connected with the thani establishment. If no persons can be found who may be able to read or write, the more respectable persons in the village shall be required to bear witness, and to affix their marks in the attestation of the writing. The party confessing as well as the witnesses, shall be allowed to read the same when finished, or if unable to read, the police officer recording the confession shall invariably read it over in the presence of the party and witnesses, before it is signed and attested, and shall state at the foot of the paper the day of the week, date, hour, and place at which it may be taken, the original confession bearing the signatures of the party and witnesses, shall invariably be transmitted to the Magistrate and not a copy and the police officer presiding at the inquiry, as well as the person by whom the confession may be taken down in writing, shall subscribe their signatures to the papers in attestation of its authenticity. Again clause (2) of the same section provided that 'no compulsion shall be used either towards parties or witnesses for the purpose of claiming any information whatsoever, and police officers are strictly enjoined not on any occasion or under any pretext whatever to encourage a prisoner to apprehend upon a criminal charge to confess the same or to excite the hopes or fears of a prisoner by holding forth a prospect of pardon or using threats, or otherwise persuading or intimidating the prisoner with the view of inducing him to confess any species of maltreatment inflicted on a prisoner or witness by a police officer, landlord or farmer or by any other persons whatever, whether with a view to extort a confession or to procure information, will subject the offender to exemplary punishment, on conviction before the Magistrate or Court of Circuit'. After laying down these stringent rules, clause (3) of the section goes on to say "whenever a confession may be taken at night, or at any other place than the police *thana* the special reasons for its having been so taken shall be stated in the *darogah's* report. These legislative provisions were made with a view to prevent mal practices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions. The provisions of Regulation XX of 1817 remained undisturbed in the statute-book up to a recent time when they were expressly repealed by Act XVII of 1862. The Criminal Procedure Code of 1861 (Act XXV of 1861) although it did not expressly repeal s. 19 of Regulations XX of 1817, reproduced the rules contained in the first two clauses of that section but modified and reversed them in some important and essential details so as to render them even more stringent—a circumstance which shows that the checks placed by the Regulation on the mal practices of police officers had proved inadequate (*vide* § 98, 146, 147, 148, 149, 150 of Act XXV of 1861). Ss. 146 and 147 were purely administrative prohibitions to police officers against employing any inducement, threat or promise for obtaining any disclosure or confession and against reducing to writing, any statements or confessions made by accused persons. The next three sections (148, 149 and 150) contained even more important rules, which perhaps did not properly belong to the province of Criminal Procedure, but to that of Evidence. Section 148 laid down that no confession or admission of guilt made to a Police officer shall be used as evidence against a person accused of any offence. Section 149 going even further in the same direction laid down that "no confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person. Section 150 runs as follows "When any fact is discovered by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it may be received in evidence. Sections 148, 149 and 150 contained more important rules which perhaps did not

**S 25.** properly belong to the province of Criminal Procedure, but to that of Evidence. Those were rules relating to admissibility of evidence whatever the policy may have been on which they were based, and it is intelligible that the Legislature considered it only fit and proper that they should find a place in the Consolidated Code of Evidence which it was then framing. Accordingly, we find that s 149 and 150 of Act XXV of 1861, were excluded from the region of Criminal Procedure they found no place in the new Code Act X of 1872, but appeared in their proper place as s 25, 26 and 27 of the Evidence Act under the category of Admissions. They have been imported bodily in the same order as they existed in the Code of 1861 they are identical with the rules which they lay down though the language has been improved by some verbal alterations which require no special mention except the omission of the word "or from the class of a person accused of any offence or in the custody of a police officer." In the place of the omitted word or a comma has been substituted rendering the words "in the custody of a police officer" a parenthetical clause forming the qualification of the person whose confession would fall under the section. The removal of the disjunctive word is remarkable and, if it has any effect it is that of limiting the scope of the proviso. *Queen Empress v. Bibu Lal*, 6 A 509 (523) F B.

**Scope of the section.** In section 25 the criterion for excluding the confession is the answer to the question—To whom was the confession made? To whom the answer is that it was made to a police officer the law says that such confessions shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain confessions. *Per Mithal* in *Queen Empress v. Bibu Lal*, 6 A 509 at p 532, *Nano v. Emperor*, 12 Bom L R 1196. In *Queen v. Haribol Chunder Ghosh*, 1 C 217, the confession, was made in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police Mr Lambert, in the Police Office in Calcutta, when he again affirmed the truth of his former statement to Mr Lambert and Mr Jackson, in his capacity of a Magistrate received and attested the statement. Mr Jackson contended that the reception in evidence of the statement admitted was excluded by s 25 of the Evidence Act, it being a confession made to a Police Officer. The fact that the police officer was in this case also a Magistrate does not alter the effect of the section, it does not make him less a police officer. He cannot separate his functions as police officer and Magistrate and therefore not such a Magistrate as is contemplated by s 26. In delivering the judgment *Garth C J* said "It is urged by Mr Jackson for the prisoner, that the terms of s 25 are imperative that a confession made to a Police Officer, under any circumstances, is not admissible in evidence against him, and that the 25th section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody, to any person other than a Police Officer shall be admissible, unless made in the presence of a Magistrate. I am of opinion that is the true meaning of the 25th section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th. *Adu v. R*, 11 C 365 but see *Queen v. Bibu Lal* 6 A 509. *Queen v. Panchanan* 4 A 198. In *Heran Miya*, 1 C L R 21." The confession made to a police officer by an accused is not admissible against him under s 25 of the Evidence Act a fortiori it is inadmissible against a co-accused. *Emperor v. Han Singh* 12 Bom L R 899=8 Ind Cas 622=11 Cr L J 690, *Nga Thakun v. Emperor* 30 Ind Cas 480=17 Cl L J 512. A confession contained in a statement made by an accused person to a stranger in the presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of s 25 of the Evidence Act and is admissible in evidence. *Nadu v. Croon* 8 P R 1914 Cr =214 P L R 1914=15 Cr L J 480=24 Ind Cas 568, see also *Aadu v. Emperor* 24 Ind Cas 568. A confession made by an accused to a private person in the presence of the Police is inadmissible in evidence against him. *Chanau v. Emperor* 20 Ind Cas 408=37 P W R 1913 Cr =320 P L R

S 25.

1913=14 Cr L J 596 Section 25 of the Evidence Act lays down that a confession to a Police officer shall not be used as against the person making it, it does not say that such a confession shall be inadmissible for all purposes. Such a confession may be used for the purpose of arriving at a conclusion whether a subsequent judicial confession should be believed or not. *Golab v Emperor*, 75 Ind C 13 693=6 L L J 54=25 Cr L J 5=A. I R 1923 Lah 315. Section 27 of the Evidence Act qualifies not only sections 26 and 25 but also section 24. Therefore, when a confession as a whole is excluded, whether by reason of the section 26 or of section 25 or of section 24, so much of the information given by the person making the confession when he was an accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible. *Amiruddin v Emperor*, 44 Ind C 13 321=22 C W N 213=27 C L J 148=19 Cr L J 305, see also *In the Matter of Hiran Miya*, 1 C L R 21, *Emperor v Hira* 21 Bom L R 724. A confession made by an accused person on his trial for illicit possession of opium to a Superintendent of Excise, is admissible in evidence provided no inducement, threat or promise was held out or made to the accused in order to procure the confession. *Rohim Ali v Emperor*, 45 Ind C 13 284=22 C W N 451=19 Cr L J 524. A confession made to a Police officer is inadmissible in evidence according to sections 25 and 26 of the Evidence Act. *Public Prosecutor v Veera Raghava*, 15 Ind Cas 800=13 Cr L J 528=11 M L T 407, *Legal Remembrancer v Chema* 25 C 413=2 C W N 257. A was convicted on the evidence of two Excise Sub-Inspectors, who stated that he offered them Rs 10 per ball of opium as a bribe to let him land unmolested a large quantity of illicit opium from the steamer *Kattoria*. These Excise officers had been also enrolled as Police officers. Held, that the alleged offer by the accused amounted to an admission that he had a large quantity of contraband opium in his possession and being an admission of an offence under the Opium Act, amounted to a confession and was thus inadmissible under s 25 of Evidence Act. The test which has to be applied in deciding whether s 25 of the Evidence Act applies is the position of the person at the time when it is proposed to prove the admission not his position at the time when he is alleged to have made it. A confession, therefore, made to a Police officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. A confession made by an accused person to a Police officer might be admissible in favour of a co-accused but not against him. *San Paw v Emperor*, 15 Ind Cas 305. As section 26 of the Evidence Act applies only to proof of a confession as against the maker, so it should be held that section 25 has similar scope and both these sections were intended to prevent the use, as evidence against the maker of confessions made actually or in effect to Police officers. Section 25 of the Evidence Act, was not concerned with the statements of witnesses. *Suami Pillai v Emperor*, 1912 M W N 549=12 M L T 1=13 Cr L J 352=14 Ind Cas 890=35 M 397. But when an accused is examined as a witness by a Police officer his statement is inadmissible under this section. *Empress v Jadabdas*, 4 C W N 129. In that case the Court observed at page 143 "It has been already mentioned that the statement obtained by the Police from the mother of Jadab Das is said to have incriminated Rai Charan. The Inspector examined him as a witness reducing his statement to writing and that he then arrested Rai Charan. The impropriety of such proceedings is aggravated by the course taken by the Sessions Judge. He examined the Sub-Inspector in regard to that statement and he thus admitted it as evidence in the trial. The statement cannot be regarded otherwise than as a confession made by Rai Charan to the Sub-Inspector. If it be so regarded it was clearly inadmissible under section 25 of the Evidence Act. If on the other hand it was to be used as evidence against the other prisoners, it was manifestly inadmissible." Section 25 only provides that no confession made to a Police officer shall be proved as against a person accused of any offence. It does not preclude the counsel for one accused person, on his client's behalf, from asking questions to prove a confession made to the police by another accused person tried jointly with him such a confession is not to be treated or received as evidence against the person making it. The Judge should instruct the jury accordingly. *Imperatrix v Pitamber*, 2 B 61.

**S 25.** Confession—Definition of A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed the crime. Not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements which, although they fall short of being actual admission of guilt, yet suggest an inference of guilt and from which an inference of guilt follows. The factor determining whether a statement amounts to a confession or not is, not the motive of the party making it but the fact that it leads to an inference of guilt. *M. E. Th. King Emperor*, 5 L B R 131=4 Ind Cas 1028=11 Cr L J 153. Confession in this section as in section 24, means a confession made by an accused person which it is proposed to prove against him to establish an offence. *Queen Empress v. Tribhoban*, 9 B 131.

**Police officer, meaning of** "In construing the 25th section of the Evidence Act of 1872, I consider that the term 'police officer' should be read not in any strict, technical sense but according to its more comprehensive and popular meaning." *Per Garth C J in Queen v. Hurribole* 1 C 207 (21.) A Deputy Commissioner of Police in Calcutta is a Police officer. *Ibid*. Primarily the term 'Police officer' in this section means the same as it does in the Police Act but it can be extended beyond the definition in section 1 of the Police Act to cover only those persons who like Police officers coming within that definition, are so much more interested in obtaining convictions than any member of the community is that they might possibly resort to improper means for doing so. That class does not include police patel in Berar. *Emperor v. Akua*, 23 N L R 23=101 Ind Cas 599=A I R 1927 Nag 222, *Mt Mechu v. Emperor*, 82 Ind Cas 32=7 Cr L J 1088=A I R 1925 Nag 340. But in Bombay a police patel is a Police officer. *R v. Bhima*, 17 B 485, *R v. Kamalia*, 10 B 595. There is no qualification of the expression "Police officer" in s 25 or s 26 of the Evidence Act and a confession made to a Police officer whoever that officer may be and whether he is a Police officer in British territory or a Police officer in foreign territory is inadmissible. *Queen v. Nagla* 22 B 235, *Uabli v. Emperor*, 87 Ind Cas 520=26 Bom L R 706=26 Cr L J 984. See *Sulam v. Emperor* 43 Ind Cas 111. *Nadu v. Crown* 15 Ind Cas 800. A village headman in Burma who is authorized to arrest without warrant is not a Police officer so as to make a confession made to him inadmissible. *Nga Myin v. Emperor*, 3 Bur L J 11=81 Ind Cas 540=25 Cr L J 924. The widest and most comprehensive extension of the term 'Police officer' cannot make it include a Kotwar in the Central Provinces. *Sulluaria v. Emperor* 25 Cr L J 147=76 Ind Cas 291=A I R 1914 Nag 29, see also *Bhagatdin v. Emperor* 59 Ind Cas 88=21 Cr L J 30. A member of a frontier constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police officer and admission made to him, and not in the presence of a Magistrate by an accused person cannot be proved against the maker. *Khuaja Hassan v. Emperor* 71 Ind Cas 360=24 Cr L J 136. In the Punjab a village Chaukidar is not a Police officer within the meaning of section 25 of the Evidence Act. *Khuda Baksh v. Emperor*, 43 Ind Cas 84=19 Cr L J 52=42 P R 1917 Cr. See also *Dal v. Emperor*, 16 Cr L J 62=61 Ind Cas 654. A chaukidar although he is not a Police officer under Act V of 1872 is one under Reg XX of 1817 and Act I of 1872, and a confession made to him is inadmissible. *Empress v. Indra Chandra*, 2 C W N 637, *Narayan v. R* 94 W N 474. *R v. Salemuiddin* 26 C 569.

A tenhouse Gang appointed under the Lower Burma Village Act, 1880 is a Police officer within the meaning of s 25 of the Evidence Act, and an admission to him of the accused's guilt is inadmissible in evidence under the section. *Sin v. King Emperor*, 3 L B R 283=5 Cr L J 421. The provision of the section which declares that no confession made to a Police officer shall be proved against a person accused of any offence, applies to every Police officer and is not restricted to officers of the regular Police force. *Queen Empress v. Salomukha* 26 C 519. A Sub-Inspector of a thana (In the matter of *Uranmya* 1 C L J 21), a police Sub-Inspector (*Addu Sikdar v. R*, 11 C 635, *R v. Fayree* 58 19 W R Cr 51 a daroga (*R v. Pancham*, 4 A 198) a head constable of a police (*L v. Luchoo* 5 N W P, 86) or even a police constable (*R v. Madhoo* 10 B 1 R App 2 *R v. Pitambar* 2 B 61, *R v. Pandhurnath* 6 B 31).

v *Babu Lal*, 6 A 501) are Police officers within the meaning of this section and S 25  
 confession made to any one of them is inadmissible in evidence

There is some conflict of opinion between Bombay High Court and other High Courts as regards whether an excise officer is a police officer or not. An excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under the Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a Police officer. Any admission made to him is therefore inadmissible under the provisions of s 25. *Emperor v Dushaw*, A I R 1929 Bom 70=31 Bom L R 49, *Nanoo v Emperor*, A I R 1927 Bom 4 (T B)=28 Bom L R 1196=51 B 78=99 Ind Cas 330 (overruling *Raphael Pereira v Emperor*, 28 Bom L R 674=97 Ind Cas 665=27 Cr L J 1145=A I R 1926 Bom 517). But the Calcutta High Court has held that a confession made to an excise officer is admissible in evidence as an excise officer is not a Police officer and section 25 of the Evidence Act does not apply to such a confession. *Harbhayan Sao v Emperor*, 54 C 601=31 C W N 667=102 Ind Cas 547=28 Cr L J 579=A I R 1927 Cal 527, *Ah Foong Chunaman v The King Emperor*, 22 C W N 834=48 Ind Cas 504=46 C 411, *Rukunah v Emperor*, 22 C W N 451. An excise officer is not a Police officer within the meaning of section 25 of the Evidence Act. *Emperor v Budhu*, 99 Ind Cas 594=A I R 1927 Sind 112, *Tillabai v Emperor*, 82 Ind Cas 151=25 Cr L J 1223. *Mechu v Emperor*, 88 Ind Cas 32=26 Cr L J 1088=A I R 1925 Nag 340, *Emperor v Waju Singh*, 44 Ind Cas 588=3 P R 1918 Cr=19 Cr L J 364. *Muhammad v Emperor*, 39 Ind Cas 977=21 C W N 694=18 Cr L J 609. *San Pau Aung v Emperor*, 13 Cr L J 465=15 Ind Cas 305=5 Bur L 1 92. A village Munsiff is not a Police officer and confession made to him is, therefore, admissible in evidence under s 25 of the Evidence Act. *Queen Empress v Samu Papi*, 7 M 287=2 Weir 235. A confession made to a *luathuggy* should not be admitted in evidence. He is head of the rural police and has police duties to perform. He is to all intents and purposes, a Police officer though he may not be so designated. *Maung Huan v Queen Empress*, L B R (1893-1900) 22.

**Confession made to a police officer whether admissible.** A confession made to a Police officer cannot be used in evidence. *E v Thalur*, A W N 1883, 188 *E v Pancham*, A W N 1883 21=4 A 193. Confessions recorded in a police diary cannot be used for any thing other than to assist the presiding Judge in the enquiry or the trial or for the purpose of enabling the defence under certain circumstances to contradict the witness for the Crown. It is the duty of the Judge to bring on record by evidence any material fact that may come to his knowledge and it is for that purpose that he should use the confession. *Karam Singh v Emperor*, A I R 1928 All 25=8 A I Cr R 24=8 L R A Cr 153=106 Ind Cas 442=26 A L J 92. A confession made to another person in the presence of a Police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the Police officer is in such proximity as to make his presence likely to affect the mind of the confessing person is in substance a confession to a Police officer. *Emperor v M Har Prari*, 97 Ind Cas 41=44 A L J 959=A I R 1926 All 737 see also *Channan v Crown*, 21 Ind Cas 468. A statement made on oath by a person at an inquest before a coroner cannot be admitted as a confession in a trial for a charge based on such a statement for it is not voluntary. *Emperor v Ka*, 28 Bom L R 79=50 B 56=93 Ind Cas 225=A I R 1926 Bom 141. Rule 19 of the Madras Council Rules of Practice is not a rule of law but merely a rule for the guidance of village Magistrate and therefore a confession recorded by a village Magistrate after the police investigation has begun is inadmissible apart from the fact whether the Magistrate knew that the investigation had begun. *Kuppatham v King Emperor*, A I R 1927 Mad 974.

When a house was searched and the accused put his signature on the recovery list held that the fact of the accused putting his signature on the recovery list is not admissible in evidence against him in a case in which the possession of the house is in question because it would be an incriminating statement of the nature of a confession to a Police officer and could not be



**S. 25.** proved by reason of the prohibition contained in section 25 *Behari Lal v Crown*, 8 Lah 326=28 P L R 119=100 Ind C1s 707=28 Cr L J 33. If after committing a murder the murderer proceeds straight to the Police station and there makes a confessional statement, which is recorded on the First Information Report the statement is inadmissible in evidence as being a confession made to the Police *Nur Muhammad v Emperor*, 90 Ind Cas 14=26 Cr L J 1492. An investigating officer cannot be allowed to depose that the accused pointed out the route taken by them in going to commit the offence of dacoity and the place where they divided the booty, as they were confessional statements made to a Police officer *Sheikh Abdul v Emperor*, 26 Cr L J 686=85 Ind Cas 830. A confession not reduced to writing made to an Honorary Magistrate, who was also a zaddar, while he was taking part in an investigation in the absence of the Police and subsequently repeated before him and a Police officer is admissible in evidence *Wadlawa v Emperor* 76 Ind Cas 819=25 Cr L J 259=A I R 1923 Lah 389. In a case of dacoity a statement made by an accused to a Police officer, at the time of the search of his house, that property would be found in the possession of his co-accused is not admissible in evidence against the accused making the statement nor is it admissible against his co-accused as proving their participation in the dacoity. *Rahmit v Emperor*, 65 Ind Cas 849=20 A L J 178=23 Cr L J 197. A first information of murder was lodged at the Police station by the accused himself on the morning following the murder and in it after stating the narrative events prior to the night of occurrence he confessed that he had committed the offence. *Held* that although by reason of the provisions of section 25 of the Evidence Act the first information was not admissible in its entirety, yet, in so far as it spoke of events prior to the night of occurrence, it was admissible in evidence. *Superintendent v Lalit Mohan*, 62 Ind Cas 578=25 C W N 788=22 Cr L J 562. A confession made to the Police by an accused person is admissible to prove the ownership of property in respect of which he is accused *Ganpat v Bam*, 55 Ind Cas 62=21 Cr L J 414. Statement made by the accused in the presence of a Police officer is admissible in evidence *Hira Gobar v Emperor*, 52 Ind Cas 601=21 Bom L R 724=20 Cr L J 681. A report made to the Police which amounts to confession is not admissible in evidence against the person who makes it *Silandar v Emperor*, 48 Ind Cas 883=36 P R 191=20 Cr L J 83. Any statement made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in his trial *Dal v Emperor*, 16 Cr L J 62=26 Ind Cas 654. Accused went to a Police station and made the report "I have killed my wife and her corpse is lying in my house," in consequence of which the Police proceeding to his house, discovered the corpse of his wife in an inner room of the house. *Held* that the provisions of s. 25 and 26 of the Evidence Act apply to the circumstances of the case. *Surendra Nath v Emperor*, 16 A L J 478=47 Ind Cas 659=19 Cr L J 935. A statement made by a person in an investigation made by a Police officer under s. 162 Criminal Pro. Code must be taken to be a statement to the Police officer himself, whether the questions were put by the Police officer himself or by somebody else in his presence. But incriminating statements made by accused persons while in Police custody, in answer to questions put by a Police officer in the presence of a Head man, are excluded from evidence under s. 25 and 26 of the Evidence Act. *Zia v Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L J 270. When the accused at the time of making an incriminating statement is enfeebled by illness and is undefended, a withdrawal of the plea can be allowed if the accused wishes to withdraw it. *Emperor v Shuldan*, 28 Ind Cas 145=44 P W R. 1911 Cr.

The only evidence against the first accused was that, in consequence of information given by him the second accused was questioned and the stolen property was produced. The first accused was also said to have admitted the theft before the police. *Held* that the evidence was too insufficient to justify the conviction of the first accused for theft. The confession was irrelevant, as it did not lend directly to the recovery of the property. *In re Ippari Ramalingam*, 3 M L T 333=7 Cr L J 398. Where a confession was made before an investigating Police officer who joined the prosecutor in questioning the accused, a

should in fact be held to have been made to a Police officer though actually taken down by the prosecutor and it is hence inadmissible under s 25 of the Evidence Act. *Empress v Lango Imperor* 10 C P L R 16. A confession to a village headman or a person appointed under the Burma Police Act is inadmissible under s 25 of the Evidence Act. *See Empress v Queen Empress* 1 B R (1872) 189. Section 25 of the Act does not prevent the proving in evidence of a confession made to a village headman or village headman under the Lower Burma Village Act 1889. *Crown v A. P. Hinn* 11 B L R 6. A person who had committed a murder voluntarily went to a police station and made a statement to a police officer that he had done the deed and that the instrument of murder was in a place near by. He was subsequently arrested. *Held* that the statement was a confession and was not admissible under s 25 of the Evidence Act. Evidence of the police however was admissible to prove the conduct and condition of the murder at the time when the statement was made. *Ar v Sheikh Tahir* 10 C L J 113-10 Cr L J 193-2 Ind Cas 90.

When a Police officer has evidence before him sufficient to justify the arrest of a person he should not permit him to be arrested except as a confession to a Police officer and is inadmissible in evidence under s 25 of the Evidence Act. *Queen Empress v J. J. B. B.* 27 C 263-4 C W N 129. Any statement made by an accomplice who is a police officer is a suspect in consequence of a tender of a pardon by an Assistant Commissioner acting in his executive capacity though professing to be a tender of s 25 Cr Pro Code was held to be inadmissible against him. *Indulley v Empress* 10 P R 189. Cr Section 25 of the Evidence Act only provides that a confession made to a Police officer shall not be proved against an accused person. It does not preclude an accused person from proving on his own behalf a confession made to a Police officer by another accused person tried jointly with him. *Abraham v Imperor* 12 Cr L J 79-9 Ind Cas 411. Confession to a Police officer of having given false information cannot be proved against the person making it and charged under s 182 and s 211 of the Penal Code. *Queen Empress v N. J. Thet* U B R (1897 1901) Vol I 176. Three persons were tried jointly for rioting. During the trial an information lodged by one of them with the police was proved, and in his charge to the jury the Judge said "it (the information) contains an admission that all three accused persons were present at the occurrence. *Held* the information was not a confession under s 25 of the Evidence Act, and as against the person other than the informant it amounted to an admission of evidence against them. *Har v King Imperor*, 11 C L J 301-5 Ind Cas 305-11 C W N 593.

Where a Police officer read over to the accused the statement which he (Police officer) had taken from others and then told him "I know the whole thing now and the accused, thereupon, made a statement, in consequence of which he was arrested and his confession was duly recorded. *Held* that the confession recorded under the circumstances was free and voluntary and was perfectly admissible in evidence. *King Imperor v Lango Hanmat* 3 Bom L R 401. Where there is no judicial proof of the guilt of the accused person it is illegal to rely upon an unreliable or suspicious confession or a confession which is open to grave suspicion of having been produced by ill treatment of the police. *Akhar Dun v Crown* 21 P W R 1907 Cr = 6 Cr L J 266.

An incriminating statement, made by an accused person to the police, when nothing is discovered in consequence of it, cannot be admitted in evidence against him. *Farid v Imperor* 111 P L R 1906-16 P R 1906-4 Cr L J 177. See also *Crown v Craugatta* 3 P R 1868 Cr. Where the confession of an accused person conflicted with the medical evidence in the case and was probably induced by the police, the Chief Court declined to confirm a capital sentence based upon it. *Crown v Meer Khan*, 3 P R 1867 Cr.

A Police officer examined for the prosecution stated in the course of cross examination, that when he arrested the prisoner he said to the former that some Chinaman at the time of the occurrence came out with hatchets. In re-examination the Policeman substituted the words "at the time of the occurrence" being asked if the prisoner had explained "what time", the Policeman said that the prisoner said "at the time I struck the deceased". *Held* that the

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ment of the prisoner that the Chinaman came out with hatchets at the time he struck the deceased would not be admissible in evidence, as it was an incriminating statement made to a Police officer by an accused person in custody. *Q. Empress v Matheus*, 10 C 1022

An admission to a Police officer made by an accused before arrest is admissible in evidence. *Empress v Dabee Pershad*, 6 C 530=7 C L R 541

The accused was convicted of an offence under s 412 I P Code. The evidence for the prosecution consisted of certain confessions made to the Police at the circumstance that the accused found some stolen cloth for the Police while in Police custody. Held that the confession was inadmissible under s 25, Evidence Act, and the circumstance mentioned did not justify his conviction under the section. *Empress v Nanhe Beg*, A. W N 1883 126

Admissions not amounting to confessions, whether admissible when made to a Police officer. Every statement is not a confession. *Adho v Emperor* 13 S L R 6=A I R 1925 Sind 257. Incriminating statement to police officer though on the face of itself exculpatory is inadmissible. *Emperor v Anand* 5 Cr R 15=49 B 642=89 Ind Cas 1046. The question whether a particular statement, whether it be positive or negative, verbal or expressed by conduct is or is not a confession, must be decided on the facts of each case. *Umer Durrani v Emperor*, 86 Ind Cas 410=26 Cr L J 778=A I R 1925 Sind 237. After a fight in which death was caused several accused drove certain cattle belonging to the deceased to the pound. Two of them made a statement to a Sub-Inspector of Police that they were in the fight and that the deceased had attempted to interfere with the seizure of the cattle. Held that the statement did not amount to a confession, inasmuch as it was only an explanatory statement of the circumstances under which the cattle had been seized and was not an admission of guilt but rather in the nature of a complaint against the deceased and was not therefore inadmissible in evidence. *Jailal v Emperor*, 81 Ind Cas 347=2 Cr L J 811=A I R 1923 Lab 232. A statement by one accused to the police that certain property which he produced had been given to him by two other accused who were charged with him as being members of a gang of dacoits, is inadmissible as being an admission of a criminating circumstance under s 25 of the Evidence Act. *Emperor v Sher Mahomed* 75 Ind Cas 70=46 B 961=24 Cr L J 101. A statement made by an accused to a Police officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement turns out to be false in the light of the other evidence in the case. If it amounts to a confession then it must be excluded from evidence altogether under section 25 but in either event it can only be used against the accused making the statement. *Rahmat v Emperor* 65 Ind Cas 849=20 A L J 11=23 Cr L J 197. The word confession in section 25 of the Evidence Act is confined to actual admissions of guilt but it includes inculpatory statements from which inferences of guilt can reasonably be drawn or which suggest the guilt of a person making the statement. *Pan Gang v Emperor* 42 Ind Cas 1000=1 Cr L J 42. Section 25 of the Evidence Act does not say that all statements made to the police are admissible but it excludes only confessions made to them there being a distinction between mere admissions and confessions which are statements either directly admitting the guilt of the accused or statements which suggest the inference that he committed the crime with which he is charged. Further the general rule is subject to that which admits statements leading to discovery whether such statements amount to confession or not. *Emperor v Amirul Mub* 26 Ind Cas 161=15 Cr L J 713=41 C 601, *Emperor v Pan* 3 N L R 71=5 Cr L J 434. A statement made by an accused person to a Police officer by way of an explanation in order to exculpate him is admissible in evidence. *Emperor v Ikhtiar* 19 Ind Cas 508=65 L R 143=14 Cr L J 11. A statement made by the accused to the police which does not amount directly or indirectly to an admission of any criminating circumstance is admissible in evidence, hence where the accused was found carrying away a box at night and when asked by a policeman on duty about the ownership of the box stated that it belonged to him, the statement was held admissible against him as a confession. *Emperor v Muhammed*, 5 Bom L R 312. "Confession" in section 25 of the Evidence Act, as in section 24, means a confession made by an accused

person, which it is proposed to prove against him to establish an offence, For such a purpose, a confession might be inadmissible which yet for other purposes, would be admissible under s 18 against the person who made it (s 21) in his character of one setting up an interest in property the object in litigation or judicial enquiry and disposal *Queen Empress v Tribhovan*, 9 B 131

## 26. No confession made by any person whilst he is

in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person

**\* Explanation**—In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 †

**Origin of the section** This section is based on section 149 of the Criminal Procedure Code of 1861 (Act XXV of 1861) which runs as follows “No confession or admission of guilt made by any person while he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate shall be used as evidence against such person” The explanation was added by Act III of 1891, s 3 The rules contained in this section were originally treated in British India as, strictly speaking not rules of evidence but rather as rules governing the action of police officers, and as matters of criminal procedure *Queen v Babu Lal*, 6 A 509 (F B.), see also *Muthu v King Emperor*, 35 M 397

**Reason of the rule** “The object of section 26 of the Evidence Act appears to us to be to prevent the abuse of their powers by the police, and hence confessions made by accused persons while in custody cannot be proved against them unless made in the presence of a Magistrate” *Per Burch J in Queen v Mon Mohun* 24 W R 33 “Its human object is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them” *Per Garth C J in Queen v Hurribole Chunder*, 1 C 207 (215) The reason of the rule seems to be that the custody of a police officer provides easy opportunities of coercion for extorting confessions *Queen Empress v Babu Lal*, 6 A 509 (532)

**Scope of the section** This section deals with confessions made in the presence of a police officer who has the custody of an accused person, that is, of a police officer who is concerned more or less in the investigation of the case, and those confessions are absolutely excluded, whether made to a police officer or to any other person, unless made in the immediate presence of a Magistrate The proper construction of sections 25 and 26 is one which excludes confessions to a police officer under any circumstances or to any one else, while the person making it is in a position to be influenced by a police officer—unless the free and voluntary nature of the confession is proved by it being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police *Per Ainslie J in In the matter of Hirun Muz* 1 C L R 21 Section 26 is not to be read as qualifying the plain meaning of s 25 *Queen v Hurribole*, 1 C 207, *Queen v Duman* 12 W R Cr 82 Section 26, cannot be treated as an exception or proviso to s 25, there being no words to justify such an interpretation The criterion adopted in s 26 for excluding confession is the answer to the question—under what circumstances was the confession made If the answer is that it was made whilst the accused was in the custody of a

\* This Explanation was added to the Indian Evidence Act by the Indian Evidence Amendment Act (III of 1891) s 3

† See now the Code of Criminal Procedure, 1908 (Act 5 of 1908)

**S 26** police officer, the law lays down that such confession shall be excluded from evidence, unless it was "made in the presence of a Magistrate" *Queen Empress v Babu Lal*, 6 A 509. The law is imperative in excluding what comes from an accused person in custody of a police if it incriminates him. *Queen Empress v Matheus* 10 C 1022. *R v Pancham* 1 A 198 (201). A witness ought not to be allowed to describe a 'confession' made by the accused, if the fact was deposed to and discovered in consequence of information received from the accused while in the custody of the police. *Queen Empress v Bhagwan Das* S C 81 (Oudh). Section 26 of the Evidence Act applies only to the police of a confession as against its maker. *Muthu Kumara Siamu v Emperor*, 1912 M W N 549 = 12 M L T 1 = 13 Cr L J 372 = 35 M 397 = 14 Ind Cas 896. But it may be admissible in favour of a co-accused. *R v Pitambar* 2 B 611. The general rule applicable to confessions made by prisoners while in the custody of a police officer is contained in section 26 and the proviso contained in section 27 refers to an exception to that rule. *Queen Empress v Coomer Sahib*, 12 M 153, *Reg v Jora Hasji*, 11 B H C R 249. In a case in which three persons B, M and T were charged with the murder of one H the following statement made by T to a Police Superintendent on the day next to the day of the occurrence, while M was arrested but neither of the other two accused was suspected of having had any hand in the murder and was not then under arrest was sought to be given in evidence for the prosecution. The statement was as follows: "The deceased H had culled the previous day was taken with cholera, was purged three times after which the dispute arose regarding the Bengalee bill H had abused M's wife, on which M had given H a push in the throat when H fell backwards and became in-ensable, they tried to get a box and to put the corpse into the box, as the body was too big they had to tie the body to make it fit into the box, they then put the lid after placing a sheet on the body, they lowered the box with a gunny and then tied it up with a rope, they left the box till evening, at 6 P.M. M got a coolie and had the box removed." The statement was held inadmissible. *Queen Empress v Meher Ali* 15 C 589. Incriminating admissions of an accused under the admitted circumstances that he took the whole of the investigation staff of the police officers round the scene of offence and admitted before him his own guilt are inadmissible in evidence under section 26. *Shamail v Emperor*, A I R 1929 Nag 350. A statement made in the presence of a sub-inspector and a constable who had the accused under arrest at the time and not recorded by a Magistrate under s 164 of the Criminal Procedure Code is not admissible in evidence. *Nathu v Emperor*, A I R 1929 All 855.

**Police custody—meaning of.** When an accused person is brought to a Magistrate for recording a confession, while the police officer, in whose custody he had been, remained outside ready to capture him if he ran away, the accused should be treated as still being under police custody. *Queen Empress v Lakshmya*, Rat Un Cr C 855. Where a woman charged with the murder of her husband was taken into the custody of the police, a friend of hers accompanied her, and the police man in charge of the woman left her with her friend for the purpose of procuring fresh horse any confession made to the friend accompanying her while the policeman was away, would not be admissible in evidence as the prisoner should be regarded to have been in the custody of the police notwithstanding the temporary absence of the police man. *Empress v Lester*, 20 B 155 see also *Rechoda v Aichoda* 3 M H C 31. Two accused persons admitted the offence imputed to them to the persons who assisted the police in the investigation. The first accused accompanied the police and others to his house where certain of the stolen property was discovered. The second accused was not taken there till after discovery. Held that the confession of the second accused was not sustainable as an admission of the accused made while in police custody, was inadmissible under s 26. *Queen Empress v Singh* 12 P R 1900 Cr = P L R 1900, 56 Cr As soon as an accused or suspected person comes into the hands of a Police officer, he is, in the absence of clear and unmistakable evidence to the contrary no longer at liberty and is therefore in custody within the meaning of ss 26 and 27 of the Evidence Act. *Maung Lay v Emperor*, 23 Cr L J 381 = 77 Ind Cas 429 = A I R 1914 R 10.

173 The meaning of the words "in the custody of a Police officer" in this section, cannot be extended by implication to cases beyond what is absolutely necessary, that is, where the person is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the person to whom the confession is made. But where the accused is not arrested or under supervision, and is merely being invited to explain certain circumstances, it would be going further than the section warrants to exclude the statement that he makes, on the ground that he is to be deemed in Police custody. *Emperor v Mahomed Bur*, 85 Ind Cas 833. The accused while in Police custody, made a confession on being questioned by the Court Inspector who forthwith produced him before a Magistrate. The latter proceeded to record a confession in the presence of the Court Inspector and after recording it reminded the accused to Police custody. Held that it would be most unsafe to hold that the confession was made voluntarily and that, therefore, it could not be taken into consideration as against the accused. *Neki v Emperor*, 76 Ind Cas 180=25 Cr L J 116. When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of Criminal Procedure Code should ascertain how long the accused has been in custody. If there is no record of that fact it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872) to send for the Magistrate and satisfy himself on the point. *Queen Empress v Narayan*, 25 B 543. The custody of the keeper of a jail in a Native State, who is not a Police officer, does not become that of a Police officer, merely because his subordinates, the warders of the jail, are members of the police force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a Police officer investigating an offence section 26 of the Indian Evidence Act (I of 1872) does not exclude such a jailor from giving evidence of what the accused told him while in jail. *Queen Empress v Fatya Din*, 20 B 795.

**Confessions made in police custody, whether admissible.** A confession made to a Police officer but not in the presence of a Magistrate is inadmissible. *Queen Empress v Ali Balsh*, S C 98 Oudh, *Manjunathaya v King Emperor*, 26 M L J 352=15 Cr L J 533=24 Ind Cas 845. An admission of the accused while in Police custody is inadmissible under this section. *Queen v Jas Singh* 12 P R 1900 Cr =P L R 1900, 56 Cr, *Queen v Jarecharan*, 19 B 563, *In re Sankappa*, 3 M L T 270. *In re Ippari Ramalinga*, 3 M L T 333=7 Cr L J 393. *In re Bechaba Beori*, 3 M L T 263. But a former confession which was made by the accused when not in Police custody is admissible in evidence. *Harbans v King Emperor*, 8 O C 365=2 Cr L J 811, see also *Raj Kumar v Emperor*, 9 Pat L T 449=A I R 1928 Pat 473. Confession made by an accused not to a Magistrate but to the Superintendent of Post Offices, at his house, where he was taken temporarily by the police and was again removed back to police lock up is inadmissible in evidence. *Emperor v Sheo Ram*, A I R 1928 Lah 282=10 L L J 174=108 Ind Cas 398. Statements of accused while in custody of the Police officer, and of his having pointed out the places where he committed the offence are not admissible as being of an incriminating nature. *Keamat v Emperor*, A I R 1926 Cal 320=48 C L J 524=92 Ind Cas 439. While accused was in the lock up and under trial he was sent by the Magistrate to a dispensary in order to be treated for a malady which involved an examination of the patient in private. Two police men took the accused from the lock up to the dispensary. At the dispensary the police men waited outside on the verandah while the accused was inside undergoing examination at the hands of the doctor and during the few minutes that he was with the latter he made a confession. Held, that the confession was inadmissible in evidence under section 26 of the Evidence Act, in as much as the accused remained in the custody of the police men while he was undergoing the examination. *Emperor v Mallangouda*, 42 Ind Cas 597=19 Bom L R 683=42 B 1=18 Cr L J 991. Where a person suspected of having committed a murder made a confession to the *Zaildar*, in consequence of the latter dropping a remark to the effect that his own brother had committed a murder but had got off on making a clean breast of the matter. Held that in as much as the police were in the vicinity at the time

**S. 26.** of the confession and the accused though not handcuffed, was in police detention as a suspect, he was to all intents and purposes in police custody and the confession could not be proved unless made to a Magistrate *Karm Singh v. The Crown*, 32 P W R 1916 C1 = 153 P L R 1916 = 26 P R 1916 Incriminating statements made by accused persons while in police custody, in answer to questions put by a Police officer in the presence of a headman, are excluded from evidence under ss 25 and 26 of the Evidence Act *Zeta v. Emperor*, 18 Cr L J 106 = 37 Ind Cas 314 = 10 Bur L T 270, see also *Emperor v. Hua Guber*, 57 Ind Cas 601 = 21 Bom L R 724 Where the accused while in custody of the police, confessed to have committed theft and also stated that the stolen property would be found in a heap of rubbish close to his house and after making the statement he took out the property from the heap in the presence of two police constables Held that the statement as regards the commission of theft was not admissible in evidence but the statement that stolen property would be found in the heap of rubbish was admissible *Manjunathya v. Emperor*, 24 Ind Cas 845 = 24 M L J 372 = 15 Cr L J 533

Where an accused person promised while in police custody to return the stolen property, held, that the promise was an incriminating statement suggesting the inference that the accused participated in the commission of the offence, and 'therefore' a confession irrelevant under ss 25 and 26, Evidence Act *Hakimani v. King Emperor* 20 P R 1907 = 51 P L R 1905 = 2 Cr L J 230

A statement made by an accused person, while in the custody of the police if it is an admission of a criminalizing circumstance, is not admissible in evidence *Queen Empress v. Jarecharan*, 19 B 363, *Queen Empress v. Nana* 14 B 260 F B

**Confession made in the presence of a Magistrate** There is no provision of law which renders a statement made voluntarily by an accused, a suspect in an inquest proceedings before a Coroner inadmissible against the accused on his trial for the offence *Emperor v. Azim Khan* A I R 1928 Bom 52 = 30 Bom L R 84 A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the time is a confession made by him where the accused was told he need not make any statement but he insisted upon doing so Such a statement is a pure voluntary statement Section 20 of the Coroner's Act provides that a Coroner shall be deemed to be a Magistrate for the purposes of section 26 of the Evidence Act *Emperor v. Ram Nath*, 28 Bom L R 111 = 50 B 111 = 93 Ind Cas 690 = A I R 1926 Bom 151 But it would be wrong of a Coroner to examine an accused person on oath on the ground that he did not know that the person was an accused person and thereafter use that evidence in trial for a charge based on that evidence *Emperor v. Kari* 28 Bom L R 13 = 31 B 6 = A I R 1926 Bom 144 = 93 Ind Cas 225 = 27 Cr L J 433 A confession to a Magistrate while in Police custody is not inadmissible *Anwar Singh v. Emperor* 9 Ind Cas 806 = 27 Cr L J 134 = A I R 1925 Dah 57, *Queen v. Manmohan*, 24 W R Cr 33, *Queen v. Shahabat* 13 W R Cr 47, *Queen v. Vilmalhab* 15 C 595 A confession made by an accused person before the administrator in Portuguese territory, who is not a Magistrate is excluded by S 26 of the Indian Evidence Act It is immaterial that the Police-officer in whose presence the confession was made was not himself the person in charge of investigation in the case *Emperor v. Mahil Rana* 26 Bom L R 706 = 1924 Bom 480 A statement made to a Magistrate and so statements made in his immediate presence are admissible in evidence The term Magistrate is not restricted to the Magistrates exercising jurisdiction under the Cr Pro Code *Panchanatham v. Emperor*, A I R 1929 Mad 487 = 76 M I T 620 = 29 M L W 645 = 19 Cr L J 383

**Police officer, meaning of—**The word Police-officer in this section means "police-officer in Native States" *Queen Empress v. Lakshmya Rat. Un. Cr C 855 = Cr Rg 22 of 1896 Emperor v. Anand Rao* 49 B 612 It is doubtful whether a Chaukidar is a Police officer under his section *Anwar v. Emperor* 9 C W N 474 = 2 Cr L J 255 The words "police officers in this section" are used in the same sense in which they occur in section 2, and there is no reason for importing into this section the notion that the police officer there did not

in general terms must be restricted to investigating 'police officers' *Emperor v. Vallangadda* 42 Ind Cas 597=19 Bom L R 683=42 B 1=18 Cr L J 981 A Deputy Commissioner of Police of Calcutta is a police officer *Queen v. Horibole* 1 C 215 A village Magistrate in the Presidency of Madras is not a police-officer *Queen Empress v. Sama Pami*, 7 M 787 *Emperor v. Anand Rao* 49 B 492=89 Ind Cas 1096, *Gowind v. Emperor* 69 Ind Cas 257, *Badan Singh v. King Emperor*, 2 P R 1909=7 P W R 1909, *Emperor v. Anand Rao*, 49 B 642

**Magistrate** The word 'Magistrate' in this section includes Magistrate in Native States *Queen Empress v. Lakshmya Rat* Un Cr C 855, *R v. Naga Kala*, 22 B 235, *Queen Empress v. Sunder*, 12 A 595 A Magistrate though on leave and not in the district in which he has been exercising jurisdiction is a Magistrate within the meaning of this section *Tai Ullah v. Crown*, 8 P W R 1914 Cr=38 P L R 1914=15 Cr L J 6=22 Ind Cas 150 see also *R v. Vahala Jetha* 7 B H. C R C C 56 'Judge's Instruction of the French Government is a Magistrate and so statements made in his immediate presence are admissible in evidence The term Magistrate is not restricted to the Magistrate exercising jurisdiction under the Criminal Procedure Code *Pancha Nath Pillai v. Emperor* A I R 1929 Mad 487 But a Portuguese Administrator is not a Magistrate *Emperor v. Bhathi*, 87 Ind Cas 20=26 Bom L R 706

## 27 Provided that, when any fact is deposed to as discovered

How much of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved

**Principle** Sections 25 and 26 exclude confession to a police officer under any circumstances, or to any one else while the person making it is in a position to be influenced by a police officer *In the matter of Hiran Miya*, 1 C L R 21 The broad ground for not admitting confessions made to a police officer is to avoid the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by s 27, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given *Per Oldfield J in R v. Babu Lal* 6 A 509 (F B) The reason rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true *R v. Butcher*, 1 Lerch 265 notes (1) to *R v. Warwick* shall, 1 Leach 263=2 East P C 658, *Russ Gr* 2197 This section was intended not to let in confession generally, but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gives evidence *Per Straight C J in Queen Empress v. Babu Lal*, 6 A 509 (F B) at p 546 Certain statements made under certain circumstances are rendered inadmissible because the Legislature has in such cases, considered them unworthy of credit, but the taint is removed by the finding upon search, of articles connected with the crime or other facts *5 Mad L Jow Aricle at p 80* "The prisoner's statement as to his knowledge of the place where the property or other articles were to be found, being thus confirmed by the fact, is shown to be true and not to have been fabricated in consequence of any inducement It is this guarantee afforded by the discovery of the property for the correctness of the accused's statement which is the ground for the admission of the exception to the general rule The fact discovered shows that so much of the confession as immediately relates to it is true *Queen Empress v. Babu Lal* 6 A 509 (513 517)

It has already been noticed that the fundamental theory upon which confession becomes inadmissible is that when made under certain conditions they are untrustworthy as testimonial utterances A very slight probability of untruth to be sure, is sufficient to exclude (a probability much less than that which supports other testimonial exclusions) and the tests worked out are often more or less artificial, but the principle underlies the whole body of rules If now a



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circumstance appears which indicates that the law's fear of untrustworthiness is unfounded and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence the confession be accepted. This is the theory of confirmation by subsequent facts, which has been in vogue ever since there has been any doctrine about excluding confessions. That theory is that where in consequence of a confession otherwise inadmissible search is made and facts are discovered which confirm it in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation." *Higmore* § 856

"But it should seem, that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of respect... extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true." *Mr Leach's Crown Law 3rd Ed I, 301 note* In *R v Garbett*, 2 C & K 490, *Martin* for the prosecution said "Even in those cases (of improper confessions) the confession of a theft is received if the property be found in consequence." In the same case *Denman L C J* states the reason for such admission thus "Because it leads to the inference that the party was not accusing himself falsely." "so much of the confession as relates strictly to the fact may be received in evidence, and this is on the principle that so much of the confession is established to be true, and the foundation of the whole doctrine is that the jury ought to hear whatever is true, and are entitled to look for truth through any and every medium that may be calculated to reveal it." *Per Withers J* in *State v Fearnew*, 5 Rich L 404

**Origin of the rule** The section 150 of Act XXV of 1861 (The Criminal Procedure Code) ran as follows "When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it may be received in evidence." That section was thus altered by Act VIII of 1869 "Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact thereby discovered, may be received in evidence." section 150 of Act XXV of 1861 was re-embodied in section 27 of the Indian Evidence Act. *Queen Empress v Babu Lal*, 6 A 509

**Scope of the section** In *Empress v Awarpal*, A. W. N 1882 P. 2 *Yahmood J* held that s 27 cannot be regarded as governing the general rule laid down in s 25, but only that contained in s 26. In *Queen Empress v Babu Lal*, 6 A 509 (F. B.) the question arose whether section 27 was rightly interpreted in *Empress v Awarpal*, A. W. N 1882 225. In delivering his judgment *Yahmood J* said "The question raised by this reference is one of interpretation of the Statute and it may be briefly stated to be whether the proviso contained in section 27 of the Evidence Act governs only the last preceding section or s 25. In order to arrive at a satisfactory conclusion upon this point it seems to me advisable to trace the history of the rules contained in s 25, 26, and 27 of the Evidence Act, so as to ascertain how these provisions find a place in the law of evidence for India. I have stated these facts as introductory observations which I am about to make that the rules contained in s 25, 26, and 27 of the Evidence Act were not originally treated in British India as speaking rules of evidence, but rather as governing the action of police officers and as matters of criminal procedure. Then stating that s 150 of Act XXV of 1861 was repealed and re-enacted by Act VIII of 1869, he went on "What was the exact change of language introduced by the new section? Why was it introduced? What was its effect? These are questions which must be considered with reference to the point now before us. It seems clear to me that the change of language limited the operation of s 150 of Act XXV of 1861 to the facts discovered by a police officer in consequence of information received from a person accused of any offence, so much of such information whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it may be received in evidence." *Yahmood J*

taking away from it the force of a separate and independent proposition of law, and by reducing it to mere proviso. But a proviso to what proposition of law? Surely not to all the propositions contained in the four preceding sections. The change of language consisted in the introduction of the words 'provided that' as the opening words of the section. The new section by its change of language allowed the imperative rule laid down in s 148 to stand supreme, by rendering the language of s 150 a mere proviso to the rule contained in the immediately preceding section 149, which is expressly limited to confessions made by a person whilst he is in the custody of a police officer. The sections 25, 26 and 27 are identical in the rules which they lay down though the language has been improved by some verbal alterations which require no special mention except the omission of the word 'or' from the clause 'a person accused of any offence or in the custody of a police officer'. In the place of the omitted word 'or' a comma has been substituted, rendering the words 'in the custody of a police officer,' a parenthetical clause forming the qualification of the person whose confession would fall under the section. The removal of the disjunctive word is remarkable and if it has any effect, it is that of limiting the scope of the proviso. But the majority of the Full Bench held that section 27 is a proviso not only to section 26 but also to section 25, and therefore so much of the information given by the accused to the police officer whether amounting to a confession or not, as related distinctly to the fact thereby discovered might be proved. *Queen Empress v Babu Lal* 6 A 509 (F B) see also *Queen v Pagona*, 19 W R 51. *Reg v Jora Hasji*, 11 B H C R 242. *Empress v Rama Birappa*, 3 B 12. *Empress v Panchanan*, 1 A 198. *Adu v Queen*, 11 C 633. *Queen v Kamala* 10 B 595. *Queen v Nana*, 14 B 260. *Surendra v Emperor* 1b A L J 478. *Amiruddin v A E* 24 22 C W N 213. In *Queen v Mussamut Luchoo*, 5 N W P 86, it was held that section 27 does not qualify section 24. But in *Empress v Ram Buappa*, 3 B 12, it was assumed that section 27 did limit the operation of section 24 although no express mention of it is made therein, see also *Empress v Pancham*, 4 A 198. "The reasons given for and against the view that section 27 controls section 25 also apply with equal force to the question whether that section like wise controls section 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his own will is not his act, there is on the other hand the consideration that by whatever means obtained the statement receives a guarantee of its authenticity by the corroboration which the discovery lends to it. The considerations for or against the admissibility of such a statement may be said to be equally balanced." *Per Huda J in Amiruddin v The King Emperor*, 22 C W N 213 (223, 224)=44 Ind Cas 321=45 C 457. see also *King Emperor v Nagachi Pomin*, 2 L B R 168. *R v Misra*, 31 A 392. *R v Dhurm Dutt* 8 W R Cr 13. *Bushnoo Manjee v Queen* 9 W R Cr 16, 17. The operation of this section is restricted to information from an accused person in custody of the police and does not apply to information from accused persons not in custody of the police. Only so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. *Per Oldfield J in Queen Empress v Babu Lal* 6 A 509 (F B) at p 513, 514. This section refers to information whether received by a police officer or by other person. *Ibid*. It is manifest that the prohibition laid down in these two sections (25 and 26) must be strictly applied and any relaxation of it in accordance with the proviso of s 27 should be sparingly admitted and only to the extent of so much of the accused's statement as directly and distinctly relates to the fact alleged to have been discovered in consequence of it. *Per Straight C J in Queen Empress v Babu Lal* 6 A 509 (F B) at p 511. But *Mahmood J* said in the same case. "I hold that the rule laid down by the Legislature in s 24 (read with s 28) of the Evidence Act is a rule absolutely independent of the question of discovery or no discovery to which s 27 relates, that the state of things in India has induced the Legislature to frame in section 25 an equally absolute rule in regard to confessions made to police officers which are presumed to have been made under conditions prohibited by s 24 that, the Legislature going further in the same direction, has prohibited the admission

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of even such confessions as are made to third persons by the accused while in the custody of a police officer, that not the first two rules, but only the last rule so enunciated is made subject to the saving clause contained in section 26 rendering confession admissible, if they are not made to the police officer but to a third person, 'in the immediate presence of a Magistrate,' which affords a guarantee that the confession was not extorted, that the proviso contained in section 27 is not intended to qualify the absolute rules contained in s 24 and 25 but only the rule contained in the immediately preceding s 26 which relates to confession made, not to the police officer, but to third persons, while the persons making the confession is in the custody of the police. In short, I hold that the law of India as to confessions improperly obtained is the same as the rule laid down by Lord Eldon in *Harcley's Case*, 2 East P C 638 and that confessions to a police officer are conclusively presumed to have been improperly obtained, so as to be subject to the same rule, unaffected by the question of discovery." The test of the admissibility under s 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not is — "was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered and as such a relevant fact?" *Queen Empress v Contractor Sahib*, 12 M 153. Under section 27 of the Indian Evidence Act not every statement made by a person accused of any offence while in custody of a police officer, connected with the production or finding of property, is admissible. Those statements only which lead immediately to the discovery of property, and in so far as they do lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case and the connection between it and the statement made must have been such that statement constituted the information through which the discovery was made in order to render the statement admissible. Other statements connected with the one thus made evidence and thus immediately, but not necessarily or directly, connected with the fact discovered, are not admissible. That a witness says that a plan was prepared in his presence is not sufficient reason for admitting the plan in evidence, unless the witness also says that to his own knowledge the plan is correct. *Reg v Jora Hasu* 11 B H C R 242.

No part of a criminating statement whether amounting to a confession or not, written by an accused person himself while in police custody is admissible either against him or against the person jointly tried with him, unless it has led to the discovery of any fact within the terms of s 27, Evidence Act. *Chowdhury v Shuddham*, 44 P W R 1914 Cr (F B).

Section 27 of the Evidence Act, is a proviso to the preceding sections which deal with what may or may not be proved as against the person making a confession. *Aman Ali v King Emperor* 13 O C 309=8 Ind Cas 379=11 Cr L J 631. Section 24 of the Act contains an absolute rule which is not affected by the proviso made for a different purpose in section 27. *King Emperor v Agas* 2 L B R 168, *Nga Sanya v King Emperor*, U B R 1909, 1st Cr Evidence 3=11 Cr L J 41=4 Ind Cas 759, *Empress v Kuarpala*, A. W. N 1922 225.

This section does not permit statements made by an accused person, while in police custody to be proved, when he gave no clue which led to the discovery of the stolen property. *Queen Empress v Jai Singh* P L R 1900 Cr 56=1, P R 1900 Cr. Where the police were enabled to go to a place where stolen property was discovered on account of certain information given by the accused, held that so much of the information as related to the facts discovered could be proved notwithstanding that the information was given while the accused was in police custody. *Ganga v Empress* 30 P R 1895 Cr.

Bald evidence introduced through the mouth of a prosecution witness to prove the confession of an accused under cover of section 27 ought to receive very little credence by the Court more especially when the accused stands charged with grave offence as an attempt to murder and particularly when more direct evidence to prove the same points are available to the prosecution and which they do not take care to produce before the Court. *Shantilal v Emperor*, A I R 1922 Nag 350.

The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions but the necessity for the exclusion disappears in a case provided by s 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given *Buladi v Emperor*, A I R 1929 Lah 476, see also *Gairinda Emperor*, L R 4 A 210 Cr

When an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make up a story to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it *Hinga v Emperor*, 23 Cl L J 481=68 Ind Cas 17=9 O L J 190=4 U P L R O C 50

When a confession as a whole is excluded whether by reason of s 26 or 25 or 24, so much of the information given by the accused when in custody as distinctly relates to a relevant fact thereby discovered becomes admissible. When the accused himself produced the articles said to be discovered, so much of the information as the police in motion and led to the discovery is admissible *Amiruddin v Emperor*, 45 C 557=22 C W N 213=27 Cl L J 148=44 Ind Cas 321. Section 27 of the Evidence Act, qualifies not only ss 25 and 26 but also s 24, all three of which lay down general rules excluding confessions and the same broad grounds underlie all the three. *Ibid*, see also *Queen Emperor v Aana* 14 B 260 (F B), *Harbans v King Emperor* 8 O C 395=2 Cr L J 811, *Imperator v Dubud*, 4 S L R 209=9 Ind Cas 718=12 Cl L J 119. *Nga Ban v Queen Empress*, U B R (1892-1896) Vol. I 83. Section 27 of the Evidence Act is an exception to the preceding sections, and its object is to provide for the admission of evidence which but for the existence of that section could not be admitted. So much of the information, even if it amounted to a confession, made to a police officer, may be proved as related to the discovery of the stolen articles. The conduct or acts of the accused are not dealt with by section 27 and are relevant under section 8. *Mussamat Misri v King Emperor*, 6 A L J 839 (F B)=31 A 592=10 Cr L J 212=3 Ind Cas 26, 975 (F B)

The exception contained in section 27 of the Evidence Act to the general rule must be very strictly confined within its legitimate limits *Tara Singh v Crown*, 11 P R 1915 Cr

As a general rule, a confession made to a police officer is not admissible in evidence. But section 27 of the Evidence Act makes admissible so much of the accused's statements to the Police as led to the discovery of the stolen property. *Legal Remembrancer v Chuna Nashya*, 25 C 413=2 C W N 267. Where the statement of an accused person is a necessary preliminary to the fact discovered, it is admissible under section 27 of the Evidence Act, the question whether the statement is sufficient to enable the police to make the discovery by themselves or is only of such a nature as to require the further assistance of the accused to enable them to discover the fact, being immaterial. *Ibid per Bannerjee J*

In order to render a confession not made in the presence of a Magistrate admissible in evidence the fact discovered by it must be one which, of its own force independently of the confession would be admissible in evidence. *In re Choda Achanna*, 2 Weir 735=3 M H C 318

**Any fact** The fact discovered by a statement must be a material thing and not a mental state induced in another person by that statement. *Emperor v Chaitu* 16 C P L R 122, *Sukhan v Emperor*, A I R 1929 Lah 344 (F B). The words "any fact" are qualified by the word "discovered" as used in the section. Moreover the facts discovered must be relevant to the case. *Reg v Jora Haspi* 11 B H C R 242. "No judicial officer should allow one word more to be deposed to by a police officer, dealing with a statement made to him by the accused in consequence of which he has discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as

**S 27.** in itself to be relevant evidence against him' *Per Straight C J in Queen Empress v Babu Lal*, 6 A 509 (516), see also *Adu Shirdar v Queen Empress* 11 C 635 The test of admissibility, under s 27 of information received from an accused person in the custody of a police officer is, "Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?" *Mad L Jour* p 80 (Article)

**Deposed to** It is necessary, in order to bring a case of discovery within section 27, that the fact discovered should be deposed to by the person to whom the statement was made. *Mad L Jour* p 80 (Article)

**Discovered.** The word 'discovery' is in ordinary parlance capable of two meanings firstly the purely mental act of learning something which was not known before to a person, and secondly the physical act of finding upon search something, the existence or the exact locality of which was unknown till then. It is in the latter, and not in the former, sense that the word is employed in the Evidence Act and this will be made evident upon considering the principle underlying this section. *Mad L J* pp 80-81 From this definition of 'discovery' it follows that simple statements, or statements made while pointing out the scene where the crime was committed or while producing articles, and showing the connection of the place or thing with the offence are not renderable admissible under section 27, but only statements preceding the finding, upon search or inquiry, of articles or other facts connected with, or referable to the crime. *Ibid* see also *R v Jora Haspi*, 11 B H C R 242 *R v Nana*, 3 B 12 *R v Nana*, 14 B 260 'The test is was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact' *Queen Empress v Commer Sahib* 12 M 153 Incriminating admissions of an accused before the police officers cannot be said to lead to the discovery of several places pointed out by the accused where they are already known and cannot be said to have been discovered in consequence of the said admissions within meaning of s 27. *Shamsh v Emperor* A I R 1929 Nag 350 *Adu v R* 11 C 635 *Pirar v E*, 11 P B 1900 Cr But this section applies when the discovery is made by a police officer even when the facts are already known to persons other than police officer. *Legal Remembrance v Lalit* 49 C 167=25 C W N 788 The word 'discovered' is very important. The test is that the fact discovered must be discovered in the sense that the proof of the existence of the fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of the fact. The rest of the information is not admissible. But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he may ask the deponent to depose to the exact words used by him. Then under section 39 so much of the statement made by him can be given in evidence as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement. But so far as the admissibility of the words deposed to is concerned, they are still governed by the provisions of s 27 which must be construed as favourably to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections namely 25 and 26 which are in his favour. *Karam Das v Emperor*, A I R 1929 Lah 338

**Information whether includes Mere Statements** The statement of a person that he killed a person is a fact according to s 3 of the Evidence Act [entails (c)] Such a statement made to a police officer by the accused in custody may lead to a mental discovery. But discovery under this section does not include mental discovery. Hence such a confession cannot be deposed to by a police officer under this section. *Mad L Jour* Art 81 So where an accused makes a statement to a Magistrate, detailing at length the occurrence of the crime and there was no discovery of article after the statement the description of the manner in which the murder was committed was held inadmissible. *Emperor v Rama Dasappa* 13 B 12 *Mad L Jour* Art 82 'Throughout all the authorities dealing with section 27 the word 'statement' is used interchangeably with the word

'information'." *Per Shadi Lal C J in Sulhan v Emperor*, A I R 1929 Lah 344 (F B) at p 353. But *Dalip Singh J in Karam Din v Emperor*, A I R 1929 Lah 338 said "In connexion with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement, alone was intended. The word 'information' is distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. It is unnecessary to enter into the question whether all means of imparting knowledge by one person to another person are or are not covered by the word 'statement' but it is necessary to emphasize the second portion, namely that 'information' also includes knowledge derived by the person informed from the informant."

**Statements made while pointing out the scene of the crime.** A confession of murder made to a Police constable, is not at all confirmed by the prisoner's saying "that is the place where I killed the deceased." *Reg v Jora Hasji*, 11 B H C R 242, *Empress v Rama Buaqa*, 3 B 12.

**Statements accompanying production of articles.** If the prisoner himself produces or delivers articles said to have been connected with the crime and makes declarations contemporaneously as regard them, the act of production or delivery itself may be proved as 'conduct' under section 8, but the accompanying statements cannot be deposed to under section 27, as there is no discovery in such a case. *5 Mad L Journal* p 83, *Empress v Rama Buaqa*, 3 B 12 (17). In the last mentioned case the prisoner *Rama*, besides the formal recorded confession, made confessions to the Police officers before and during his pointing out particular places and particular articles said to have been connected with the murder. Held that the confession was inadmissible, see also *Reg v Jora Hasji* 11 B H C R 242. Similarly in *Empress v Panham* 4 A 198 (200) *Straight C J* said "Now the fact thus deposed to of *Panham*, giving up a knife to the *daroga* in presence of the witness as the weapon with which the murder was committed is of course inadmissible as evidence against him as proving a confession or admission of his guilt. But there are other things in this deposition which appear to me to be not only not excluded as evidence but which come fairly within the meaning of s 27." See also *Adu Shukdar v Queen Empress*, 11 C 635.

**Statements preceding finding upon search or inquiry.** The discovery must be made in consequence of the statement. Such discovery proves that the statement is true and is not fabricated. *Reg v Jora Hasji* 11 B H C R 242. *Empress v Rama Buaqa*, 3 B 12. *Queen Empress v Nana*, 11 B 260.

**In consequence of information.** 'Whatever be the nature of the fact discovered, that fact must in all cases, be itself relevant to the case and the connection between it and the statement made must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible.' *Reg v Jora Hasji* 11 B H C R 242. In *Queen Empress v Nana* 11 B 260 the accused was charged under section 411 of the Indian Penal Code, with dishonestly receiving stolen property. In the course of the police investigation the accused was asked by the police where the property was. He replied that he had kept it and would show. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and with his own hands disinterr'd the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was contended that the statements were inadmissible having been made when the accused was in custody of the police. *Sargent C J* in delivering his judgment said "As regards section 27, it has been contended that it is not applicable, as the property it is said was not discovered in consequence of the information given by the accused to the police but by the act of the accused himself on the spot and the case of *Queen Empress v Kamalia* 10 B 595 following the expression of opinion by *Straight J* in *Empress of India v Panham* 4 A. 198 (206) was cited as an authority for that view. It is clear however, that it was

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upon the information which the statement gave to the police that they examined the accused to the spot where the earthen pot was discovered by the accused containing the property, and it is equally clear that, if it had not been for the information, the property would not have been discovered, and it is, therefore, in accordance with the ordinary use of such terms to say that the discovery of the property in this case was the consequence, of the information. It is the police in motion, the immediate consequence being that the police led the accused to show them the spot and accompanied him there, but such proceeding on the part of the police was with the view to the discovery of the property and was the natural consequence of the information they had received from him, and connected it with the final result viz the discovery of the property as a *causa causans*. In the same case *Jardine J* said: 'After further consideration I come to the opinion that, in regard to the extent of the words thereby discovered, we may derive some assistance from the test applied by the Court in dealing with proximate and remote cause of damage, namely whether what followed was the natural and reasonable result of the defendant's act. It being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and the Court is not divided in opinion. But to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate causes, I would refer to Lord Blackburn's decisions, where he discusses Lord Bacon's Maxim, 'It were infinite for the law to judge the cause of causes and the difficulty of drawing the line (*Suresby v Lancashire and Railway Co*, L R 9 Q B at p 257, *Dudgton v Pembroke* L R 9 Q B at p 595, *Hobbs v London and South Western Railway Co* L R 10 Q B at p 121). In the present case I am of opinion that the latter acts of Nana are closely connected with his earlier statement as effect and cause and naturally arose therefrom in the usual course of things and are not remote and indirect consequences. 'Section 27 was not intended to let in a confession generally, but only such particular parts of it as set the person to whom it was made in motion, and led to his giving the fact or facts of which he gives evidence. *Queen Empress v Babu Lal*, 6 A 509 (546), see also *Queen v Paqaree* 19 W R 51, where it was held that where the article was discovered by the act of the party, even there it was deemed to be discovered in consequence of the information. But in *Empress v Rama Bappa*, 3 B 12 West J took a contrary view. In *Empress v Pancham* 4 A 198, also *Straight J* expressly laid down a distinction between a discovery by the act of the party and one from his information. See also *Queen Empress v Babu Lal* 6 A 509, *Queen Empress v Kamaha* 10 B 595.

The view as expressed in *R v Nana*, 14 B 260, has also been adopted by the Calcutta High Court. *Legal Remembrancer v Chema Nashyut* 25 C 413, *R v Paqaree Saha* 19 W R Cr 57.

The fact deposed to as discovered in consequence of information received or confession made to the police by an accused person must be a fact relevant to the case in which the evidence is sought to be given if it is sought to be admitted as evidence under section 27. *Golul Chaman v Emperor* 105 Ind C 683-85 Cr L J 971-6 Pat 611. If arms are recovered in consequence of information supplied by the accused, the statement made by them are admissible under section 27 of the Indian Evidence Act. *Ali Ahmed v Emperor* 1923 Ind 434.

**From a person.** Where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information the fact should not be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of A B and this will let in so much of the information as relates distinctly to the information therein discovered. *Queen v Ram Churn* 21 W R Cr 36. In *R v Babu Lal* 6 A 509 (549, 550) *Strait J* observed: 'I have more than once pointed out that it is not a proper course where two persons are being tried to allow a witness to state 'they said this, or they said that, or the prisoner then said'. It is certainly not at all likely that both the persons should speak at once and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he has

dually used. And I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. In dealing with statements of this kind which are alleged to have led to the discovery it is of the essence of things that what each prisoner said should be precisely and separately stated. If the witness was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it." See also *Rama Singh v Crown*, 50 P R 1915=7 Cr L J 12. Where all the accused persons jointly pointed out the place where blood stains were found and subsequently the place where the dead body of a person was discovered buried, such evidence is not admissible at all against any of the accused unless it can be shown who made the discovery first. *Taguva v Emperor*, A I R 1929 Lah 665, *Adam Khan v Emperor* 101 Ind Cas 488=28 P L R 187=28 Cr L J 456.

"In my opinion section 27 of the Evidence Act ought to be strictly construed. In a case where one accused has agreed to point out a place, where a fact would be discovered in pursuance of his statement to point out that place section 27 does not cover similar statements of the other accused in police custody." *Per Pradeaux J in Kudaon v Emperor*, 21 N L R 86=A I R 1925 Nag 407, *Budha v Emperor* 9 P L R 1922=(1922) Lah 315=64 Ind Cas 502=23 Cr L J 22, *Rama Singh v Crown*, 7 P R 1916 C=35 P W R 1916 Cr=17 C L J 273=34 Ind Cas 993.

If two persons give information which leads to the discovery of a fact, so much of the statement of each person which relates distinctly to the fact discovered may be proved. The exclusion of confessional statements under section 26 is based on the presumption arising from the custody of the police that they are untrustworthy. As soon as a circumstance is proved which rebuts that presumption, e.g. the presence of a Magistrate or confirmation by subsequent discovery, the confession becomes admissible either *in toto* if there is a guarantee of a Magistrate's presence, or to the extent to which it is confirmed. If therefore two persons give information which leads to discovery, the statement of both have been confirmed and are admissible. Statements of co accused subsequent to the discovery are irrelevant. *Crown v Sulleman*, 10 S L R 7=17 Cr L J 506=36 Ind Cas 474.

Where a material fact for instance, the manner in which a theft was committed, has already been discovered by some other means an accused's subsequent statement relating to the same fact while in police custody, is not admissible under s. 27 of Act I of 1872. *Munna v Emperor*, 9 Ind Cas 232=12 Cr L J 35=3 P W R 1911.

Where the Police succeeded in discovering property in consequence of information received from an accused, it is not competent to the Police to replace the property in the place where it was discovered, and to ask the other accused to produce the property because there is no further discovery under s. 27, Evidence Act, as against the other accused. *Queen Empress v Bashyn*, 2 Bom L R 1089.

**Accused person in custody.** The words used in section 150 of Act VIII of 1869 (which is re-enacted as section 27 of the Evidence Act 1872) are "a person accused of any offence or in the custody of a police officer." The only alteration in section 27 is the omission of the word 'or before 'in custody,' but this only shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police. *Per Oldfield J in Queen Empress v Babu Lal* 6 A 509 (513). The meaning of the word in the Evidence Act appears to be that, in order to bring a case of discovery within the scope of s. 27, it is necessary that the party making the statement should be both accused and in custody at such time hence this section will be inapplicable where the person at the time of making the statement was (a) neither accused nor in custody (b) in custody but not accused besides under the circumstances mentioned by *Oldfield J* of being (c) accused but not in custody. *5 Mad L J Article p 128*. As soon as an accused person comes into the hands of a police officer he is in the absence of clear and unimpeachable evidence to the contrary, no longer at liberty



**S 27.** and is therefore in custody within the meaning of ss 26 and 27 *Maung Lal v Emperor*, 25 Cr L J 381-77 Ind Cas 429 "Applying these words of limitation in section 27 to ss 24, 25, 26, the result will be as follows —

(1) A confession obtained by inducement, threat, or promise under the circumstances of s 24, will not be affected by the operation of s 27, when the person confessing is at the time (a) neither accused nor in custody, (b) in custody but not accused, (c) accused but not in custody, notwithstanding any fact of discovery in consequence thereof

(2) A confession made to a police officer by a person who at the time (a) neither accused nor in custody, (b) in custody but not accused, (c) accused but not in custody, is wholly excluded notwithstanding any fact of discovery in consequence thereof. A confession made to a police officer by a person who is not in custody of the police, would not be inadmissible in evidence because it could not fall under the purview of section 27, which is restricted to a person in the custody of a police officer (*Queen Empress v Babu Lal*, 6 A 309 304 F. *Mahmood J* and see per *Oldfield J* p 513 *supra*)

(3) A confession made to any person, other than a police officer by a person who was at the time in his custody but not accused, is inadmissible even though it may lead to discovery unless indeed it was made in the immediate presence of a Magistrate. 5 *Mad L J Article* pp 128, 129

A husband assaulted his wife and his wife died as a result of it. The husband immediately went to the police station and reported that he went to the west facing room and there finding his wife sitting, wounded her and she became senseless. On receipt of the information the police went to the house and found the corpse. Held that the statement to the police was not admissible under section 27 of the Evidence Act as the husband was not at the time of making the statement, a person accused of an offence not having been charged with any offence then. *Deonandan v Emperor*, 6 Pat L T 534=111 Ind Cr 113=9 Cr L J 790=A I R 1928 Pat 491

Petitioner was neither accused nor in custody when he gave information which led to the discovery of a rifle. One of the prosecution witnesses deposed that the petitioner said where the rifle had been buried, the other deposed that he said "I buried it." Held that in the absence of any other evidence of possession by the petitioner, it cannot be presumed that because he knew where the rifle was he had concealed himself. *Khuda Bakhsh v Emperor* 1923 Ld 238 Section 27 of the Evidence Act does not make a confession which would otherwise be inadmissible, admissible to prove the fact discovered in consequence of information contained in it unless the person who confesses is a person accused of an offence and also in custody of the police. *King Emperor v Nga Lung Bo* U B R (1916) 2nd Qr p 114=17 Cr L J 402=35 Ind Cas 962

So much of the information as relates distinctly to facts thereby discovered. Two views appear to have been taken as to the extent of the information admissible in evidence under this section. The first view is in favour of putting a wider construction on the words "as relates distinctly," so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact but also the portion of the information which leads immediately by way of explanation. The other view construes the words "as relates distinctly to" to mean "as leads directly and immediately to or is a proximate cause of." 5 *Mad L Journal Art* pp 129 130. In *Queen v Purni Singh* 19 W R Cr 51, the accused stated to the Sub Inspector "that he had seized *Khatu Bibi* (the deceased) by the neck and pushed her forcibly down that she fell against a plantain tree and broke her neck, that he also took her with his hand that the woman then and there died and that he then endeavoured to remove the body, took from it a necklace and a pair of bangles which he concealed in the neighbouring jungle. In consequence of the information the accused was taken to the jungle pointed out by him and the bangles produced from a concealed place the necklace and bracelets before spoken of saying that they were the ornaments he had removed from the body of *Khatu Bibi*. Held that under section 27 of the Evidence Act that part of the confession which described his assault on the deceased and her consequent death and the way in which he became possessed of the jewels related distinctly

to the fact of the discovery of the ornament, and might be proved against the accused. So it is clear from this case, that the Court in this case followed the first view. But *West J* in *Reg v Jora Hasji*, 11 B H C R 12 took a different view. He supported the second view mentioned above as will be apparent from the following passage of his judgment namely "It is not all statements connected with the production or finding of the property which are admissible, those only which led immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case and the connection between it and the statement made must be such that the statement constituted the information through which the discovery was made in order to render the statement admissible. Other statements connected with the one thus made evidence, and so mediately but not necessarily or directly connected with the fact discovered are not to be admitted, as this would rather be an invasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance a man says 'you will find a stick at such and such a place. I killed Ruma with it. A policeman in such a case, may be allowed to say he went to the place indicated and found the stick but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find' the prisoner has said 'I placed a sword or knife in such a spot' when it was found, that too, though it involves an admission of a particular act on the prisoner's part is admissible, because it is the information which has directly led to the discovery and is thus directly and independently of any other statement connected with it. But if, besides this the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement is it has not furthered much less caused, the discovery is not admissible' This case apparently supports the second view mentioned above. See also *Empress v Rama Birappa*, 3 B 12.

"It is true that *Brodlhurst J* in referring to this question in *Queen Empress v Babu Lal*, 6 A 509 says that no difference is noticeable in the rulings of *Queen v Pagaree Saha* 19 W R 51 *Reg v Jora Hasji* 11 B H C R 242, *Empress v Pancham* 4 A 198 as to the extent to which statements or confessions of accused persons can be proved by a police officer under section 27, but it is respectfully submitted that the case of *Queen v Pagaree Saha* 19 W R 51 is not reconcilable with the principle laid down in *Reg v Jora Hasji* 11 B H C R 242, *Empress v Rama Birappa*, 3 B 12 *Queen Empress v Babu Lal* 1 L R 6 A 509, *Adu Shukdar v Queen Empress*, 11 C 635 *Queen Empress v Commer Sahab* 12 M 153 *Queen Empress v Nana* 14 B 260 and is indeed virtually over ruled by *Adu Shukdar v Queen Empress* 11 C 635. The statements of the accused as to the assault would be clearly excluded according to the test laid down in the subsequent rulings as not leading directly to nor being the proximate cause of discovery. The only portion admissible, according to these cases, is that which refers to his taking the ornaments and concealing it in the jungle. *J Mad Lau Jour Article p 130*.

In *R v Nana* 14 B 260 263 it was said that there was little or no difference of views of the several High Courts. But nevertheless the section has been the subject of considerable discussion at the Bar at the hands of very learned counsels and at the Bench at those of very eminent Judges of the High Courts in India. *A I R 1929 Journal 101*.

In *Sukhan v Emperor* A I R 1929 Lah 344 (F B) the question of the admissibility of an incriminating statement made by an accused while he is in the custody of a police officer was considered. The prisoner in that case was tried for the murder of a boy who was wearing certain ornaments at the time of his disappearance but the ornaments were not found on his corpse when it was recovered from a well. At the trial the Sub-Inspector of Police deposed to the fact that in consequence of information received from the prisoner he had recovered from one *Allah Din* silver *karas* (bangles) which were proved to be the *karas* which the boy was wearing when he was last seen. The witness was then asked to disclose the information communicated to him by the accused which caused the discovery of the fact deposed to by him and he stated that the prisoner had during the investigation made the following statement "I had

**S. 27.** removed the *karas*, had pushed the boy into the well and had pledged the *karas* with *Allah Din*" The trial Judge admitted the whole of the confession but *Jek Chand* and *Aya Haidai J J*, who heard the appeal preferred by the prisoner referred to the Full Bench, the question of the extent to which the aforesaid confession can be proved against the accused

*Shadi Lal C J* in delivering the decision of the majority of the Full Bench said "Now, the first thing which the Court trying the criminal case involving a confession of this description does is to allow the police officer to prove the fact discovered by him in consequence of the information imparted to him by the accused. It is obvious that the fact itself must be relevant to the issue arising in the case, otherwise no evidence can be admitted in proof thereof. It is to be observed that section 27 has nothing to do with the question as to whether the fact is or is not relevant, and that question must be determined with reference to the other provisions of the Evidence Act. When the prosecutor has after satisfying the Court about its relevancy, deposed to the fact discovered by him he has laid the foundation for proving the information received by him from the accused. It is at this stage that s. 27 comes into operation, but, before solving the problem as to how much of the information should be received in evidence the Court must ascertain the exact fact discovered by the police officer. If the fact is correctly and precisely defined it would help the Court in determining the extent of the information rendered admissible by the aforesaid section.

The expression 'fact' as defined by s. 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in section 27. The phrase 'fact discovered' used by the legislation refers to a material, and not a mental fact. A fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing or it may be a mental thing in relation to the place or the locality where it is found. Taking the present case as an illustration, the fact discovered is not the *karas* simpliciter but the *karas* being found in the possession of *Allah Din*. It is necessary to draw this distinction because the amount of the information admissible is limited by the precise fact discovered thereby. In other words, the information he admitted must relate distinctly not to the *karas*, but to the *karas* in relation to their possession by *Allah Din*.

"Having ascertained the fact discovered we proceed to determine how much of the information supplied by the accused may be proved. The language of s. 27 when analyzed, shows that the legislature has prescribed the following limitations in order to define the scope of the information provable against the accused: (1) the information must be such as has caused the discovery of the fact. This condition follows from the phrase 'discovered in consequence of the information' and also from the expression 'thereby discovered', used by the legislature with reference to the fact. In other words, the fact must be the consequence and the information the cause of its discovery. The information and the fact should be connected with each other as cause and effect. If any portion of the information does not satisfy this test it should be excluded. (2) The information must 'relate distinctly' to the fact discovered. The word 'relate distinctly' means 'relate to have reference to' or 'to connect' and the word 'distinctly' means 'clearly and unmistakably decidedly or indubitably'. To put it in a different language, the information must be clearly connected with the fact. As I have pointed out, the wording of the section shows that the requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. These conditions when combined lead us to the conclusion that only that portion of the information is provable which has the immediate or proximate cause of the discovery of the fact. Anything which is not connected with the fact as its cause or is connected with it not as its immediate or direct cause but as its remote cause does not come within the ambit of the section and should be excluded.

In determining the question referred to us we cannot derive much assistance from the English Law. The judgments of the English Courts are not easy to reconcile but the rule followed in the later authorities appears to be

that so much of the inadmissible confession as relates strictly to the fact discovered in consequence thereof may be given in evidence, but independent statements though made at the same time, must be rejected. Nor do the judgments of the High Courts in India to which our attention has been invited by the learned counsel on both sides, disclose a complete unanimity as to the extent of the information admissible in evidence under section 27. The consensus of judicial opinion is, however, in favour of the view that the section allows only so much of the information as leads directly and immediately to the discovery of a fact, but that the portion of the information which, merely explains the material thing discovered cannot be proved. This rule is not only warranted by the language of the section which embodying as it does, an exception to the general rule against the admissibility of confessions must receive a strict construction but also conforms to the principle upon which the exception is founded. The real difficulty arises in applying the test to the facts of a particular case. To illustrate this difficulty I may mention a case in which the admissible portion of a confession is so mixed up with the inadmissible one that the two cannot be separated without modifying the language in which the confession was made by the accused. It is cases of this description which have led to a divergence of judicial opinion, and it has been laid down in some judgments that the whole of the statement can be given in evidence, and that it is not competent to the Court to split up the language used by the accused in conveying the information to strike out some words which are objectionable and to admit only those which relate strictly to the discovery. There is considerable force in this argument but I do not see why the protection thrown round an accused person by ss 24, 25 and 26, Evidence Act, would be dependent upon the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information. Suppose a prisoner on being asked about the weapon of offence says 'I buried a hatchet in my field. I killed A with it. Now, it is indisputable that the recovery of a hatchet from the field renders only the first part of the statement admissible, and that the second part cannot be given in evidence. But, if the police officer converts the two sentences into one and represents the accused as saying 'the hatchet, with which I killed A, I buried in my field', then according to those judgments the whole of the above statement would be admissible. The admissibility or otherwise of the information must depend upon its intrinsic character, and not upon the manner in which the sentence conveying the information is framed by the police officer or the prisoner. It would be unreasonable to suggest that a statement which could not be received under s 27, if it were placed before the Court in a separate sentence should be let in as soon as it is amalgamated with the admissible statement. In determining the extent of the statement, which should be provable on the ground of its being the proximate cause of the discovery, the Courts must have regard not to the composition of the sentences in which the statement is concluded but to its substance.

"The information received from an accused person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy. But it is not always possible to observe this salutary rule. If the witness, to whom the statement was made, has not reduced it to writing and does not remember the exact words used by the accused, he can depose to it only in his own language. And there is no valid reason why he should not be required to do the same if the admissible portion is so mixed up with the inadmissible one as to render it necessary to give the former in the words of the deponent. *Regina v Gould* 9 C & P 364, see also *Santa v Emperor* 19 Ind. Cas 190 *Tara Singh v Emperor* 29 Ind Cas 817=10 Cl L J 545, *Gurdit v Emperor* 44 Ind Cas 967=52 P L R 1918 *Gula Khan v Emperor*, A I R 1926 Lah 138.

The difficulty of splitting up the words used by the accused in imparting the information leading to a discovery was relied on in the judgment of *Sogan-muthu v Emperor* 30 M 274=A. I R 1926 Mad 638 which was followed in *Harnam Singh v Emperor*, A I R 1928 Lah 308=9 Lah 626. In the last mentioned case *Jai Lal J* said 'The whole of the information including the confessional portion thereof given by the prisoner which relates to the fact include not only the concrete thing discovered by the investigating officer, but also its

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description as given by the accused including its connection with the crime which is under investigation. While only so much of the information can be proved as has led to the discovery of the fact, there is no legal justification for splitting or cutting down the statement and thus to defeat the very object which section 27 was enacted and therefore, the information must be proved in the precise terms in which it was given." See also *Lalji Dosadh v Emperor*, A I R 1928 Pat 162=6 Pat 747. So in the Full Bench case of *Sulhan v Emperor*, A I R 1929 Lah 344, *Shadi Lal J* in delivering the judgment of the majority of the Full Bench continued "In the present case I have no hesitation in holding that the confessional statement that the accused pushed the boy into the well is wholly inadmissible, as it relates to a separate matter and had no connection with the possession of the ornaments by *Allah Din* which was the only fact discovered. Nor do I think that the statement that the prisoner had removed the *karas* from the boy can be regarded as immediate cause of the discovery. A man may remove the ornaments from the boy, but he may not give them to *Allah Din*. The removal is not the proximate cause of the ornaments being found in the possession of *Allah Din*. Some other act must take place after the *karas* have been removed from the boy and before they came into the custody of *Allah Din*. That intervening act is the pledging of the ornaments by the prisoner with the latter and it is only this statement in consequence of which the discovery was made." But in the same case *Fforde*, and *Jailal J J* (dissentient) said "The information 'I had removed the *karas* and had pledged the *karas* with *Allah Din*' may be proved." See also *Queen Empress v Nani* 14 B 260. *Shriabhai v Emperor*, A I R 1926 Bom 513=50 B 683.

In *Sogamuthu v Emperor*, 50 M 274=A I R 1926 Mad 638, *Spencer J* expressed his view of the section in these terms "I adhere to the view which I expressed in *In re Nannamalai Konan* (A I R 1921 Mad 679) that the statement of the accused that he had in his possession certain stolen property is admissible in evidence even though he himself produced the property." *Manju v Emperor* (1914) 26 M L J 352=24 Ind Crs 845=15 Cr L J 333.

In *Lalji Dusadh v Emperor*, A I R 1928 Pat 162=6 Pat 747, *Mulla J* observed "The learned *rakil* objects to the admissibility of that part of the statement which refers to the weapon as the one used for attacking the deceased but in my opinion section 27, Evidence Act, is quite clear upon this point. It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon, but common sense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provision of section 27, Evidence Act wholly nugatory. The whole confession of a prisoner in police custody cannot of course go in but where the confession includes a statement that a weapon was used for committing the offences charged that part of the confession can certainly go in if it leads to the discovery of the weapon. The most recent case on this point is, *In re Sogamuthu Padayach* 50 M 270=A I R 1926 Mad 638, see also *Shriabhai v Emperor*, A I R 1926 Bom, 513=50 B 683.

So far as the High Court of Lahore is concerned that matter has been set at rest by the recent Full Bench decision in *Sulhan v Emperor*, A I R 1929 Lah 344 (F B) which overruled the interpretation of the section as given in *Harnam Singh v Emperor*, A I R 1928 Lah 308=9 Lah 626. The exposition of the law in the latter case was also not accepted as correct by another division of the same High Court in *Karam Din v Emperor*, A I R 1929 Lah 333.

But the High Courts of Madras, Bombay and Patna have given a wider interpretation of the terms of the section and that view accords with the view expressed by *Fforde* and *Jailal J J* in the minority judgment of *Sulhan v Emperor*, A I R 1929 Lah 344 (F B) as well as in *Harnam Singh v Emperor*, A I R 1928 Lah 308=9 Lah 626. So it is clear that the Full Bench case in *Sulhan v Emperor* *supra* following the analogous rule of English Common Law has placed a new interpretation on the wordings of the section while the Madras, Bombay and Patna High Courts as well as *Fforde* and *Jailal J J* interpreted the section taking into consideration only the language of the section and very probably being influenced

by the consideration as observed by *Fford J* in *Hornam Singh v Emperor* *supra*, that "as section 27, Evidence Act has been drafted, as have been almost all the provisions of the Act upon the English principles of law laid down in decided cases, these principles are very useful guides to the interpretation of the Evidence Act. But in considering the effect of section 27, it must be borne in mind that whereas in England a confession made to a police officer by a person in custody is admissible in evidence, provided the prosecution first shows that it has not been obtained by any improper means such as coercion threat or wrongful possession, section 26 Evidence Act prohibits such confession being received in evidence at all unless it comes within the four corners of s 27." There is no recent English authority on the subject probably due to the fact that in England this question now very rarely arises. In America the tendency of the Courts appears to be to admit the whole confessional statement once it has been proved that some relevant fact has been brought to light in consequence thereof.

The law on the subject is thus stated by *Prof Wigmore*. It will be observed that, in Mr Leach's phrase, "so much of the confession as relates strictly to the fact discovered by it" is to be received. In other words, the confirmation admits the part confirmed and that only. Now this falls something short of the logic of the case, for a confirmation on material points produces ample persuasion of the trustworthiness of the whole. It can hardly be supposed that at certain parts the possible fiction stopped and the truth began and that by a marvellous coincidence the truthful parts are exactly those which a subsequent search (more or less controlled by chance) happened to confirm. Such a differentiation is purely artificial, and corresponds to no actual mental processes, either of the confessor or of the hearer. If we are to cease distrusting any part we should cease distrusting all." *Wigmore* § 857.

"If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is true it ought to be received, for in such cases the reason of the exclusion is done away with. All the Courts recognize the propriety of this reasoning, but illogically decline to pursue it to its logical results. If one, accused of larceny being put to torture, confesses the crime and produces the goods from his own possession or discloses the place of their concealment, and they are afterwards found in the place indicated you may it is agreed give in evidence the fact of the finding of the goods conformably to information given by the prisoner but you may not in the same case according to the received opinion give in evidence the prisoner's statement that he deposited the goods in the place where they were found, or that he stole them. But, I assert, in the case supposed, the finding of the goods at the place indicated not only tends to corroborate the declaration of the prisoner that they will be found there, but also his declaration that he stole them and concealed them at the place, if he make this statement. In other words the received doctrine involves this absurdity that while in passing upon the primary question whether the evidence shall be received, the Court notwithstanding the corroborating circumstances shall find the confession probably untrue and therefore exclude it the jury, considering the same evidence (that the place of concealment was disclosed by him) may find the very fact confessed to be absolutely true." *Per Wells J* in *Berry v U S* 2 Colo 211.

A statement leading to discovery of certain articles is, however, admissible under section 27 *Emperor v Panyab* A I R 1929 Sind 245.

The words used by the legislature in s 27 make it absolutely clear that only so much of such information whether it amounts to a confession or not, as relates distinctly to the fact which is deposited as discovered in consequence of the information received may be proved. *Mahibur v Emperor* A I R 1929 Sind 175. Such portions of the confession made to the investigating officer as lead to the discovery of any fact are admissible under section 27 of the Evidence Act. *Jagmala Dhanuk v Emperor* 5 Pat 63-93 Ind Cas 884-7 Pat L T 396-27 Cr L J 484-A I R 1926 Pat 232. Where a person was murdered and his body was discovered in consequence of information received from the accused the statement of the accused to the police that he in company with his father and brother buried the body, is admissible in evidence. *Sufal v Emperor*, 8 Lah L J 519-

**S 27** 95 Ind Cas 603=27 Cr L J 827 The information given by the accused which led to the recovery of certain jewels which had been stolen was held to be admissible in evidence under section 27 *Mansha Singh v Emperor*, 7 Lah L J 1186 Ind Cas 347=26 Cr L J 763=A I R 1925 Lah 371 A confession which led to the discovery of the articles is admissible under s 27 but a statement in which they were stolen articles does not lead to discovery of the articles and hence is inadmissible *Manna Lal v Emperor*, A I R 1925 Oudh 1, see also *Emperor v Tura*, 55 Ind Cas 685

The accused in a murder case informed the Superintendent of Police that he was ready to point out the axe with which the murder had been committed. The axe however was not produced in his presence but subsequently. Held that the offer to produce the axe and the subsequent production of it were all parts of one transaction and the words used by the accused were admissible in evidence *Bahadur v Emperor*, 88 Ind Cas 7=26 Cr L J 1063=A I R 1927 Sind 289

A statement made by an accused may be proved under section 24 of the Indian Evidence Act, 1872, so far as it relates to any material fact discovered in consequence even though the police were present when the statement was made *Naina Malai Konan*, In re, 14 L W 418 In order to bring in information by an accused under section 27 of the Evidence Act, the information must have had the direct effect of leading to the discovery of the stolen property *Domasani Boyan* In re 11 L W 8=51 Ind Cas 479 The accused made a statement during investigation by police as to his having thrown a *dassi* and a *gandasa* into the canal. In consequence of the statement the police recovered the *dassi* and the *gandasa* from a neighbouring village having discovered from a boy the fact that the *dassi* and *gandasa* had been found in the place pointed out by the accused. Held that there was immediate connection between the statement and the discovery and that the statement was admissible in evidence *Karam Singh v Emperor*, 98 P L R 1918=50 Ind Cas 481=20 Cr L J 305

The discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact within the meaning of s 27 of the Evidence Act. The test of admissibility under section 27 of the Evidence Act, if an information received from an accused person in the custody of a police officer is whether the fact so discovered was a direct natural and necessary consequence of the information so received *Salim v Emperor* 14 N L R 192=43 Ind Cas 111=19 Cr L J 79

Under s 27 it is legitimate to record evidence that an accused person said 'I will point out certain property' if such statement leads to a discovery, but it is not legitimate to record as evidence that an accused said 'I will point out certain property which I obtained & my share of the booty in the dacoit' *Grudil Singh v Emperor*, 52 P L R 1918=9 P W R (1918) Cr =44 Ind Cas 967=19 Cr L J 439 see also *Kul Singh v The King Emperor*, 155 P L R 1908=21 P W R 1908 Cr

It is not all statements made by an accused person connected with the production or finding of property which are admissible those only which lead immediately to such discovery are properly admissible. Other statements connected with the one thus made evidence and so immediately but not necessarily or directly connected with the fact discovered are not admissible. Hence where a person accused of an offence under section 328, Penal Code, pointed out in the course of the police investigation a *dhutwa* tree and said that he had taken the fruit of it held that the statement was inadmissible *Emperor v Panchu* 13 L J 1077

A statement made by the accused while in police custody in consequence of which arms are found buried in a field is admissible in evidence against the accused *Isher Singh v Crown* 72 P I R 1916=24 P W R 1916 Cr =11 Cr L J 187=33 Ind Cas 823

The pointing out of the jewels of a child with whose murder the accused was charged, after an inducement improperly held out to her by a constable was held to be relevant fact legally admissible in evidence *In re Temuladji* 2 Weir 736

Having regard to the wording of s. 27, Evidence Act, the admission by the accused that the share of the proceeds of the dacoity could be found with men whom they named can be legally proved against them. *Crown v Husari*, 2 S L R 27 Cr = 10 Cr L J 239

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Incriminating statements by way of confession, made by an accused person while in police custody, when producing or pointing out articles connected with the commission of a crime, are inadmissible under section 27 of the Evidence Act. The statement of an accused that he buried the weapon of the offence in a certain place is relevant but not that part of the statement that it was the weapon with which he had committed the crime. So also the statement that he would point out a certain spot and the evidence that at the spot indicated blood stains would be found would be admissible, but not that part of the statement that it was at this spot that he committed the crime. Where the accused produces the articles himself though the fact that he actually produced it at a particular place may be proved the accompanying statement to the effect that he buried it there is inadmissible in evidence. *Santa Singh v Crown*, 1 P W R 191, Cr = 19 Ind C 190 = 14 Cr L J 190 = 171 P L R 1913. Under section 27 of the Evidence Act a statement made after the production and discovery of the stolen property and not leading to the discovery of the same is not relevant. The question whether the mere production of stolen article raises a presumption of guilt is one of fact. *Crown v Photo*, 5 S L R 257 = 15 Ind C 1801 = 1 Cr L J 529

Where a police Sub Inspector, the investigating officer in a murder case was *inter alia* informed by the accused of the fact that the latter had committed the murder and the Sub Inspector was allowed to depose to regarding this information. Held, that such information not being admissible in evidence under section 27 of the Evidence Act, the Sub Inspector should not have been allowed to state in Court that the accused said that he had committed the murder. *Mahli Husain v Emperor*, 15 Cr L J 474 = 24 Ind C 562

A statement made by the accused to the police officer after the discovery was made, as to the place where the stolen property was concealed is admissible in evidence under section 27 of the Evidence Act but the reception of the statement as to the pointing out by the accused the place of concealment, though not illegal is improper. *Janli v Emperor*, 11 C L J 182

An accused person made the following statements viz., that he and another accused stole the missing money from a *dabbi* and that the stolen money will be found in a heap of rubbish close to his house. Immediately after making these statements he went to that rubbish heap in the presence of two police constables and of witnesses who made the search in his house and took out certain coins and metal plates similar to one kept in the *dabbi*. Held that on the above facts, the accused was rightly convicted. *Manjunathaya v King Emperor*, 26 M I J 352 = 15 Cr L J 533 = 24 Ind C 1845

**Facts not directly discovered.** A fact discovered in consequence of the information which an accused person gives to the police, must be directly discovered in consequence of the information given by the accused to make evidence as to the information admissible under section 27, Evidence Act. *Mauney Thaya v Queen Empress*, L B R (1893 1900), 963, *Empress v Gangaram*, 10 C P L R Cr 25

**Whether amounts to a confession or not.** "The words in section 27 of the Evidence Act 'whether it amounts to a confession or not' are to be read as qualifying the word 'information' in the immediately preceding context, not the words 'so much' and the effect is that although ordinarily a confession of an accused while in custody would be wholly excluded yet, if in the course of such a confession information leading to the discovery of a relevant fact has been given so much of the information as distinctly led to this result may be deposed to though as a whole the statement would constitute a confession which the preceding sections are intended to exclude. *Per West J in Ingh v Jura Harji*, 11 B H C R 520. In construing section 27 the word 'confession' does not necessarily mean a complete confession of guilt but means and include any incriminating statement. *Karam Din v Emperor*, A I R 1929 Lah 738



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**Distinctly** Under section 27, the information to be proved must relate distinctly to the fact thereby discovered. The word 'distinctly' in section 27 is used in some sense, other than the word 'directly'. It means to exclude certain things and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information. *Kiam Din v Emperor*, A I R 1929 Lah 338

**Section 162 of Criminal Pro Code and section 27** Section 27 is confined in its operation to an incriminating statement by an accused person while in police custody while section 162 contains a general provision embracing all statements made by persons examined in the course of an investigation. *Gola v Emperor*, A I R 1929 Nag 17=24 N L R 158, *Ganpat v Emperor*, 6 N L R 180=181 Ind Cas 1181=12 Cr L J 60. It is no doubt true that prior to his arrest and detention in police custody, an accused person will answer the description of the class of persons referred to in section 160 Cr Pro Code and will consequently be liable to be examined by the investigating officer under section 161, Cr Pro Code. But section 27 of the Evidence Act relates to a statement made by an accused person while in police custody and not to a statement made by him prior to his arrest and detention in such custody. *Ibid*. So the provision of section 27 of the Evidence Act is quite independent of those of section 162 Criminal Procedure Code and the amended section 162 does not repeal or in any way affect section 27. *Ibid*. It has been held in *Emperor v Maung*, A I R 1926 Rang 116 by a Full Bench of the Rangoon High Court (*Hald J dissenting*) that section 27 Evidence Act, is neither repealed nor affected by the amended section 162 Criminal Procedure Code, because a person accused of an offence is not any person being within the limits of the station of the police officer making the investigation under Ch 44 or any adjoining station "who from the information given or otherwise appears to be acquainted with the circumstances of the case," and that consequently information received from a person accused of an offence 'in the custody of a police officer' is not a statement within the meaning of s 162 cl (1) of the Criminal Pro Code. The dissenting Judge admitted that the interpretation of the majority of Judges was in accordance with what was in fact the intention of the legislature. He seems to have attached more weight to the ordinary meaning of the words used in section 162 than to the context in which the section appears and the bearing it has on the interpretation of the section. A Bench of the Calcutta High Court has affirmed in *Azimuddy v Emperor*, A I R 1927 Cal 17=54 C 237=44 C L J 253 that s 162, Cr Pro Code applies to witnesses and not to accused persons under trial, and that it does not repeal s 27 Evidence Act or render inadmissible statements relevant under the latter section, which is observed by a Bench of the Patna High Court in *Jagan Dhanuk v Emperor*, A I R 1926 Pat 232=5 Pat 63 that the main object of the amendment of s 162 Criminal Pro Code is to prevent the use of the statement of prosecutive witnesses as corroborative under s 157, Evidence Act and that the section does not override the general provisions of the law with regard to the admissibility of the statements made by accused persons as laid down in s 27, Evidence Act. Similarly a Bench of the Lahore High Court has ruled in *Rannun v Emperor*, A I R 1926 Lah 88=7 Lah 84, that section 162, Criminal Pro Code applies to statements of persons examined as witnesses in the course of a police investigation, and not to the statement of an accused person, and that it does not override or modify the provisions of section 27, Evidence Act. In the course of his judgment Sir Shadul C J referred to the observations appearing at p 149 in *Interpretation of Statutes* which runs as follows "It is in the highest degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with intelligible clearness and to give any such effect to general words simply because they have that meaning when used either in their wide or in their usual or natural sense would be to give them a meaning other than that which was actually intended. Generally words and phrases therefore however wide and comprehensive they may be in their literal sense must usually be construed as being limited to the natural objects of the Act and as not altering the law by their extension." The same view has been taken by the Madras High Court in *In re Goundan*, A I R 1925 Mad 74=86 Ind Cas 684 and in *In re Goundan*.

*Venkata Subbiah*, 86 Ind Cas 208, while it has been affirmed by the Court of the Judicial Commissioner of Sind in *Umro Dinar Munshi v Emperor* A I R 1925 Sind 237, that the words 'statement of any person' in s 162 Cr Pro Code refer to the statement of any witness in the course of a police investigation, and not to the statement of an accused person in respect of whom such investigation was held. See also *Emperor v Aga Tha Din*, 4 Rang 72, *Gudita v Emperor*, 104 Ind Cas 441, *Badri v Emperor* 92 Ind Cas 874, *Bahadur v Emperor*, 7 Lah 261. There is one case of the Rangoon High Court *Baua Ronther v Emperor* A I R 1925 Rang 101=84 Ind Cas 545 decided by a single Judge affirming the opposite view. The effect of that decision is however nullified by the decision in the recent Full Bench case *Emperor v Mang Tha Din* A I R 1926 Rang 116=4 Rang 72 (F B), in which the former case was referred to. There are also some observations made by the Judges constituting the Bench who decided the case *Venkata Subbiah v Emperor* A I R 1925 Mad 579=4b Mad 610, favouring the view that section 162 Cr Pro Code applies to statements of witnesses as well as to those of accused persons. It would however appear from the remarks of *Madhavan Nair J*, at p 611, that he adhered to the view that s 27 Evidence Act was not affected by the provisions of section 162 Criminal Procedure Code, and that the legislature did not contemplate to repeal the former when it amended the latter section.

In Nagpur the opinion is divided. Both the Judges who decided *Sheobatal Prasad v Emperor*, A I R 1928 Nag 108=11 N L J 7=108 Ind Cas 442, are in favour of the view that section 27, Evidence Act is unaffected by the amendment of section 162 Cr Pro Code while on the other hand, the opposite view is maintained by the two Judges who decided the case *Dadi Lallu v Emperor* A I R 1926 Nag 369. See also *Bhagya v Emperor*, 100 Ind Cas 823, but see *Gola v Emperor*, 21 N L R 158. As for the unreported case of *Hama v Emperor* (Cr App No 6) B of 1926, decided on the 14th October by the Nagpur Judicial Commissioner's Court) there was a difference of opinion between the two Judges who decided it.

Confession made after removal of impression caused by inducement threat or promise, relevant

**28** If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant

**Principle** The exclusion of a confession necessarily assumes (1) that the inducement if it operated at all was likely to produce a false confession and (2) that it did in fact operate upon the mind of the person. The question arising under the first of these elements—the nature of the inducement, having been examined it remains to notice those arising under the second—the existence and operation of the inducement. Where an inducement sufficient to exclude any confession obtained by it, has been offered the question often arises whether a confession subsequent in time to the inducement was in fact influenced by it. It must be remembered that no attempt was ever made to investigate the actual motives of the person confessing or the part played by the inducement among other motives. The whole theory of inducement rests on the probable effect not the actual effect upon the person. If while that inducement is held out a confession is made, no enquiry is ever made into the exact share of influence which the inducement had in evoking confession. Nevertheless, though there is no enquiry into the actuality of the operation of the inducement, and though it is assumed that if it was there it operated, we may often have to inquire whether in fact it was there at all as present to the mind of the person confessing. There are two kinds of cases in which the question may be raised. In the one kind, the enquiry is: Did the inducement, for the person in hand ever come into existence at all? In the other kind, the enquiry is: Was the inducement, for the person in hand brought to an end before the confession was made? *See* *Hyman v People* 369 U.S. 57 (1962).

**Scope of the section** A confession is deemed to be voluntary if (in the opinion of the Judge) it is shown to have been made after the complete removal of

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the impression produced by any inducement threat or promise which would otherwise render it involuntary. *Step Dig Fy* Art. 22. So this section should be read as an exception to section 24. But this section makes no provision for consideration whether any inducement came into existence at all. Section 24 contains an absolute rule which is not affected by the proviso, made for a different purpose in s. 27. When the Legislature wished to make an exception to the absolute rule it did so by a separate section namely section 28, which declares under what circumstances a confession rendered irrelevant by s. 24 may become relevant. Statements that are irrelevant under one section of the Act may be relevant under some other section of the Act. No confession made under inducement, threat or promise can be relevant, except in the circumstance provided for by s. 28. *King Emperor v. Nga Po Min* 2 L. B. R. 169. Although a confession must be taken as a whole and considered along with the admitted facts of the case the accused being judged by his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it deems irrelevant. *Kamoda v. Emperor*, 46 Ind. C. 705 = 19 Cr. L. J. 785.

**Did inducement come into existence at all.** The inducement is always addressed to the person in question and thus becomes known to him as a promise or a threat directly bearing on his situation. It was intended to be accepted by him and no doubt arises as to its existence for him as an inducement. But where the inducement was not directly addressed to the person but made through another person, how are we to determine whether it was in fact present as an inducement? This will of course be a pure question of fact for the Judge, and no ruling can serve as a precedent, the conduct and language of the person showing whether he had the inducement in mind. The important thing to remember however is that unless the inducement was held out, directly or indirectly to the person in question, it cannot exclude the confession, in such a case that person has himself chosen to allow it to affect him and to hope that it will be applicable to him by the promisor and thus he is himself responsible by free choice for its effect and not the promising person who cannot be said to have held out an inducement to him. *Higmore* § 854. So where a person who hears a fellow prisoner being offered an inducement and conceives the hope that it will be applicable to him also makes a confession, such a confession would not be excluded. *Jacobs* 1 Cox. Cr. 54. *Higmore* § 851.

**Was the inducement brought to an end?** "Here" says Prof. Wigmore five questions may arise: (1) Must it be shown clearly that an improper inducement once offered, was brought to an end? (2) Are there any circumstances which this showing will be regarded as impossible and thus the inducement once made vitates any further confession of that person? (3) Can the person who has offered the inducement put an end to it so as to make a confession afterwards made to himself? (4) Are confessions made frequently but to a person different from the one offering the inducement treated as not made under the inducement or must it be shown to have been negatived by the second person? (5) What suffices, in general, to end the inducement? *Higmore* § 855.

**Subsequent ending of improper inducement.** There must be independent evidence that the influence of the inducement really has ceased. In *Sherrington* 2 D. & C. 123 *Pitteson J.* said: "There ought to be evidence to show that the impression under which the first confession was made was afterwards removed, before the second confession can be received." It is an opinion in this case that the prisoner must be considered to have received a second confession under the same influence as he made the first, the interval being too short to allow of the supposition that it was the result of free and voluntary determination. A female servant being a pet of a man, he told her in the morning on Monday that he would free her if she told the truth. On Friday she was taken before a Magistrate and appeared again to her and was discharged. On Wednesday she was apprehended by the Superintendent of Police went with her mistress to the Magistrate and told her in the presence of her mistress that she was not free but was still under his power and that if she had anything to say for herself she

would hear her' but (not knowing that her mistress had promised to forgive her) he did not tell her that if she made a statement it might be given in evidence against her. The prisoner then made a statement. *Patterson* held that this statement was not receivable as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been present it might have been otherwise. *L v Hewitt*, 1 Car & M 331, *R v Ruc* 13 Cox Cr 269. So the general principle is universally conceded that the subsequent ending of an improper inducement must be shown, it is assumed to have continued until the contrary is shown. *Higmore* § 831, see also *R v Cleerton* 21 & 1 331. This inducement may be removed by subsequent caution. *R v Hornbrook* 1 Cox Cr 51. *R v Horner* 1 Cox Cr 361. *R v Collier* 3 Cox Cr 57. *Berigan's Case* 1 Ir Cr C R 177, *R v Byin* 1 Lebb Cr 157, *R v Hones* 6 C & P 401.

**Can inducement be irrevocable?** The next question raised by *Prof Higmore* is whether there is any situation in which it cannot be shown that an inducement once offered has been brought to an end? In answering this question he said "There is nothing permanently irrevocable in an improper inducement whether it has been brought to an end is a all conceded always open to inquiry." *Higmore* § 855.

**A person who has offered inducement in put an end to it.** It has not been decided specifically whether the same person may put an end to an inducement of his own creating. But there is no reason why he cannot. *Higmore* § 855. Where a Magistrate told a prisoner that if he did not strike the fatal blow, and would tell all he knew he would use his influence to protect him, but afterwards communicated to the prisoner a letter from the Secretary of State declining to give pardon a subsequent confession was received. *R v Cloues* 4 C & P 221, *Nort Tr* 166. In receiving the confession *Littledale J* said "I think that this declaration is clearly admissible. I think that the conversation with Magistrate, after he received the Secretary of State's letter and the caution given by the Coroner must be taken to have completely put an end to all the hopes that had been held out."

**Inducement offered by one person and confession made to another.** There is on principle, no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who had no share in the other's conduct and shows no power or inclination to corroborate his promise or threat. Nevertheless the inducement may on the facts prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case, no general rule can be laid down. *Higmore* § 855. see also *Carty's Trial* (11c) 26 How St Tr 889, *R v Bell* 16 Nally Fr 13. *R v Tyler*, 1 C & P 129, *R v Clees*, 1 C & P 223.

**What suffices in general to end an inducement.** If the impression produced by the promise or threat is clearly shown to have been removed—e.g. by lapse of time or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable. *Phy Ep* p 231. Where a prisoner confessed some months after the promise, and after due warning his confession was received. Warning by a person of superior authority, after inducement held out by one of inferior authority, will purge the confession of its taint and make it admissible. *Nort Tr* 167. *R v Bate* 11 Cox 696, *R v Horner* 1 Cox 361. But where a person in superior authority holds out an inducement to a prisoner to confess a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson it appeared that the committing Magistrate had told the prisoner that if he would make a disclosure he would do all that he could for him. The prisoner after he was committed, made a statement to the turnkey of the gaol who had held out no inducement to him to confess and had not given him any caution not to confess. *Parle J* said "I think I ought not to receive the evidence, after what Mr S (the committing Magistrate) said to the prisoner, more especially as the turnkey did not give any

**S 28.** caution to the prisoner *R v Cooper*, 5 C and P 73. In that case the Reporter observes 'If a person of inferior authority cautions a prisoner not to confess 'after an inducement held out by a person of superior authority it is important to consider whether a statement made by a prisoner under such circumstances would be receivable as it seems to be but a fair conclusion that what was said to the prisoner by the Magistrate would be much more likely to operate on his mind than anything subsequently said by a constable' 'It may be alleged that as the inferior can have no control over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect.' *Russ Cr p 2184*, see also *R v Gilham* 1 Mood 136, per Little J. Where a collecting *panchayat* and an assistant *panchayat* take a person into custody and part in holding an inquiry into the circumstances of the commission of a murder they must be taken to be "persons in authority" within the meaning of section 24 of the Evidence Act and if the accused person is aware of this the assistant *panchayat* that he would be let off if he disclosed everything and in consequence of that assurance he makes a statement that statement is inadmissible under the provisions of the section above quoted. A similar statement made subsequently to a Magistrate and retracted afterwards would be inadmissible in evidence unless it could be shown that the impression which was made upon the accused's mind had been entirely removed therefrom. *Empress v Ganesh* 74 Ind Crs 261=59 C 127, *Queen v Fuchoz*, 5 N W P 86, *R v Navajo*, 9 B H C R 378.

**In the opinion of the Court** It is for the Court to decide whether the impression caused by inducement, threat or promise has been fully removed. So where promises or threats have been once used of such a nature as to render a confession inadmissible all subsequent admissions of the same or like facts will be rejected unless from the length of time intervening from proper warning of the consequences or from other circumstances there be good reason to presume that the delusive hope or fear which influenced the first confession has been effectually dispelled. *Joy on Conf* 69, *R v Hewitt* C & Marsh 534 *R v Cooper*, 5 C & P 534 *R v Ross* 13 Cox 203 *Taylor* § 378. So where it appears to the satisfaction of the Judge that the influence was totally done away with before the confession was made the evidence will be received. *Greenl Et* § 221. So where the prisoner had been induced by promises of favour to make a confession which was for that cause excluded but about five months afterwards and after having been solemnly warned by two Magistrates that he must expect death and prepare to meet it he again made a full confession, this latter confession was admitted in evidence. *Guild's Case* 5 Halst 163. In this case upon much consideration the rule was stated to be that although an original confession may have been obtained by improper means yet subsequent confessions of the same or of like facts may be admitted if the Court believes from the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled. *Guild's Case* 5 Halst 180, *R v Chertsey* 2 F & F 833. But otherwise the evidence of a subsequent confession, made on the basis of a prior one unduly obtained will be rejected. *Com v Hiram* 4 Burr 269. In the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession unless the contrary is shown by clear evidence. *Greenl Et* § 221. If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected. *R v Knight* 20 Cox 711=69 J P 106. A girl charged with poisoning was told by her mistress that if she did not tell all about it that night, the constable would be sent for next morning to take her before the Magistrate on which she made a statement—which was rejected. The next morning a constable was sent for, who took her into custody, and on the next day she was brought before the Magistrate, without any inducement, she confessed to him. *Bryant v*

in admitting the confession said "I think this statement receivable. The inducement was, that if confessed that night the constable would not be sent for, and she would not be taken before the Magistrates. The inducement therefore was at an end." *R v Richards* 5 C & P 318. *Roscoe Cr* 46. So it must be proved that the inducement has been clearly removed. *R v Thompson*, (1893) 2 Q B 12=62 L T M C 93=17 Cox Cr 641. See also *R v Rose*, 18 Cox Cr 717=67 L T Q B 299. *R v Smith*, (1897), *Roscoe Cr* 47.

**29** If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

**Scope** Confession procured by deception or under promise of secrecy are not, on this account alone, rendered inadmissible. This of course applies to confessions which otherwise satisfy the conditions prescribed for admissibility under section 24. A friend who, for the purpose of obtaining a confession, promises to keep it secret, may, nevertheless, testify in regard to it. *R v Shaw* 6 C & P 373. Deception alone will not render a confession inadmissible. It might seem that, in fairness to the accused a confession obtained by fraud or artifice should not be used against him. As the ultimate object in view, however, is the truth as to the facts charged, and as deception of this sort is not likely to affect the reliability of a confession, it has not been held to render it inadmissible. *McKelvey's Cr* § 91. So also a confession made by a prisoner while drunk has been received. *R v Spilsbury* 7 C & P 167. It will be equally admissible, however much the mode of obtaining it may be open to censure, or may render the statement itself liable to suspicion. Much less will a confession be rejected, merely because it has been elicited by questions put to the prisoner whether by Magistrate, officer, or private person, and the form of the question is immaterial, even though it assumes the prisoner's guilt. *Taylor Cr* § 181.

**Promise of secrecy** "If no inducement has been held out relating to the charge," says Mr Taylor, "it matters not in what way the confession has been obtained." *Taylor* § 881. It is not necessary that it should have been the prisoner's own spontaneous act. So it will be received though it were induced by a solemn promise of secrecy, even confirmed by oath. *R v Shaw* 6 C & P 372, *Com v Knapp*, 9 Pick 496, (500 510) *Greenl Ev* § 220b. After the prisoner had been committed on a charge of murder a fellow prisoner said to him, "I wish you would tell me how you murdered the boy, pray split." The prisoner said "Will you be upon your oath not to mention what I tell you?" The other prisoner went upon his oath, and he hoped, if he told that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that although such oaths were very wrong and wicked, still they were not binding, and that every person except counsels and attorneys were bound to reveal what they might have heard. *R v Shaw*, 6 C & P 372, *Patteson J*, *R v Hornbrook*, 1 Cox 51. See also to be overruled *Russ Cr* 2169. So also where a person said to a prisoner that he might say what he had to say to him for it should go no further and the prisoner thereupon made a statement, it was held that it was admissible. *R v Thomas* 7 C & P 345. *Russ Cr* 2169. The accused made a confession of his guilt to the Regiment who states to the accused that he had already obtained information from another person and promised secrecy if they told the truth. It was contended that the confession was obtained

**S 29.** on the promise of mercy if the person told the truth *Ashton J* in admitting the statement observed "As to the alleged deception and inducement, that appears covered by the provisions of section 29 of the Evidence Act" *Fugate v. Mahomed Bakhsh* 5 Bom L R 507 = 4 C L J 49

**Deception** A free and voluntary confession is not inadmissible because it was originally obtained by an artifice practised on the accused by officers having been in charge or by other persons if the means employed were not calculated to cause him to make an untrue statement *People v. McMohan* 15 N Y 32. So it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, not even though such artifice has been used to draw him into that supposition *R v. Burley* 1 Phil Ex (7th Ed) 111, 2 Stark Ev (4th Ed) 13 (n) confirmed by all the Judges. So where a prisoner while in gaol asked the turnkey if he would put a letter into the post for him and after his promising to do so, gave a letter addressed to his father to the turnkey who instead of posting it gave it to the visiting Magistrate of the gaol who gave it to the prosecutor *Garrow B* held that the letter was admissible in evidence and said he remembered making an objection when at the bar to evidence under the same circumstances before *Gould J* who overruled it. *R v. Derrington* 2 C & P 418, *Russ Cr* 2171 *R v. Nabaduyp*, 1 B L R 15 (23). In *Queen Empress v. Ram Charan* 22 W R 33 where the confession it was alleged was obtained by a police officer by falsely stating that the accused's brother in law had given out that he was guilty, *Marby J* in admitting such a confession at page 35 said "Whether the statement made by the police officer that the prisoner's brother in law had given out that he was guilty was actually true or not, it does not appear to us that there is any thing which would justify us in inferring that the prisoner was induced to suppose that he would gain or lose any thing by making the confession. If this amounted to any thing at all, it was a deception practised on the prisoner, but though we might disapprove of any deception being practised, section 29 of the Evidence Act expressly says that a confession made in consequence of deception is not to be excluded." The question how was the confession obtained is of minor importance. The main point to be considered is was the confession probably true? (*People v. Mc Mahon* 15 N Y 384 387 390). The real question always turns not much upon the means used in obtaining the confession, as upon the motives which prompted the prisoner to make it. As regards confession obtained by deception *Tamm J* in *People v. White* 176 N Y 331 349 (4n) and "While we do not sanction the deception practised by one of the officers in charge of the defendant, the Court could not exclude the confession made to him on this account. Deception was used in order to induce the defendant to tell the truth. No inducement was held out to him to confess guilt unless there was guilt. The confession to the under sheriff was made to him not as a public officer, but as a supposed friend. It is not sufficient to exclude a confession by a prisoner as we have held that he was under arrest at the time or that it was made to the officer in whose custody he was or in answer to questions put to him or that it was made under the hope or promise of a benefit of a collateral nature (*People v. White* 80 N Y 500 515). Confessions induced by the use of decoy letters or the false assertion that some of the accomplices of the prisoner were in custody or made to a detective disguised as a confederate or upon the promise that he will not be disclosed have been received in evidence with the sanction of Courts of high authority. Cautious and he stating as Courts have always been in regard to confession made by a person when under arrest to those in authority over him they have not gone so far as to exclude them simply because they were procured by deception provided they were voluntarily made. They are careful however to leave the credibility of the witness who practised the deception and the circumstances under which the confession was made to the consideration of the jury. In *America* it has been held that a confession procured by a person who by falsely representing himself to be an attorney of the confidence of the prisoner was inadmissible *Cotton v. Tate* 57 Ala 219. *Times v. Commonwealth* 77 S W 363 "A man who will deliberately betray the confidence and with words of friendship upon his lips

every means in his power to obtain an admission which can be tortured into a confession of guilt which he may blaze to the world as a means of accomplishing the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honour or moral obligation. Hence it is doubtful if any thing is really gained in the administration of justice from the admission of such evidence. *Underhill Cr. Evidence* § 135. But see *R v Firth* 8 Cr A R 161, where *Atory J* said 'No one approves of the police setting traps for prisoners, but as a matter of law, if the police made an untrue statement to a prisoner which called forth an admission would it not be evidence?' see *R v Reason*, 12 Cox Cr 228.

A person who may over hear the remarks of a prisoner made to himself or to another person, as his wife or an attorney or spiritual adviser who is incompetent as a witness to privileged communications may testify to what he has heard. *R v Simon* 6 C & P 540. See also *Queen v Sagua* 7 W R Cr 56. *R v Gardner*, 11 Cr A R 265. But not to incriminating declarations made during sleep for the defendant is then unconscious of what he was saying. *People v Robinson* 19 Cal 10 (1st) *R v Elizabeth* Kent Sum Ass 1839. *Gore v Gibson*, 13 M & W 623. *Best Et* 11th Ed 514. A confession constituting a part of a prayer may be proved by one who overheard it though he may not be able to prove the whole prayer. *Woodfall v State*, 85 Ga 69 (1st). A confession made to another prisoner under the erroneous impression that one prisoner cannot testify against the other is not for that reason inadmissible. *State v Mitchell* Phil (N Car) p 447 (1st). A confession to a fellow prisoner in jail, procured by the latter's spiritual exhortation and reading the Bible to the accused is not to be rejected because the witness is himself a grossly irreligious man. *Stafford v State*, 55 Ga 591 (596) (1st). *Underhill Cr. Ev* § 135. H already charged was again charged jointly with G. When G's and another's statements implicating H were read by a sergeant to the three together purposely to elicit admissions, though evidence of what then took place is strictly admissible the trial judge if satisfied of such a purpose ought to exclude it. *H v Gardner*, 11 Cr A R 265, *H v Graupson*, 16 Cr A R 7. *H v Pilley* 16 Cr A R 138. *R v Turner* 19 Cr A R 191.

**When he was drunk.** Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible. *R v Spilsbury*, 7 C & P 187. In the last named case *Coleridge J* said 'I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible, it must be obtained either by hope or fear. This is matter of observation for me upon the weight that ought to attach to this statement when it is considered by the jury. This is the rule even where the intoxication is produced by liquor given to him by the officers having him in charge for the sole purpose of procuring a confession. *Nort Et* p 168. *Esbridge v State* 25 Ala 30. *Jeffers v People* 5 Park Cr (N Y) 522, 561. *South v People* 98 Ill 261 (265). But the extent of the intoxication and its effects upon the mind are questions to be submitted to the Court with the confession, and to be considered by them in determining its weight. *McKelvey's Et* 159. Any condition of mind which renders a person temporarily incompetent would make his statements while in such condition valueless and while, perhaps not inadmissible on the ordinary grounds which prevent confessions from being used still as they are of no value they should not be allowed to be introduced. If it appears that one is so intoxicated as to be incapable of understanding what he says or does, his confession should not be used against him. *Com v Houe*, 9 Gray (Mass) 110. *Esbridge v State* 25 Ala 30. The question as to the mental condition of the accused at the time of the making of the confession is held to be for the jury to determine upon such testimony as both sides may submit though it is probable that in a case where there was no conflict as to the accused's mental incapacity at the time of the confession the Court would not submit the confession to the jury at all. *McKelvey's Et* § 92.

Some recent cases of America however reject confessions thus obtained because of the trick practised. But the general rule has been sustained even where the accused was suffering from *delirium tremens* if he was mentally and physically able to describe past events and to state his own participation in the



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crime "The intoxication of the accused at the time of making a confession may be considered by the jury in diminishing the value of the confession as evidence. The old proverb *in vino veritas* has never been a rule of law. It is by no means of universal application. Indeed, the contrary is often seen, for with men of a boastful disposition, intoxication is apt to result in false and exaggerated statements of their past achievements. The accused may be permitted to show that what purports to be his confession was simply boastful statements made with a humorous intention, while he was intoxicated and when he has done this, the prosecution may prove by witnesses who overheard him speaking that he appeared to be perfectly sincere while speaking." *Underhill Cr. Ev.* § 136.

The acts of persons of unsound mind also are not in general binding, but this is subject to some exceptions, which will be found collected in the case of *Molton v. Camroux* 2 Exch. 487, *best Cr.* § 529.

**Confession in answer to questions.** A confession is not to be rejected merely because it has been elicited by questions put to the prisoner. *Taylor* § 581. But this statement of law must be read subject to the provisions of sections 25 and 26 of the Indian Evidence Act which make confessions made to a police officer or while under police custody inadmissible in evidence. In England a confession made in answer to a question of a police officer is not rejected. (*For notes under Section 25*) A confession elicited by questions put to the prisoner by a Magistrate is relevant under this section. *R v. Rios*, 7 C. & P. 369, *R v. Bartlett* 7 C. & P. 832, *R v. Ellis*, Ry. & M. 432. So also when the question is put by a private individual. *R v. Wild* 1 Moo. C. C. 402. Ordinarily the form of the question is immaterial even though it insures the prisoner. *R v. Wild* 1 Moo. C. C. 452, *R v. Thornton* 1 Moo. C. C. 27, *R v. Kern*, 8 C. & P. 179, *per Park J.* A confession, in other respects admissible, is not inadmissible because it is not the spontaneous utterance of the prisoner. The fact that the confession was obtained by the employment of persistent questioning does not alone exclude it (*State v. Penney*, 113 Iowa 691) but the practice of eliciting a confession by putting questions after questions to the accused is clearly not conducive to the procurement of truth, and the mode in which the confession was elicited may always be considered by the jury to determine whether they will believe it. *Underhill Cr. Ev.* § 140. In *R v. Ellis*, Ry. & Moo. 432, *Little J.* admitted a statement of an accused on examination before a Magistrate without threat or promise but upon questioning and after refusal to allow counsel. This case was decided by following in unreported ruling of *Holroyd J.* and disapproving *Wilson's Case* i.e. *R v. Wilson* Holt N. P. 597 where *Richard C. B.* in disallowing such statements said "An examination of it itself imposes an obligation to speak the truth, if a prisoner will confess, let him do so voluntarily." *Mr. Joy* also adds his authority as to the practice in his book on confession. *Joy Confession* 40, see also *R v. Tubby* 5 C. & P. 530, *R v. Rucers* 7 C. & P. 177, *R v. Wheely* 8 C. & P. 250, where this practice was accepted indirectly. An answer given by the prisoner to a question put to him by a Magistrate was rejected by *Earle C. J.* in *R v. Beirman* 6 Cox Cr. 88. *Queen v. Nabadur* 1 B. L. R. Cr. 15.

The mere fact that a statement in a confession was elicited by a question put by the Magistrate recording it does not make it irrelevant as a confession. But the fact may be very material to an enquiry as to whether the confession is voluntary or not. *Barindra Kumar v. The Emperor* 14 C. W. N. 1111 = 37 C. 467. In *King Emperor v. Promotha*, 30 C. L. J. 503 the Court in rejecting a confession obtained by continued questioning observed "His confession in our opinion cannot upon the case made by the prosecution be said to be voluntary. The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours to use the words of the learned Judge 'under the continued questioning to which he was subjected he finally broke down.' If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from custody it should be rejected." *R v. Knight*, 20 Cox 711 = 69 J. P. 106.

In England the controversy on this point is now closed by *Per v. P.* (1900) 1 K. B. 92 = 78 L. J. K. B. 675 where *Lord Alverstone C. J.* said "L.

our opinion, it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found upon him, and he may be able in answering the question to say and show that the thing found was his own property. In our opinion *Reg v Gurn*, 15 Cox C C 656 was not properly decided it is commented on in a note printed at the end of the report. The decision has not been followed to its full extent as appears from *Reg v Braclenbury*, 17 Cox C C 628. The statement of law as set out in the report is too wide, and requires qualification. So this case practically overruled *Reg v Gurn*, 15 Cox C C 656 and *Reg v Mab*, 17 Cox C C 689. In *R v Miller*, 18 Cox Cr C 54, *Haulins I* said that it was impossible to discover the facts of a crime without asking questions and as he held that the questions there were properly put after due warning he admitted evidence of defendant's answers saying that every case must be decided according to the whole of the circumstances. *Roscoe Cr Fr* 49, see also *R v Hurst* 18 Cox Cr C 374 *R v Husted* 19 Cox Cr C 16 *Leuis v Harris* 24 Cox Cr C 66=110 L T 337. All these authorities were considered in *Ibrahim v Reg*, 83 L J P C 185=(1914) A C 599=24 Cox C C 174. A private in an Indian regiment murdered one of the officers. Shortly afterwards, while he was in custody the commanding officer asked him "why have you done such a senseless act?" and he replied "Some three or four days he has been abusing me and without doubt I killed him." The confession was admitted. Lord Sumner in delivering the judgment of the Judicial Committee (Lord Haldane L C Lord Winstan Lord Shaw Lord Moulton and Lord Sumner) said "if the matter is one for the (trial) Judge's discretion depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case" it was not improperly exercised. Then after reviewing a large number of cases he added "The English law is still unsettled strange as it may seem since the point is one which constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear nothing less than that the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be desired that the point should be settled by authority so far as a general rule can be laid down where circumstances so greatly vary."

**Want of warning.** A voluntary confession is evidence, to whomsoever it may have been made, though it does not appear that the prisoner was warned that what he might say would be used against him or even if it appear that he was not so warned. *R v Thornton* 1 Wood C C 27, *North* Fr p 168, *R v Long*, 6 C & P 179 *R v Lavin* Ir Cr R 813 *Taylor* Lr § 881. In *Queen Empress v Ucer*, 10 C 775 *Field J* said "We may observe that it is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. See also *Queen v Nobodorp* 1 B L R Cr 15=15 W R Cr 71. Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused that he need not answer. *Dinoo Roy and others* 16 W R Cr 21, 5 Mad H C App 9. But sub-section (1) of section 161 of Criminal Procedure Code enacts "A magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily etc." The italicised portion which was added by Act XVIII of 1923 has made obsolete the decision of *Queen Empress v Ucer* 10 C 775. Now the procedure laid down in this section should be strictly followed. *Balam Singh v Emperor* 7 Lah L J 39=26 Cr L J 731 *Baharwal v Crown* 6 Lah 153=26 Cr L J 1238=A I R 1925 Lah 132 *Emperor v Garib Hira* 30 C. W N 44=27 Cr L J 621 *Aranda v Purbati*, 3 L B R 173, *Shree Sin v King Emperor* 3 L B R 213=4 Cr L J 385, *Furud v Crown*, 2 Lah 325. A statement of an accused, a suspect, made at an inquest before a Coroner is clearly admissible either as a confession under s. 26 or as a statement made by a party to proceeding

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under s 18 and 21 of the Evidence Act. As regards the objection that such a confession is not relevant in as much as the Coroner did not warn the accused, *Fawcett* observed. It is quite clear that, even treating the statement as a confession, the mere fact that Mr. Harle did not warn the accused that, if he made the statement it might subsequently be put in evidence against him, is immaterial. That a confession is not inadmissible on account of such an omission is expressly provided for by s 29 of the Indian Evidence Act. Mr. Pindar referred to s 164 of the Criminal Procedure Code as containing a general principle to the contrary. But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 164. It cannot override the general provisions of s 29 of the Indian Evidence Act except where the circumstances bring the section into operation.

In England before the passing of the Stat 11 & 12 Vict C 4 s 13 and confessions were used to be admitted and it did not matter whether the accused was cautioned or not. *R v Hall* quoted in 2 Leach Cr L 3rd Ed 63a R v Magill McNally on Lynd 37, *L v Green*, 5 C & P 312, *R v Arnold*, 8 C & P 622. It will be noted that in the cases confirming the orthodox doctrine (of which *R v Ellis*, Ry & Moo 142 and *R v Gilham* 1 Mood Cr C 186, 191 are most frequently cited) some of the confessions received were given under a caution or some were made without questions preceding, but neither of the circumstances seems to have been treated as essential to their reception. *Wignore* § 84. In 1849, Stat 11 & 12 Vict. C 42 s 18 was passed which revised the method of conducting such examinations. That statute required two cautions to be given and it apparently sanctioned all confessions previously admissible.

Aside from statute the fact that a confession which is otherwise admissible is made without the accused having been cautioned by the Court or by the person to whom the confession is made that what he says may be used against him, does not render it incompetent. *Reg v Arnold* 8 C & P 621, 622, *Reg v Price*, Cox Cr C 378 *Simon v State* 36 Miss 636, 639.

**30** When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

\* *Explanation*—"Offence" is used in this section, include the abetment of or attempts to commit the offence.

*Illustrations*

(a) A and B are jointly tried for the murder of C. It is proved that A said—"B and I murdered C." The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C." This statement may not be taken into consideration by the Court against A as B is not being jointly tried.

**Principle** This section is entirely a new provision of the law. There was no such provision either in Act II of 1855 or in the Criminal Procedure Code of 1861 and 1872. Before the passing of the Indian Evidence Act the confession of an accused person was only evidence against himself (*Queen v Kelly* 11 W. R. 84 Cr.) and it could not be taken to be corroborative evidence or any evidence at all against any body other than himself. *Queen v Ba* 11 W. R. 179.

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R 35 Cr So the confession of one prisoner could not be used as corroborative evidence against another prisoner *Queen v Darbaroo Das*, 13 W R 14 Cr "Until the passing of the Indian Evidence Act 'such dangerous material as this could not be used as evidence against the accused person, and even by that Act, the legislature only bestowed a discretion upon the Court to take into consideration such confession as against such person as well as against the person who makes such confession' *Per Phcar J in Queen v Sadhu Mundal* 21 W R 69 Cr (71) The old cases followed the English cases on the subject *Vide R v Fletcher*, 4 C & P 250, *Roseoe Cr Et* 55, *R v Turner* 1 Moo C C 347, *R v Blake*, (1844) 6 Q B 126, *R v Appleby* 3 Stark 33

The principle underlying this section is thus stated by *Phcar J in Queen v Belat Ali*, 19 W R 67 It seems to me that it is this implication of himself by the confessing person which is intended by the Legislature to take the place as it were of the sanction of an oath or rather which is supposed to serve as some guarantee for the truth of the accusation against the other So when a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth and the Legislature provides that his statement may be considered against his fellow prisoners charged with the same crime' *Per West J in Empress v Day Aarsu*, 6 B 288 (291) What was intended was that where a prisoner to use a popular phrase, makes a clean breast of it and unreservedly confesses his own guilt and at the same time implicates another who is jointly tried for the same offence his confession may be taken into consideration against such other as well as against himself because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one' *Per Straight J in Queen Empress v Jagrup*, 7 A 616, 648 The object sought by the rule of law said *West J in Queen Empress v Nur Mahomed*, 8 B 223, is a safe guard for sincerity and for information' This principle, it must be observed, is sound in theory rather than in practice In the first place the confession of a crime is not an absolute guarantee of its truth as to the person making it for it may have been falsely made from a sense of hopelessness of contending against the array of circumstantial evidence against him But from being a guarantee of the truth of the confession as against the confessing party to its operation similarly as regards another person is a wide step It does not follow necessarily that because a man has truly implicated himself therefore his implication of another is also true If his self implication was actuated by remorse or a sense of justice there would be ground for believing the whole of his confession even as against another but very few confessions have that character and therefore in most confessions the sanction of an oath is really wanting nor its truthworthiness is guaranteed by confrontation or cross-examination *Vide I J (Journal)* p 220 The reason for allowing the Judge to take into consideration confessions of this character is thus given by *Mr Justice Cunningham* in his Evidence Act Lastly, Judges are relieved from attempt to perform an intellectual impossibility by a provision, that, when more persons than one are tried for an offence and one of them makes a confession affecting himself and any other of the accused the confession may be taken into consideration against such other person as well as against the person making it Such a confession is of course in the highest degree suspicious, it deserves ordinarily very little reliance but nevertheless it is impossible for a Judge to ignore it and under the Indian Evidence Act, he need no longer pretend to do so The exclusion in fact was one of the rules of evidence borrowed from the English system, which though well adapted to trials for Jury are meaningless and out of place on occasions where the functions of Judge and Jury are confined in a single official The Indian Judge has simply to consider whether the confession ought to have any weight with him and if any weight, how much in the opinion he forms about the case The exclusion of confessions of this kind from the definition of evidence is intended, apparently to remind the Judge that he is dealing with very unsound material and that though he takes them into consideration he must not rely on them as the sole and even as the chief basis of his belief *Cum Fi Intro* pp 26-27 So there might be some reason for considering such confessions by a Court where the Court

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under s 18 and 21 of the Evidence Act. As regards the objection that such a confession is not relevant in as much as the Coroner did not warn the accused, *Farrer* 7 observed. It is quite clear that even treating the statement as a confession the mere fact that *Mr Atharke* did not warn the accused that, if he made the statement it might subsequently be put in evidence against him is immaterial. That a confession is not in admissible on account of such an omission is expressly provided for by s 29 of the Indian Evidence Act. *Mr Pendse* referred to section 164 of the Criminal Procedure Code as containing a general principle to the contrary. But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 164. It cannot override the general provisions of s 29 of the Indian Evidence Act, except where the circumstances bring the section into operation.

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is composed of a trained Judge alone. But even in India such confessions are generally taken into consideration by Courts which are composed of Judges and Jury as well as Magistrates who are not stipendiary Magistrates and have got very little legal training. It is a very dangerous instrument in the hands of persons prosecutors and under the present system it is better to follow the wise advice of the writer cited by Justice Cunningham where he says "The policy of the section has been much questioned, and one writer has gone so far as to say that the best consideration which the Court can give to a confession within this section will probably be to hold that it will not act upon it against third parties" *Cun Ev* 153. It may well be doubted whether in this country, and especially among the lower classes, a confession is ever the result of such worthy motives, and the importation of such a principle into the system of Indian Jurisprudence is a dangerous innovation. *Per Glover J in Queen v Jaffir Ali*, 19 W R 77 (64) Cr. *Queen v Sadhu Mundle* 21 W R 69 (79), *per Phcar J*, 3 Mad L J 501 (1890) p 20. "I have always thought that was a most unsatisfactory section and was a needless tampering with the wholesome rule of the English Law that a confession is only evidence against the person who makes it. *Per Coult's Trotter in In re Lili* 1811, 81 Ind Cas 817.

**Scope of the section** "The provision is flatly in contradiction to the Law of England where Judges always take the greatest pains to prevent the statements of a prisoner affecting the case of a fellow prisoner, and I do not think that Judges in India have looked with much favour on the section. *Markby Et* p 28. So this section which introduces a new and a dangerous element of law not sanctioned by the salutary principle of English Jurisprudence should be construed with utmost strictness. *Queen v Jaffir Ali* 19 W R 57 Cr. *Queen v Sadhu Mundal*, 21 W R Cr 69, *Imperatrix v Malapa Bin*, (1890) 11 Ind Jur N S 19. The confessions of persons tried jointly for the same offence may, by section 30, Act I of 1872 be 'considered' as against other parties then on their trial with them, but such confessions, when used as evidence against others stand in need of corroboration and cannot be used as corroborating in any way the evidence of approver against such other parties. *Queen v Jaffir Ali*, *supra*. "Until the passing of the Indian Evidence Act, such dangerous material a confession could not be used as evidence against the accused person, and even by that Act the Legislature only bestowed a discretion upon the Court to take into consideration such confession as against such other person as well as against the person who makes such confession, *Per Phcar J in Queen v Sadhu Mandal* 21 W R 69 (71). Section 30 relates to confessions made by accused person who are being jointly tried for the same offence. *Empress v Nagia*, 5 C P L R 69. A confession duly made at the time, by one of several accused persons under trial jointly for the same offence can be used under s 30 of the Evidence Act. The section is not to be treated as though the words 'at the trial' were in and after 'made' and the word 'recorded' substituted for 'proved'. *Queen Empress v Tanga Rat Cox* Cr C 510 = Cr Rg 30 of 1890. Confessions made by an accused person may be considered against persons who are tried with him but they cannot be accepted as evidence of any fact necessary to constitute the offence. *In re Kaliyappa Goundan* 2 Weir 741. In order that a confession of an accused person may be admissible as against the other accused tried with him, it is not necessary that the confession should have been made in the latter's presence. 2 Weir 745.

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial. *Goundan v Emperor* A I R 1909 Vol 285. *Emperor v Mahadev Prosad* A I R 1928 All 322 = 45 A 323. *Emperor v Ashutosh Chakravarty* 4 C 483 = 3 C L R 270, but see *In re Bali Reddy*, 5 M 302 = 22 Ind Cas 157 = 15 Cr L J 13, where *Aylmer J* held that there is no reason why confessional statements made at the trial itself should not be taken into consideration under s 30 of the Evidence Act. But according to *Phcar J in Emperor v Mahadev Prosad*, *supra* it should be before the trial, because an accused person is entitled to know what the evidence against him is, before he is called upon for a defence at all, and the closing of the case for the prosecution is no mere form but with certain exceptions closes the door to any further evidence against him. "If a prior confession is to be proved, he can attack it."

cross-examination of the witness who proves it. Against a confession made from the dock after the prosecution case has closed, he has no protection whatever. *Per Waller J in Gounda v Emperor, supra*. Section 30 of the Indian Evidence Act is not limited to cases where the confessing accused directly implicates another accused but extends to cases where the confession indirectly affects a co-accused. *Emperor v Shuabhai*, 50 B 683=27 Cr L J 1140=28 Bom L R 1013=97 Ind Crs 660=A I R 1926 Bom 513.

A statement by one accused can only be used against a co-accused if the provisions of sections are applicable. *Ramli v Emperor*, 20 A L J 178=L R 3 A 50=65 Ind Cas 849=A I R 1922 A 24. The test as to whether the confession of an accused person can be used against his co-accused is whether the person making such confession could have been convicted on that confession of the crime with which he and his co-accused were charged. *Chun v Emperor*, 60 Ind Cas 660=22 Cr L J 260. The Court can only treat such a confession as binding assurance to other evidence against a co-accused. *Emperor v Lalit Mohan*, 10 Ind Cas 1582=38 C 509 (588)=15 C W N 593. As regards the confessions of co-accused the Indian law has no counter part in England, but it seems to me that for the purpose of a dismissal such confessions stand on the same footing as accomplice evidence and their weight must depend on the circumstances of each case. I propose therefore, to apply to the question of corroboration of the confession the same rules as are applicable to the corroboration of accomplice-evidence. In *Rex v Baskerville*, (1917) 86 L J K B 28=(1916) 2 K B 658 a criminal appeal heard by a Court of five Judges specially constituted to lay down rules for future guidance, it was said, there are propositions of law applicable to corroboration which are beyond controversy. For example, confirmation does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary. *Reg v Mullins*, 3 Cox C. C 526. Where a pardon tendered to one of two accused persons by a Magistrate was withdrawn before the close of his examination, held that the evidence thus given was inadmissible in the Sessions Court. In this case the person to whom the pardon was tendered repudiated the statement in the Magistrate's Court when examined as a witness in the Sessions Court. *Queen Empress v Agu* A W N 1891, 184 Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it. It does not limit the operation of s 32. Illustration (b) to section 30 cannot be construed to have this effect. *Nga Po Lin v King Emperor*, U B R 1906, I evidence 3=5 Cr L J 300. Where an accused person makes a confession, the most that could be taken into consideration on such a statement against a co-accused would be, under section 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of some relevant fact against him. In *R Sanappa Rai* 18 M L J 66=31 M 127=3 M L T 270=7 Cr L J 27. Prior to the Evidence Act the rule not of law, but of practice was that a confession could not be based on the unsupported evidence of a co-accused; that the accused person's statement was no evidence against a fellow prisoner examined jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box. *Crane v Nihal Singh*, 31 P R 1866 Cr, *Gharoo v Crown*, 124 P R 1866 Cr, *Queen v Jummigala*, 121 P R 1866 Cr, *Deira Singh v Crown* 27 P R 1867 Cr, *Crown v Sal Khan*, 24 P R 1867 Cr, *Crown v Ruheemee* 38 P R 1867 Cr.

Section must be construed strictly. *Section 30, Sec 1 of 1972*, introducing as it does, an entirely new, and, I am sure, a very dangerous element in the conduct of criminal trials, must be construed with great strictness. *Per Glorier J in Queen v Jitendra* 1973 Cr L J 177 (84). The decision cases merely require a strict interpretation of the provisions in section 30 of the Evidence Act to a joint trial for the purpose of a dismissal. *Manicka v Pandiyachi* 14 L W 474.

Tried jointly. The words "as charged in the indictment" in section 30 of the Evidence Act refer to the charge of the particular judicial officer who presides at the trial. *Procedure Code*. To hold otherwise would be to render section 30 of the Evidence Act inoperative.



**S 30.** by one of the accused before him as s 23 Cr Pro Code seems to contemplate that the accused should be examined before the charge is actually framed. *Per The Queen Empress* 12 B R (1893-1900) 613. The term "tried jointly" means legally tried jointly with the confessing accused for the same offence. *Queen Empress v Jagat Chandra*, 22 C 51. Section 30 which makes the confession of one prisoner evidence against persons other than the man who made the confession applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used. *Queen v Sheikh Bano*, 21 W R (r 65), *M Radhu v Empress* 25 Cr L J 13=75 Ind Cas 701.

It is not supposed to support the conviction of persons based solely on a retracted confession of a co-accused which do not implicate to the same extent the co-prisoners. *Pendra v Emperor*, (1918) Pat 175=46 Ind Cas 84=18 Cr L J 326.

Several persons were put upon their trial for an offence under s 103, Penal Code. One of them made a statement confessing his guilt and implicating some of the other accused. The Magistrate did not convict him upon the confession but recorded evidence against all the accused and convicted them after considering the whole evidence including confession. The Sessions Judge reversed the judgment in this respect. *Held* that the confessing accused was tried jointly with the other accused and the confession was evidence against them all. *King Empress v Dep*, 37 A 117.

A person escaping from custody during the trial, but before charge, who has been tried separately after re-arrest cannot be said to have been jointly tried with the person whose trial from a stage prior to the charge, was separate on account of the escape from custody and the confession of the co-accused, first tried, was held to be inadmissible against the prisoner as the trial was not joint. *Hasan Khan v Emperor*, 29 P R 1901 Cr = P L R 1900 p 32.

Two persons jointly tried one for theft, and the other for abetment of it before hand and being present during its commission, were held to be jointly tried for the same offence within the meaning of s 30. *Day Shah v Crown* 3 P R 1904 Cr. In 1873, two persons were concerned in the murder of a third person, the first absconded, but the second, having been arrested was tried in the year. The second person, during his defence at the sessions trial, made a statement that the first person admitted to him having committed the murder. In 1877 the first person having been arrested and placed upon his trial—the second person meanwhile died—the Court of Sessions used the statement of the deceased as evidence at his trial in 1873 as evidence against the first. *Held* that the accused person's statement was not admissible against the first offender under section 37 Cr Pro Code 1872 or ss 30 and 133 Evidence Act. *Crown v Thabu* 1 P R 1908 Cr.

In this connection an important question arises when the confessing prisoner pleads guilty to the charge. In such a case can he be called till jointly tried with the rest so as to let in his confession under this section against the co-accused? In *Heg v Kalu Patel*, 11 B H C R 146, the Court observed: "We are of opinion that the examination of Nausia was wrongly admitted as evidence in this case. After Nausia had pleaded guilty and had been convicted and sentenced to punishment and his evidence had been taken on solemn affirmation and witnesses, he could not any longer be considered as one jointly tried with others when the Assistant Judge in framing his judgment took his evidence into consideration." *Peg v Kalu Patel* 11 B H C R 146, *Imperatrix v Balu Patel*, 5 B 63. *Venka Sami v Queen* 7 M 102, *Imperatrix v Chand Lalad*, 14 Ind Jur N S 125. *R v Pubhu*, 17 A 521=1895 A W N 111, *Empress v Pubhu* 19 B 195.

Where a confessing accused pleads guilty, he should be sentenced and put aside or the Judge without immediately passing the sentence, ought to wait to see what the evidence discloses. These are the two courses suggested in *R v Kalu Patel* *supra*. In the latter it seems according to this case his confession may be considered against his co-accused under this section. This view is also supported in *Empress v Ram Saran* 8 A 308. But in *Queen Empress v Pachay* 19 B 195 quite a contrary view is taken. See also *Queen Empress v Pubhu*, 1895 A W N 111.

If the Court does not convict an accused person on his plea of guilty his trial does not terminate with his plea and therefore a confession by him may be taken into consideration as against any other person who had been jointly tried with him of the same offence *Shanley v Emperor*, 24 A L J 318=93 Ind Cas 341=27 Cr L J 449=A I R 1926 All 318. In a trial of a number of persons by a Magistrate under the Opium Act one of them pleaded guilty and this was taken into account as against the other. *Held* it was admissible in evidence *Fakhu uddin v The Crown* 6 Lah 176=A I R 1925 Lah 135.

Although it is open to the Court, under certain circumstances, to continue the trial without convicting those of the accused who pleaded guilty, yet it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused who are being tried with them. *Queen Empress v Pattua*, 25 A 53=A W N 1900, 192, *Emperor v Kheoraj* 30 A 540.

Where the statements of two of several co accused persons followed their plea of guilty, held they were not entitled to be considered as evidence against the other accused persons and that in those circumstances they ceased to be statements of persons jointly tried for the trial ended as regards them with their plea of guilty. *Queen Empress v Publat* 17 A 724=A W N 1895 11 *Crown v Shuidham*, 44 P W R 1914 Cr (T B) *Queen Empress v Chand Rat* Un Cr C 400=Cr R 60 of 1888 *Queen Empress v Lakshmi* 23 M 491 *Pawa v Empress*, 11 P R 1900 Cr, *Emperor v Keramat* 38 C 446, *Kanhaya v Crown*, 15 P R 1911 Cr.

The trial of a person does not necessarily end as soon as he pleads guilty. The proper course to be adopted, when the accused person pleads guilty is either to convict him on his plea and remove him from the dock, in which case his trial would be manifestly at an end so as to warrant his being called as a witness for or against any person who had been accused along with him, or else to allow the trial to go on as if the plea had been one of not guilty in which case his trial does not end with the plea of guilty and therefore, any confession made by the person so pleading could be taken into consideration under section 30 of the Evidence Act, as against any other person, who was being jointly tried with him for the same offence. The only case in which there may be any doubt, is where neither of these courses has been explicitly adopted but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him though the Court intends ultimately to convict him on the plea of guilty. In such a case, it will not be fair to allow his confession to be considered as against his co accused for that would be in effect, to comply with the forms of justice while violating it in substance. *Empress v Chuma* 23 M 151.

The question whether an accused who pleads guilty was being jointly tried with the other accused who did not plead guilty so that his evidence could be taken into consideration against them under s 30 Evidence Act appears to depend upon whether the Judge accepted the plea of guilty or not. The test to be applied would seem to be whether in fact the trial proceeded as against the accused who had pleaded guilty as if he had not done so i.e. whether for instance he was examined or was given the opportunity of cross examining the witnesses whether he was examined himself (and, in a case where there are assessors whether their opinion was taken as to the guilt). Where therefore an accused who pleaded guilty did not in fact cross examine any of the witnesses and also declined to call any witnesses though he was given an opportunity to do so and where the Sessions Judge preferred not to act upon his plea of guilty but proceeded to take the evidence just as if the plea had been one of not guilty, ultimately deciding the case upon the whole evidence including the accused's plea, *held* that under the circumstances there can be no doubt that the trial was a joint trial within the meaning of s 30 of the Evidence Act. *Emperor v Aga Po Tha* U B R 1913, 2nd Cr 170=21 Ind Cr 166=14 Cr I J 566.

Until an accused person who has pleaded guilty is convicted or acquitted he is still an accused person and is therefore not a competent witness against the co accused. It is open to the Court to refuse to accept the plea of guilty returned by an accused and to try the question of the accused's guilt. Where one of two accused pleaded guilty, but the Magistrate took no action on the plea

**S 30.** but proceeding to try the case as against the other accused directed his mind and his judgment entirely to the case as it stood on independent testimony. *Held* the trial was good. *Sul Leib v Emperor*, 9 C L J 291 = 13 C W N 539

In a warrant case although the statement of a co-accused amounts to an unqualified confession, he need not be forthwith convicted and removed from the dock. The co-accused is still to be deemed to be jointly tried with the other and his confession can be used against the others. A Sessions case is to be distinguished from a warrant case for this purpose. *Ram Ashan v Emperor*, A I R 1928 Lahore 880 = 111 Ind Cas 387 = 29 Cr L J 835, *Kanhaiya v Emperor*, 15 P R 1911 = 12 Ind Cas 931 = 51 P W R Cr 1911 *Fakhrudin v Emperor*, A I R 1925 Lah 135 = 6 Lah 176, *Re Bati Reddi*, 38 M 307, *Emperor v Madho*, A I R 1923 All 322 = 15 A 323

A and B were tried at the same trial A for murder and B for abetment. A confessed to having committed the murder at the instigation of B. The Sessions Judge subsequently conceded the charge against A into one of abetment. B, who was represented by a Vakil did not object to the amendment or ask for a new trial. *Held* that the objection that the Judge should not, under s 30 of the Evidence Act have taken the confession of A into consideration against B could not be allowed in appeal since the two charges were so nearly related, and there was no such material prejudice as would under ss 447 to 449 of the Criminal Procedure Code, have necessitated a new trial and since the amendment of the charge was not objected to. *Reg v Gobinda*, 11 B H C R 9, 3

Where two persons were jointly accused of theft but the Magistrate issued a process against one of them only, the evidence of that person against whom process was not issued adduced on behalf of the accused who was on his trial was held to be admissible. *Mohesh v Mohesh*, 10 C L R 553

**Same offence** The expression "same offence" in section 30 means the identical offence and does not mean even offence of the same kind. The Legislature did not intend the section to cover different offences in the same transaction by different persons. The illustration to s 30 makes the meaning of the section quite clear. *Gour Chandra v Emperor*, A I R 1929 Cal 14 = 32 C W N 1704. If the confession of a co-accused must be of the same crime of which the accused are being tried, unsupported by other testimony, its evidentiary value is very weak. The motive of the crime will not be corroborative evidence of the confession. *Sheo Amba v Emperor*, 9 O & A L R 836. Where two persons were jointly tried for the offence of murder and one of them made a confession which implicated himself only of an offence under section 323, Penal Code (i.e.) causing hurt by means of poison, but not of murder. *Held* by *Oldfield and Odgers JJ* that it could be used as a confession under section 30 of the Evidence Act against the other co-accused. *In re Manika Padayathi*, 14 L W 74. But in the same case *Rameshan J* said that where the confession made by one of the accused is not a confession of the guilt of the person making it of the offence for which he is tried but of a minor offence it does not satisfy the requirements of s 30 of the Evidence Act. In a case under s 110 Cr P Code against the petitioner the confession made by a person who was the co-accused of the petitioner in a de facto case but not in the present case was admitted in evidence. *Held* that the confession was inadmissible. *Mafizuddin v Emperor*, 25 C W N 239 = 33 C L J 10 = 61 Ind Cas 793. In a proceeding against several persons under section 110 of the Cr Procedure Code the confession of one is inadmissible against the other co-accused the provisions of section 30 of the Evidence Act not being applicable to a case like the present. *Ambinulla v Emperor*, 22 C W N 403.

Two persons were jointly tried the former for criminal breach of trust and the latter for the abetment of that offence. The only evidence against the latter was the confession by the former. *Held* that he was improperly convicted on such unsupported statement. *Empress v Baldeo*, A W N 1881, 164. A confession made by one person while he was on his trial for murder for being a thug and implicating another was not admissible in evidence against the latter tried alone subsequent to the confession and conviction of the former. *Emperor v Jita Singh*, A W N 1881, 164.

An accused person and another co-accused were tried together for a joint offence. The accused though only liable for abetment of the offence, was found

to have been present at the time of the commission of the offence *Held* that under s 114 I P Code, the accused stood in the same position as if he himself had committed the offence, that his trial with the co-accused was proper and that the confession made by the co-accused in such trial could be taken into consideration under s 30 of the Evidence Act against the accused *Thalw Singh v Empress*, 32 P R 1882 Cr

It is very improbable that the Legislature having before it the definition contained in s 108 Expl (4), Penal Code should, in enacting s 30, Evidence Act have omitted to explain that the word 'offence' contained in the latter section included the 'abetment of an offence' also if the intention really was that section 30 was to be so understood. But if the offence abetted is committed as the result of an abetment and the abettor is present at its commission the abettor must be held to have committed the substantive offence *Queen Empress v Kalidin S C* 143 Oudh (but now this objection has been removed by adding of the explanation by Act 3 of 1891), but see *Teja v Empress* 30 P R 1885 Cr

The confession of one accused cannot be taken into consideration as against another unless they are tried for the same specific offence. Offences under ss 301 and 325 of the Penal Code do not constitute the same offence though they arose out of the same fact *Queen Empress v Mallappa Rat Un Cr C* 450 = C1 Rg 9 of 1889, *Queen Empress v Sheida Rat Un Cr C* 450

The confession of one co-accused who was being tried under s 411 I P Code along with another who was being tried under s 437 cannot be considered as against the latter. Offences under ss 411 and 457 I P Code, are distinct offences within the meaning of s 30 Evidence Act *Nga Po Tol v K E U B R* 1912 14 Qr 158 = 20 Ind C1s 136 = 14 Cr L J 376. Where two persons were accused of an offence under section 411 of the Indian Penal Code another of an offence under s 437 the offences arising out of the same transaction held that the confession of the third accused could not be used under s 30 of the Evidence Act against the other two accused, though it appeared to the Magistrate that the latter should properly have been charged with abetment of the offence with which the third was charged *Queen Empress v Hwa Lal, A W N* 1599, 63, see also *Maya Singh v Empress*, 9 P R 1886 Cr Niv Ahmed v Crown 8 P R 1874 Cr, *Badi v Queen Empress*, 7 M 579, *Empress v Bala Patel*, 5 B 63 = 5 Ind Jur 425

Where two persons are tried together one charged with an offence under s 372 and the other under section 373, Penal Code a confession made by one of them cannot be admitted against the other under section 30 of the Evidence Act as the offences are substantive offences. *Deputy Legal Remembrancer v Kamru Dastgir* 22 C 164

**Confession.** This section must be strictly construed. It makes a clear distinction between an admission and a confession. It is only under this section that the confession of one of two or more accused jointly tried for the same offence, can be taken into consideration against the rest. It must be a confession to be so admissible that is it must affect both the person confessing and the other accused. The word confession, as used in the Act must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. The terms of the section do not countenance the construction of a statement into a confession by a process of inferential reasoning. It is one thing to make statements giving rise to an inference of guilt and another thing to confess a crime. *Emperor v Santya Bandu*, 11 Bom L R 633 = 3 Ind Cas 712. A confession within the meaning of this section is a full and unqualified admission of the guilt of the person making it and of a character to justify his conviction upon it. *In re Kapur Singh A W N* 1881 20, *Empress v Byu A W N* 1881 93. To determine whether a statement is a confession or not, the test is to see whether it is sufficient by itself to justify the conviction of a person making it of the offence for which he is being jointly tried with the other person against whom it is tendered. *Per Straight J in Empress v Ganray*, 2 A 444 see also *Empress v Dny Naru* 6 B 288 *Queen v Uchesh Bhusas* 19 W R 16 *Queen v Bhatli* 19 W R 67 *Regina v Amrita Gorinda* 10 B H C R 197, *Queen v Khukree Oaram* 21 W R 48 *Queen v Banuaree Lal* 21 W R 53 *Queen v Vira*, 23 W R 24 *Queen v Keshub* 25 W R 8 *Queen v Bayoo*

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*Choudhury* 25 W R 43, *Noor Bur v Empress* 6 C 279, *Queen Empress v Jogrup* 7 A 646 *Hakiman v A E* 20 P R 1905 Cr, *Ilahi v Empress*, 16 P R 1886 Cr, *Raghu Nath v Emperor*, 89 Ind Cas 516=26 Cr L J 1380

A statement by an accused person consisting of the vague accusations of a co accused, but containing no admission of an offence or a share in an offence beyond the admission that he only knew that a decoy was to take place and that he was a passive spectator of it was held not to be a confession *Empress v Bapu*, A W N 1981 99 Where a Magistrate used against an accused person charged with assisting in the concealment or disposal of stolen property confessions made by others tried for theft, held that the confessions were not admissible under s 30, Evidence Act against the first who was not charged with the same offence *Mussa v Empress*, 31 P R 1885 C1 The confession of a co accused cannot be taken into consideration, where he does not substantially implicate himself to the same extent as the other accused but on the contrary tries as far as he can to minimise the part he took *Sudam Pal v Emperor*, 8 Ind Cas 719=9 M L T 318=1910 M W N 734 Statement made by a prisoner before the committing officer which implicates his fellow and exculpate himself cannot be regarded as evidence under the Evidence Act *Queen v Keshub Bhomia* 25 W R C1 8 see also *Kunji Bapu v Emperor* 14 Cr L J 586=21 Ind Cas 378 A confession must be one of guilt. The accused must inculcate himself *Bigna v Emperor* 1926 P H C C 107=94 Ind Cas 258=27 Cr L J 794=A I R 1926 Pat 440, *Bishan Dat v King Emperor* 2 A L J 53=2 Cr L J 22 *Empress v Mulu* 2 A 646 Where a person against whom enquiry is made under section 476 Cr Pro Code makes a confession it is a confession within the meaning of section 30 of the Evidence Act *Emperor v Junaji*, 26 Bom L R 614=A I R 1924 Bom 445 Merely because a confession by one of the accused is not a complete and detailed confession up to hilt it cannot be rejected against the co accused *Lakhan v Emperor* A I R 1924 A 511 A statement by an accused that he and his co accused struck the deceased in exercise of their right of private defence, is in no sense a confession and cannot be taken into consideration against the accused *Maula v Emperor*, 6 Lah L J 434=26 Cr L J 531=85 Ind Cas 371 Confession recorded in the manner provided by the Criminal Pro Code even though made by a Magistrate, outside British India if proved against the person who made them may be taken into consideration against others who are being tried jointly for the same offence *Gobinda v Emperor*, 69 Ind Cas 257=23 Cr L J 673 A statement by an accused person which suggests an inference of guilt in its amount to a confession though the person making the statement may directly repudiate his participation in the crime Such a statement may be taken into consideration against the person making the statement but it may be unsafe to use it against a co accused *Jasoda v Emperor* 53 Ind Cas 691 It is not safe to support the conviction of persons based solely on a retracted confession of a co accused which does not implicate the confessor to the same extent as the co prisoner *Upenha v Emperor* (1918) Pat 175=46 Ind Cas 842 Statements made by one set of prisoners, implicating another set of prisoners, when each individual prisoner makes a confession in which he was free from any criminal offence ought not to be taken into consideration under s 30 of the Evidence Act against the prisoner of the second set when the two sets although tried together were tried upon totally different charges *Queen v Bhunwarce* 21 W R Cr 53 *Queen v Khulree* 21 W R Cr 15 A confession made by an accused person before a Magistrate in a Native State cannot be admitted into evidence under this section The Magistrate receiving the confession must be examined to prove the confession, before it can be used as evidence *Emperor v Dhanka*, 16 Bom L R 261=2 Bom Cr C 19=15 Cr L J 433

Made "The word proved in s 30 must refer to a confession made by the hand of the accused" *Per Garth C J in Empress v Chhotosh Chakraborty* 4 C 431 *Emperor v Tanyatal Shuan*, 1899 14 Mo Jour N 516, it was held that section 30 is not to be read as if the words at the trial were inserted after the word made and the word recorded substituted for proved that the confession made at any time by one of several accused persons under a trial for the same offence can be taken into consideration under s 30

the other accused persons. *6 Mad L Jour* 87. "What have we got to prove?" The duty of the prosecution is to prove all relevant facts essential to establish the guilt of the accused person. But matters of proof must be facts which are in existence at the time when the charge is made and the expression 'proving a confession' is to my mind inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special section provided for that purpose. *Mahadevi Prasad v Emperor* 76 Ind Cas 1025=25 Cr I J 305=21 A I J 179=(1923) A I R All 323=45 A 323 see also *Queen Empress v Pablu*, 17 A 524, *Queen Empress v Pattua* 23 A 33. It seems to me that when you prove a confession made by a person you tender evidence at the trial that on some previous occasion he did in fact, make a confession, and to my mind that is the only thing which was ever contemplated by the section. *Mahadevi Prasad v Emperor* supra. Any confession made before a charge is inadmissible. The term 'confession' in this section is not restricted to an unretracted confession as once a confession is proved it may be taken into consideration. A confession which is irrelevant against the accused under section 21 of the Evidence Act cannot be taken into consideration against a co-accused as well. *Emperor v Lmda*, 166 P L R 1911=10 Ind Cas 310=9 P R 1911 Cr=22 P W R 1911 Cr=12 Cr I J 267, *Sri Ram v Emperor*, 2 A L J 100=2 Cr I J 59.

Statement of a person jointly tried with others for the same offence is non est as an admission regarding all that the person knew about the offence affecting himself and the other persons merely by the fact of the Court not holding him guilty of the offence with which he is charged. *Queen v Balu Khan* 5 N W P 213. Statement by a person before he is charged for any offence by police is only an admission and is admissible against him but not against co-accused. *Raj Kumar v Emperor* A I R 1925 Pat 173=9 P L R 449=111 Ind Cas 721.

**Affecting himself and some other.** To render the confession of one person, jointly tried with another admissible in evidence against the latter, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. *Queen v Belat Ali*, 10 B L R 453=19 W R Cr 67, *Queen v Mahesh Biswas* 10 B L R 475. Note=19 W R Cr 16. Before the confession of a person jointly tried with a co-accused can be taken into consideration against such co-accused it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which they are being jointly tried. *Ali v Illa v Queen Empress*, L B R (1893 1900) 7. The rule that the statement of one prisoner can be considered against another is applicable, only where the statement amounts to a confession of guilt and implicates the prisoner jointly tried with the prisoner can be taken into consideration against such prisoner it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried. *In re Khatter Mohun Dutt* 2 J G 37, *Queen v Babaji*, 14 Ind Jour N S 175, *Sheron v Emperor*, L B R 1922, Nag 78, *Bigna v Emperor*, 94 Ind Cas 278. *Duran v Emperor*, L B R 1922, 1002. *Nirmal v Emperor* 31 C W N 239. To use a confession against a co-accused the confessing prisoner must tar himself and the person against whom it is to be used and the same must be proved. *Emperor v Ganray* 2 A 44. *Emperor v King Emperor* 24 P R 1910 Cr=193 P L R 1910=8 Ind Cas 347=7 Lah L J 51.

Self-exculpatory statements made by a person in evidence against the other co-accused. *Emperor v Indu*, L B R 1922, Noor Buz Kazi v Empress, 6 C 175. *Emperor v Indu*, L B R 1922, A I R 1929 Nag 350. *Wahul Buz v Emperor*, L B R 1929, Bom 296. *Emperor v Rung* A I R 1929 Bom 296. *Emperor v Rung* A I R 1929 Bom 296. section 30 of the Evidence Act. *Emperor v Rung* A I R 1929 Bom 296. person or persons against whom it is to be used.

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along with the person proved to have made it, but the law nowhere requires that the confession should have been made in the presence of the person against whom it is sought to use it. *Queen Empress v Kallua*, A W N 1894, 11. A confession made by one of the co-accused who does not implicate himself to the same extent as he implicates the other co-accused and who tries to throw the entire blame on the other co-accused is of very little value at least as against the other co-accused. *Kunja Subudlu v Emperor*, A I R 1929 Pat 275=8 Pat 289, *Topandas v Emperor* 25 Cr L J 761=81 Ind Cas 249=A. I R 1925 Sind 116. It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the principle being that there is no guarantee that the maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime in which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. The admission may establish constructive guilt. Section 30 of the Evidence Act applies to confessions made to the residents of the same village as the accused. *Sula Raut v Emperor*, 4 Pat L T 593. A confession in order to be admissible under this section must implicate the confessing prisoner substantially to the same extent, as it implicates the person against whom it is to be used. Since the amendment of the section, confession which implicates its author merely of an abetment may nevertheless be used as a confession against the other co-accused who is therein charged with being the principal offender, but a statement alleging that the confessing prisoner was forced by threats of death, to remain an impassive agent in the crime is not a confession within the meaning of and for the purposes of s 30 of the Evidence Act. *Gul Hassan v King Emperor*, 24 P R 1910 Cr=193 P L R 1910=30 P W R 1910 Cr=8 Ind Cas 250.

Two persons, jointly tried, the one for committing a theft and the other for having abetted it previously and of being present at its commission, were held to be jointly tried for the same offence within the meaning of s 30, Evidence Act. *Bag Shah v Crown*, 3 P R 1879 Cr.

**Confession implicating the confessing prisoner more than the co-prisoners in the commission of the offence, charged against all.** Although many decided cases laid down the rule that a confession of an accused will be taken into consideration against his co-accused when it implicates him substantially to the same extent as the co-accused (*vide Queen v Mohesh*, 19 W R 16 Cr *Queen v A Belat*, 19 W R 67 Cr, *Queen v Bayoo*, 25 W R 43, *Empress v Gujray* 2 A 444, *Imperatrix v Bibaji* 14 Ind Jur N S 175), yet on principle such confession should be admissible if it implicates the confessing prisoner more than he co-prisoners in the commission of the offence charged against all. So where A made a confession that he himself committed the murder at the instigation of B who was not present at the time of the commission of the crime A's confession can be taken into consideration against B. *R v Gorindo* 11 B H C R 27. So also this section is not limited to cases where the confessing accused directly implicates another accused but extends to cases where the confession indirectly affects a co-accused. *Emperor v Shubhai* 50 B 683=27 Cr L J 1140=34 Bom L R 1013=97 Ind Cas 660=A I R 1926 Bom 513.

**Confessions implicating the confessing prisoner substantially to the same extent as the co-prisoners in the commission of the offence.** A statement made by an accused person before it can be taken into consideration against a fellow-prisoner as is provided in section 30, Evidence Act must amount to a confession on the part of the maker with respect to the offence with which all are charged. *Bhadreswar v Emperor*, A I R 1929 Cal 416=32 C W N 731=47 C L J 526=109 Ind Cas 351=29 Cr L J 727. The principle underlying section 30 is that unless the parties are *in pari delicto* and the confessing accused implicates himself to the full as much as his co-accused, it would be unsafe to rely on it. *Duran Dhumar v Emperor* 9 N L J 80=9 Ind Cas 1002=27 Cr L J 186=A I R 1926 Nag 229. See also *Queen v Mohesh* *Insuas* 19 W R 16 *Queen v Belat Ali* 19 W R 67, *Queen v Bayoo*, 25 W R 43 *Empress v Gujray* 2 A 444 *Imperatrix v Bibaji* 14 Ind Jur N S 175 *Ex parte Tourist* 10 B H C R 497. In order that a confession of an accused should be

used against his co-accused, he must have implicated himself by such confession to the same extent as the co-accused *Sheikh Sheroo v Emperor*, 81 Ind Cas 891=25 Cr L J 1067=A I R 1925 Nag 78 Only a confession implicating the maker and not exculpating him is admissible as against the other accused *Topandas v Emperor*, A I R 1925 Sind 116

Confession implicating the maker in a lesser degree Statements which inculcate the maker more than or equally with others, alone can afford any satisfactory guarantee of their truth This means that less weight must be attached to statements which implicate the maker in lesser degree than others Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is excluded from consideration Such a statement cannot be held admissible against the co-accused *Sheo Charan v Emperor* 9 Ind Cas 385=26 Cr L J 1537=21 N L R 88 A confession by each of the co-accused implicating self and co-accused as regards robbery but throwing the entire burden for murder on the other is admissible as regards the former offence but inadmissible as regards the latter *Mian Khan v Emperor*, 1923 Lah 293 see also *Queen Empress v Dayanu*, 1 Bom L R 428, *Queen Empress v Nur Mahomed*, 8 B 223

Statement entirely exonerating the maker and inculcating his co-prisoners A statement which entirely exonerates the maker and inculcates his co-prisoners cannot be called a confession and hence it cannot be used against his co-prisoners *Queen v Mahesh*, 19 W R 16 *Queen v Belat* 19 W R 67, *R v Amrita*, 10 B H C R 497, *Queen v Khukri*, 21 W R 8, *Queen v Bunuarre Lal* 21 W R 53, *Empress v Dayi*, 6 B 288, *Queen v Naga*, 23 W R 24, *Queen v Keshub Bhooma*, 25 W R 8 *Noor Bux v Empress*, 6 C 279, *Queen v Bayoo*, 25 W R 43, *Queen v Ganraj*, 2 A 444 Such statements are made without either the sanction of an oath or of that substitute for that sanction to which I have already referred viz, implication of themselves in the charge on which they have been tried, in short without application of any test of truth whatever' *Per Phear J in Queen v Belat*, 19 W R 67 Cr

Proved Section 30 requires that a confession made by one prisoner which is to be used for the purpose of affecting another, must be proved *Queen v Chunder Bhuttacharyee* 24 W R 42 The expression 'proving a confession' is inapplicable to the question and answers under s 364 Cr Pro Code *Mahadeo Prosad v Emperor*, 45 A 323=21 A L J 179=A I R 1923 All 322 When a confession is taken in the absence of other prisoners and the latter have no opportunity of denying or even of knowing what their fellow prisoner has said e g, when it has not even been read over to them afterwards it cannot be said that the confession has been proved *Empress v Chundianath*, 7 C 65, *Empress v Lakshman*, 6 B 124 After proper proof, such confession can be taken into consideration *Empress v Lakshman*, 6 B 124

Court The word 'Court' in this section means and includes in a trial by jury, both Judges and Jury *Empress v Ishutosh Chuckerbutty*, 4 C 348=3 C L R 276 (F B)=1 Shome L R Cr 79

May take into consideration The words "taken into consideration" in this section mean "taken into consideration" for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically evidence within the definition given in s 3 it may still be used *quantum valeat* for the basis of a reasonable inference and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *Queen Empress v Bayay*, Rat Un Cr C 311=Cr Rg 64 of 1886 These confessions may be considered but they cannot be accepted as evidence of any fact necessary to constitute the offence *In re Kaliappa Goundan* 2 Weir 741, but see *Raghubir v King Emperor*, 11 O C 328=8 Cr L J 393 The meaning of the words 'the Court may take into consideration' such confession as against such other persons as well as against the person who makes such confessions is that, if there is other evidence which, if true, would establish the charge, the confession of a person being tried



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jointly for the same offence may be taken into consideration by the Court and may be used for the purpose of corroborating the other evidence. *Ahanyan v Queen Empress*, 4 O C 69, *In re Alanga Bili*, 2 Weir 742. "This section does not provide as has been repeatedly pointed out by this Court, that confession evidence, still less does it say that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be taken into consideration and I think the obvious intention of the Legislature in saying was that, when, as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him, should be taken into consideration as bearing upon the truth or sufficiency of such evidence." Per Jackson J in *Queen v Chunder Bhuttacharjee* 24 W R Cr 42. This section does not say that the confession referred to therein is relevant but only says that the Court may take it in to consideration against the co-accused. The Court might take into consideration such confession with or supplementary to relevant facts which may form the basis of a judgment. As a matter of judicial prudence a confession implicating others must be regarded with suspicion. *Saklu v Emperor*, A I R 1922 Nag 146=65 Ind Crs 561=23 Cr L J 129. The confession of a co-accused can be taken into consideration, but the Court requires corroboration before acting upon such a confession. *Kang Emperor v Baker* 41, 21 C L J 492=19 C W N 584=42 C 789=28 Ind Crs 657=16 Cr L J 321. *Adar Crown* 19 P W R 1916 Cr=17 Cr L J 156=33 Ind Cas 636. *Ghild v Rasul v Crown* 34 Ind Crs 532.

A Judge should charge the jury that the mere confessions of prisoners tried simultaneously with the accused for the offence, which are in a very qualified manner made operative as evidence by Act I of 1872 section 30, are only to be treated as evidence of a defective character, and that they require special scrutiny before they can be safely relied on. *Queen v Sadhu Mundul*, 11 W P Cr 69. Statements made by an accused person are not evidence within the definition of "evidence" given in s 3, Evidence Act. *Aga Tha Ayan v Queen Empress*, L B R (1893 1900) 368, *Imperatrix v Bayagi Hoam* 14 Ind Jur S 384, *Queen v Khulree*, 21 W R 48, *Queen Empress v Kahyappa Gouda* 15 Weir, 3rd Ed 494, *Queen Empress v Khandia Bin Pandu*, 15 B 66, 7 Mal L C R App 15, *R v Dipnaram* 37 A 247.

In *Queen Empress v Naga*, 20 W R 24 Cr. *Phean J* said. We find the Legislature avoids saying that confessions of this sort are evidence and marked as evidence. It says merely the Court may take into consideration a confession. *Jackson J* in *Queen v Chunder Bhuttacharjee*, 24 W R 42, *Marby and Morris JJ* in *Queen v Narain Tel*, 27th May 1875 (mentioned & overruled in 4 C 485) also took the same view. But in *Empress v Chunderbatty* 4 C 483, the Full Bench said that the Legislature has not avoided calling the confession of an accused person 'evidence' against a co-prisoner. It has not so called it because it is not the phraseology of the Act. So according to the Full Bench, confession is evidence for the purpose of section 30 though it does not appear to be so according to section 3 of the Evidence Act. The general test must be applied to confessions by co-accused as to other kinds of evidence, when it is intended to be used against persons other than those who made them except that it must not be forgotten that the confessing prisoner is not giving his statement on oath and that his fellow prisoners have not the liberty of cross-examining him and thus possibly of exposing his falsehood. Per *Pathan J* in *Emma v Empress* 29 P R 1880 Cr. "The confession of a co-accused may be considered with other evidence, and if in taking all together and considering the matter before it the Court believes that the events detailed existed, or that its existence is so probable that a prudent man ought, under the circumstances of the particular case to act on the supposition that they have existed the Court may then hold the fact stated to be proved." Per *Brandt J* in *ibid*. The confession of a co-accused, is evidence though not conclusive or of great weight against another accused. May be considered in this section means "may be considered as in the nature of evidence and the confession must be treated as evidence." *Empress v Sundra* A W N 1884, 38. The confession of one accused is

strictly speaking evidence against the other on a joint trial for the same offence *Empress v Sundia*, A W N 1884 38, *Emperor v Babar Ali* 42 C 789. The confession of a co-accused, is evidence of the weakest kind, and if uncorroborated is not sufficient to warrant a conviction *Mani Tevari v Amir Hossein*, 2 C W N 749. A confession under section 30, may only be taken into consideration but cannot be treated as substantial evidence. *In the matter of Ram Mulla*, 1 J G 77, *Queen v Naga*, 23 W R Cr 24. The words "taken into consideration" in this section mean that the confessions of a co-accused are not to have the force of sworn evidence. A conviction resting on such a confession alone cannot be maintained *Queen Empress v Nimal Das*, 22 A 445 = A W N 1900, 169. Such evidence can be taken into consideration for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically evidence within the definition given in section 3 it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *R v Bayaji Kom Andu*, 14 Ind Jur N S 384 see also *Empress v Sundia* A W N 1884, 38. Although the weight of the confessions may be regarded as great against the party making them, they must be accepted with great caution against the co-accused whom they implicate unless there is corroboration forthcoming from an independent source which would make it safe to act upon the confession. *Rama Kariyappa v Emperor*, A I R 1929 Bom 327. In *Emperor v Sabithhan* 43 B 739 = 51 Ind C 65 = 21 Bom L R 448 on a reference on difference of opinion between *Heaton J* and *Shah J*, *Scott C J* concurring with *Heaton J* and differing from *Shah J* held that the confessions of the co-accused were evidence against the accused inasmuch as there was testimony independent of the confessions which affected the accused by connecting or tending to connect him with the crime. *Scott C J* remarked (pp 469, 470) — "If the confession (of a co-accused) is corroborated by other evidence it matters not whether, in proving the case at the trial the confession precedes the other evidence or the other evidence precedes the confession. As regards the confessions of co-accused the Indian Law has no counterpart in England, but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice's evidence and that their weight must depend on the circumstances of each case." On this point *Scott C J* differed from a doctrine of *Macleod J* in *Emperor v Gangappa Kandeppa* 38 B 156 = 21 Ind C 673 = 15 Bom L R 975, where the learned Judge had expressed the opinion that a confession of a co-accused would stand on a different footing, to the testimony of an accomplice, and that the Indian Evidence Act treats it as having a higher probative value than similar evidence would have according to the English Law. According to the latter ruling there is no difference between the law in England and the law in India on this point except with regard to the corroboration of accomplice evidence. Both decisions agree that the confession of co-accused could not be said to be corroborated by the confession of other co-accused. In *Emperor v Gangappa Kandeppa* *supra* the Court observed that there was nothing in s 30, Evidence Act of 1872 which prevented a Court from convicting after taking the confession of the co-accused into consideration, but the High Courts of India had laid down a rule of practice which had all the reverence of law that a conviction founded solely on the confessions of the co-accused could not be sustained. *Rama Kariyappa v Emperor* A I R 1929 Bom 327. *Mansing v Emperor* A I R 1929 A 928, *In re Magahan Bah* 2 Weir 742. The expression "may take into consideration" points to the necessity of there being other evidence on record to which this statement can lend assurance. *Veolia v Emperor*, 109 Ind Cas 801 = 29 Cr L J 609 = A I R 1928 Nag 213. Under this section the Court may take into consideration a confession made by an accused person as against the co-accused, but the Court can only treat a confession as lending assurance to other evidence against a co-accused, but a conviction based on the confession of a co-accused alone would be bad in law. *Debnendra Bhattacharya v Emperor* 8 Pat L J 566 = 101 Ind Cas 881 = 28 Cr L J 497 = A I R 1927 Pat 27. The statement of a fellow prisoner jointly tried, is by itself evidence of

**S. 30** the weakest kind and it is the duty of the judge to point this out to the jury. *Queen Empress v Jhuna Vali*, Rat Un Cr C 436

The general rule would seem to be that each case must be considered on its merits and that the Court must decide, after the most careful consideration of the effects of a confession coupled with the other evidence on the record whether the degree of proof referred to in section 3 of the Evidence Act has been received or not. *King Emperor v Nga Po Tha*, U B R 1913, 2nd Qr 170=21 Ind Cas 166 11 Cr L J 566. *The Nayan v Queen Empress*, L B R (1893 1900) 363 11 Cr L J 566. higher value can be put upon such a confession than upon the statement of an accomplice. *Emperor v Abani*, 8 Ind Cas 770=15 C W N 25=11 Cr L J 710=38 C 169

**Confession of a co accused must be corroborated** Although a confession of one co accused may be taken into consideration against another under the provisions of this section, it would be unsafe, if not illegal, to rely on it without further corroboration in material particulars. *Karam Din v Emperor*, A I R 1929 Lah 338. So it is clear that although such evidence is admissible under evidence under section 30 no weight can be given to it unless it is corroborated. *Queen v Jaffu Ali*, 19 W R Cr 57. *Queen v Koonjoo*, 20 W R Cr 1. *Queen v Sadhu Mondal*, 21 W R 69. *Queen v Naga*, 23 W R 24. *Queen Empress v Dosa Jua*, 10 B 231. So, such a confession must be corroborated by independent evidence before it can be acted upon. *Queen Empress v Ram Saran*, 84 306, *Impeatrix v Ganapabhat*, 14 Ind Jur N S 20, *Queen Empress v Alagappa Weir* 3rd Ed 499. *Queen v Bayoo Choudhury* 25 W R 43, *Queen Empress v Khandu* 15 B 66, *Empress v Bhauani*, 1 A 664, *Empress v Pamchand* 14 675, *Keher Singh v Emperor*, 59 Ind Cas 913. *In re Lalaram*, 81 Ind Cas 811. *Reg v Ambigora*, 1 M 163=2 Weir 740, *In re Kuppam*, 9 Cr L J 30=5 W L R 355, *Manki Tewari v Amir Hossein*, 2 C W N 749. *Raghubir v Emperor* 11 B O C 328. *In re Ramaswami Boyan*, 54 Ind Cas 479, *Queen v Malpa*, 11 B H C R 19, *Queen Empress v Jadab Das*, 27 C 295=4 C W N 129, *Talwar v Emperor*, 10 C W N XVI, *Nikunja Behari v Empress* 5 C W N 11. *Emperor v Gangappa* 38 B 156. *Nga Po Kanl*, v Emperor 95 Ind Cas 11. *Cr L J 748*=A I R 1926 Rang 127, *Nga Po Kya v Emperor*, 12 Cr L J 465=11 Ind Cas 1001, *Queen v Durbaroo* 13 W R Cr 14. Confession is not sufficient evidence of co-accused's guilt. *Manna Lal v Emperor*, A I R 1910 Oudh 1. The confession of a co prisoner can not per se sustain a conviction in order to achieve that object it must be corroborated also by independent evidence in some material circumstance. *Kher Singh v Emperor*, 9 Ind Cas 913=22 Cr L J 161. It must be corroborated by independent testimony in material particulars. *Ramaswami Boyan*, *In re* 11 L W 8=51 Ind Cas 479=21 Cr L J 79. see also *Emperor v Azimuddin* 57 Ind Cas 467=21 Cr L J 638. *Emperor v Sabit Khan*, 51 Ind Cas 537=43 B 739=21 Bom L F 119=20 Cr L J 497. But "there is no rule as to what constitutes sufficient independent corroboration in a particular case. That must depend upon the circumstances of that case. I desire to refer, however to two considerations: the first the evidence which is supposed to afford independent corroboration must be itself reliable and not doubtful evidence which is treated as reliable consequence of the confessions, otherwise it will not be independent corroboration. Secondly, the value of the confessions of the accused against a co-accused when the confessions are retracted at the trial is very low as pointed out by *Yasin v King Emperor*, 28 C 689=5 C W N 670 and in *Lalit Mohan's case* (1901) 10 Ind Cas 1582=38 C 539=15 C W N 593 at p 593. *Horatio J in Emperor v Sabit Khan supra*. "Very possibly there may be some cases to show that the story told by the accomplice is not a made up one. It is invariably the case that this is so, for if the accomplice's story is in any way true i.e., if he really were present as he says he was, at the time of the occurrence to which he deposes all his principal facts of course would be true and his statement of them might be expected to be corroborated in some particular or other by the collateral circumstances of the case. The question is not whether the story is generally true but whether it is true in particular respects which affect the persons who are accused by him because it is just at those points that the reason for suspicion and uncertainty come into force." *Per Q. J.*

*Mohesh Biswas*, 19 W R Cr 16(21) So it is clear that the corroboration must be as well in respect of the identity of all the persons concerned as of the *corpus delicti* 6 Mad L Jour 96 (Article) *R v Sadhu Mandal*, 21 W R 69, *Reg v Badhu*, 1 B 475, *R v Kallappa*, Weir 3rd Ed 494, *Queen v Dosa* 10 B 231, *Queen Empress v Rama Saran*, 8 A 306 *Pame M Far v Emperor*, 89 Ind Cas 839=26 Cr L J 185 The rule, as I understand it, requires that before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars particularly as to the identity of the accused *Emperor v Sabitkhan*, *supra*

Now the question is what independent evidence is sufficient in the eye of law to corroborate the confessions of a co accused so as to entitle proper weight to be attached to the latter and to justify the Court in accepting them as true, and acting on them? 6 Mad L J Article 97 It must be borne in mind that this sort of evidence being evidence of a very defective character should be more strictly examined by the Court before it can be safely relied on *Queen v Sadhu* 21 W R Cr 69, *Queen v Aga* 23 W R 24 The corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness *Imperatrix v Ganapabhat* 11 Ind Jour N S 20 *R v Sadhu Mundle supra* There is no doubt as to the sufficiently corroborative character of the testimony of independent eye witnesses or of confessions made by the accused, in addition to confessions by the co prisoner implicating him, but the difficulty arises in cases of circumstantial evidence What is the precise test of sufficiency of corroboration when it consists of circumstantial evidence? What must then be the nature of the corroborating facts? (6 Mad L J Article 97) In *Queen v Chunder Bhattachajee*, 24 W R 42 *Jackson J* seems to have thought that if the other evidence "tended to criminate"—though apparently not sufficient *per se* to support a conviction from the co prisoners—it was sufficient corroboration A similar view seems to have been taken in *Imperatrix v Bayagi* 14 Ind Jour N S 348 *Phear J* went a step further in *Queen v Aga*, 23 W R Cr 24, 25 and said that where the circumstantial evidence constituted "a very strong *prima facie* case" it was sufficiently corroborative 6 Mad L J Article 97 But in *Empress v Ashutosh Chakraverty*, 4 C 483=3 C L R 270, *Jackson and Macdonell JJ* said that an accused person should not be convicted 'on the ground of such confession corroborated by circumstantial evidence unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction' But to hold that an accused person ought not to be convicted on the ground of a co accused's confession corroborated by circumstantial evidence unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction is to render section 30 of the Evidence Act superfluous The truth is that the question of what corroborative evidence is sufficient, with the confession, to support a conviction must depend on the circumstances of each case *Ugappa v Emperor*, A I R 1929 Mad 498=1929 M W N 272, see also *Per Garth C J* in *Empress v Ashutosh Chakraverty supra*, *Emperor v Sabit Khan* 43 B 139=51 Ind Cas 657 The corroboration should be by reliable witness *Hira v Crown*, 19 P L R 1911=1 P W R 1911 Cr =9 Ind Cas 39 The mere fact that the statement of the co-accused was used as corroboration of another part of the finding about guilt is not a ground for setting aside the conviction *Sheodatt Ray v Emperor*, A I R 1929 Pat 61 The mere identification of an accused by a confessing accused who admittedly knows him, is absolutely no corroboration of the statement of the confessing accused *Dungar v Emperor*, 95 Ind Cas 938=27 Cr L J 858=A. I R 1926 All 603 The conviction of an accused cannot stand alone and there must be independent evidence entirely outside if the confession before it can be used *Lalaram Gangam Mutt, In re*, 20 L W 202=25 Cr L J 1041=81 Ind Cas 817=1924 Mad 805 The motive for the crime will not be corroborative evidence of the confession *Sheo Ambar v Emperor*, A I R 1925 Oudh 290 The confession of one co accused cannot be said to be corroborated by the confession of another accused as against the accused person who has not confessed at all, but the confession of one co-accused may furnish the corroboration of the confession of another co-accused as against the latter and vice versa *Gangaram v Crown*, 60 Ind Cas 786=22 Cr L J 290, *Emperor v*

**S. 30.** *Gangaya* 15 Bom L R 975=2 Bom Cr C 111=21 Ind Cas 673=14 Cr L J 625=28 B 176. *Imperor v Budhu* A W N 1881, 19 The conviction based on the confession of a co-accused not corroborated in material particulars by independent evidence is illegal. *Imur Shah v Impeer*, 20 P R 18809, *Impeer v Piria* A W N 1885 320 *Impeer v Bhawanji* A 661, *In re Kuppaswami* L L 135=9 Cr L J 308=7 Ind Cas 547

An accused person ought not to be convicted where the only evidence against him is the confession of a co-accused and circumstantial evidence, which although true would not by itself support a conviction. *Sri Arshen v Emperor*, 6 O C 201 2 Wcr 710=7 M H C App 15

There is nothing in law to prevent the conviction of an accused on the uncorroborated and retracted confession of an accomplice, if it be believed against him. Such a confession should however be approached with the greatest caution and care and should be subjected to the most anxious scrutiny in deciding on its truth or falsity so far as it incriminates any person other than him who made it. *Vya Pura v Impeer* 11 Cr L J 179=19 Ind Cas 179=6 Bur L T 41

**Retracted confession and co-accused.** A retracted confession is admissible but should have no weight attached to it unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement may be given full weight and can be used even against a co-accused. *Sheonarayan v Impeer* A I R 1929 Pat 212=8 Pat 262=10 P L T 27. The Evidence Act makes no distinction whatever between a retracted or uncorroborated confession. Both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. *Gour Chandra v Impeer*, A I R 1929 Cal 11. *Mahomed v Impeer* 81 Ind Cas 62

But a mere retracted confession of a co-accused cannot be sufficient to sustain the conviction of another accused. *Pala Singh v Emperor*, A I R 1918 Lah 329=29 Cr L J 267=107 Ind Cas 614. Because "experience and common sense show that, in the absence of corroboration in material particulars it is not safe to convict on a confession unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent of retraction there remains a high degree of certainty that the confession notwithstanding its having been resiled from, is genuine." *Jairam v Emperor* 30 P R 1914 Cr =50 P W R 1914 Cr =25 Ind Cas 634=264 P L R 1914 but see *Pratap Singh v Crown* 6 Lah 415=7 Lah L J 482. Retracted confessions although they are nevertheless evidence against the person making them cannot be used against the co-accused without substantial corroboration. *Debendra v Emperor* 8 Pat L R 566=101 Ind Cas 881=23 Cr L J 491=4. A I R 1927 Pat 257. A retracted confession is not the testimony of an accomplice within the meaning of section 133 of the Evidence Act. *Moye v Sarda v Emperor* 40 C L J 551= A I R 1925 Cal 406. In this case the Court observed "The law with regard to retracted confession or rather its evidentiary value when it is sought to be used against a co-accused is well settled so far as this Court is concerned. It has been laid down in a long series of cases of which it is necessary only to refer to the cases of *Yasin v Emperor* 28 C 689 and *Emperor v Lalit Mohan Chackerbutty* 38 C 559, that a retracted confession should carry practically no weight as against the person other than the maker because it is not made on oath is not tested by cross examination and its truth is denied by the maker himself who has lied on one or other of the occasions and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath." See also *Uthasod v Emperor* 2 Pat L T 773=60 Ind Cas 56=23 Cr L J 200

Where a confession made by an accused person is subsequently retracted by him and he does not implicate himself in the murder though he stated that one of the conspirators held the confession could not be taken into account against the co-accused for the person making the confession did not intend to implicate himself though he actually did so. *Hayat v Emperor* 4 Lah L J 41=1922 Lah 119=68 Ind Cas 401=23 Cr L J 361. A retracted confession carries much less weight than a confession which has been adhered to. *Gangaram*

*v. Imperator*, 62 Ind Cas 415=22 Cr L J 529 Where the confession of a co accused retracted before the trial, was not corroborated in a material particular viz., the connection of the other accused with the cause of the death, that other accused must be acquitted *In re Manula Padayarchi*, 14 L W 474

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The retracted confession of accomplices may be taken into consideration under s 30 where there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever *Reg v. Limaya Rat* Un Cr C 108, *Queen Empress v. Sahadu Rat* Un Cr C 771 *Ihya v. Crown*, 5 P R 1911 Cr =41 P L R 1911=27 P W R 1911 *Emperor v. Khesari*, 29 A 931

Against such other persons as well as against the person making the confession A confession by one of several prisoners which is irrelevant or is inadmissible under s 24—26 and where there is no discovery under s 27 is inadmissible under s 30, and is to be wholly rejected as against both the maker of it and the person implicated thereby, but it is admissible in favour of the latter *Imperator v. Palambai*, 2 B 61, 6 *Mad L Jour* 41102 If it is not admissible under s 24 26, against the maker it is admissible under s 30 (provided it otherwise satisfies its terms) as well against the one as against the other If however, it is not within s 24 26, but there is discovery under section 27, then so much of the whole statement as leads immediately to the discovery being made admissible thereunder is also admissible under s 30 against both if it is a confession on the part of the maker and affects him self and some other prisoner but not otherwise 6 *Mad L Jour Article* 108 In the case of a confession partly admissible against the maker under s 27, it is admissible under s 30, against his fellow prisoner, only when the admissible part is a confession of the maker's guilt, and affects him-self and other persons' If the admissible part is a confession and affects both persons it cannot be first rejected as against the co prisoner on the ground that the whole confession was unduly obtained, and then that very part admitted as against the maker, on the ground of discovery but should be admitted, under s 30, as against both (*Empress v. Rama Birapa*), though of course, in taking it into consideration no weight would be attached to it as against the person implicated, unless it was sufficiently corroborated and the mere discovery, though it might be sufficient for the conviction of A in the latter case above mentioned would not of itself (apart from evidence to show that property was found in B's premises and probably put there by him) corroborate A sufficiently as to B being concerned in the theft. *Ibid*

**Confession of a co accused and evidence of an accomplice** A confession of an accused person implicating a co accused under section 30, cannot be considered as the same thing as 'testimony of an accomplice' which is referred to in section 133 of the Act Section 133 contemplates that the accomplice shall be examined as a witness This being so the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co accused jointly tried with the confessing accused under section 30 *Necha v. Emperor*, 109 Ind Cas 801=29 Cr L J 609=A I R 1928 Nag 213 The confession of a co accused used under the provisions of section 30 stands on a perfectly different footing from the testimony of an accomplice which is referred to in section 133 of the Act It is plain from the words of the latter section that it contemplates that the accomplice shall be examined as a witness This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co accused jointly tried with the confessing accused under s 30 All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused *Empress v. Karimbor* 9 C P L R 37 Cr., *Empress v. Gounda* 9 C P L R Cr 35 So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case *Emperor v. Lalit Mohan* 38 C 559=10 Ind Cas 582=15 C W N 593, *Queen v. Chunder Bhuttacharjy* 24 W R Cr 42

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The confession of a co-accused stands on a quite a different footing to the testimony of an accomplice which the Evidence Act treats as having a higher probative value than similar evidence has according to English law. *Emperor v Gangappa Kardeppa*, 21 Ind Cas 673=18 B 156=15 Bom L R 910=8 Bom Cr C 143=14 Cr L J 625. 'I think it will be apparent to any one who peruses the judgment of *Lord Reading L C J in R v Baskerville*, 86 L J K B 25=(1916) 2 K B 658=115 L R 453=25 Cox C C 524 that except in regard to corroboration of an accomplice by accomplice evidence there is no difference between the law in England and the law in India.' *Scott C J in Emperor v Sabit Khan Bahadur Khan*, 13 B 739=21 Bom L R 118=51 Ind Cas 637=21 Cr L J 197. The confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence in the case, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions whether they have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. *Nga San Ayein v King Emperor*, U B R (1917) 1st Qr 3. Statements of co-accused persons are not entitled to even as much consideration as the testimony of an accomplice. *Queen Empress v Nana Rayu*, Rat Un Cr C 468=Cr R 26 of 1889, *Queen Empress v Uma*, Rat. Un Cr C 370=Cr R 19 of 1888, *Empress v Ganapabpat*, Rat Un Cr C 156.

**31** Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

**Admission—meaning of.** The word 'admission' as used in this and in the previous sections is rather misleading. The law of Evidence" says *Prof Wigmore*, "has suffered in its most vital parts, from an ailment almost incurable—that of confusion of nomenclature. The term admissions exhibits this misfortune in one of its notable aspects." *Wigmore § 1058*. According to that learned author the term "admissions" as mentioned in these sections should be termed 'quasi admissions'. "The true admissions, in the fullest sense of the term" *Prof Wigmore* "is another thing and involves a totally distinct principle." But Admission proper according to him concerns a method of escaping from a necessity of offering any evidence at all whereas this kind of admission, which should be termed as quasi admission is an item in the mass of evidence. The meaning of the learned writer will be made clear if we consider the meaning of the word admission as used in Order XII of the Civil Procedure Code along with the term "admission" as used in these sections. Admissions as used in Civil Procedure Code are designated judicial admissions. Such admissions may operate as a waiver relieving the opposing party from the need of any evidence and another party may at any stage of a suit where admissions of fact have been made either on the pleadings or otherwise apply to the Court for such judgment or order as upon such admission he may be entitled to. (*Vide Order XII, rule 6, Civil Procedure Code*). So judicial admission is a formal act, done in the course of judicial proceedings which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true. *Wigmore § 1058*.

Again this kind of admission must also be distinguished from the statements of parties which become in themselves the foundation of independent right of other persons, by virtue of some doctrine of substantive law,—in other words from binding estoppels, warranties and representations. *Wigmore § 1057*.

**Principle.** It has already been stated that admission as the term is used in this as well as in the previous sections is nothing but a piece of evidence. If A claims that his boundary line runs to a oak tree, and B admitted this. B's extrajudicial admission of the boundary's location is merely evidence for the truth of the other facts on which A rests his claim. So this kind of admission being a term of evidence, it cannot be in any sense final and conclusive. The opponent

whose utterance it may none the less proceed with his proof in denial for its correctness, it is merely an inconsistency which discredits in greater or less degree, his present claim and his other evidence. As regards such admissions in *Heame v. Rogers*, 9 B & C 577, 586 *Bayley* 1 and There is no doubt but the express admissions of a party to the suit or admissions implied from his conduct are evidence and strong evidence against him. But we think that he is at liberty to prove that such admissions were mistaken or untrue and is not estopped or concluded by them unless another person has been induced by them to alter his condition in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction, but as to third persons he is not bound. See also *Lyttelton v. Ham Sebul* 12 W R 156, *Ham Siran v. Pran Pany* 13 M I A 551, *Greenath v. Lindo* 20 W R 112, *Iman v. Doolar* 15 W R 317, *Orley v. Iadoo* 13 M I A 585, *Soojan v. Ichmut* 14 B L R App 3, *Polunuss v. Goor* 18 W R 145. An estoppel is a representation acted on by the other party by creating a substantive right does oblige the estopped party to make good his representation—in other words but inaccurately, it is conclusive. So too but for an entirely different reason a judicial admission is conclusive in the sense that it formally waives all right to deny for the purposes of the trial i.e. it removes the proposition in question from the field of disputed facts. But statements which are not estoppels or judicial admissions have no quality of conclusiveness and on principle cannot have. *Wigmore* § 1059 *Foxridge v. Botham* 1 B & P 19 *Newton v. Blecher* 12 Q B D 921 924 *Newton v. Luddard* 12 Q B D 92. Such an admission does not estop a party who makes it, he is still at liberty so far as regards his own interest to contradict it by evidence. *Per Parke* L in *Ridgway v. Philip* 1 C M & R 115. So a mere admission is not conclusive. It is only in certain cases namely where it has been acted upon by the party to whom it is made. *Janan Choudhry v. Doolar* 18 W R 317 *Brojendra v. Chaman Datta Municipality* 20 W R 223 *Yasant v. Putlu*, 14 B 312, *Chandia Kant v. Praveer Mohan* 5 W R 209.

**Scope of the section.** Unless admissions are contractual or unless they constitute an estoppel within sections 11, to 117 of the Evidence Act they are not conclusive but are open to rebuttal or explanation, or they may be controlled by higher evidence. And this applies equally to written admissions. The rebuttal will be in accordance with the circumstances of each particular case, but must be clearly established and must show fully the reasons why such admissions should not be held binding. The party may confess its untruth, he may show mistake, or that the response which formed the admission was made not in a serious but in a jocular manner or that the admission was made in ignorance of the true state of the facts. This is true even though they are made under oath although admissions thus solemnly made are evidence of great weight against the declarant, and they throw on him the burden of showing a mistake. *Rees v. Clarke* 8 Term Rep 220 *Thornes v. White* 1 Tyro & G 110. Admissions cannot be rebutted or explained by other statements of the declarant made at another time, for such other statements are not admissible for that purpose unless they form part of the *gestae*. *Lee v. Hamilton* 3 Ala 529 *Roberts v. Trautick* 22 Ala 490, *Burr Jones* § 296. Informal admissions may be either in writing or oral or even by conduct. They may have been made in business correspondence or casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission. They are therefore more easily explained away than formal admissions. But if sufficiently clear they shift the onus of proof. *Pouell on Evidence*, 430.

This section declares that admissions are not conclusive proofs of the matters admitted but that they may operate as estoppels. An admission is the easiest possible kind of evidence to procure, and when the witnesses are closely related though not necessarily interested in the case there is a certain suspicion attaching to their testimony. The provision that admissions may operate as an estoppel is sometimes attempted to be used as if in stead of saying, that an admission is not conclusive proof the section means that an admission is not sufficient proof without corroboration. But this is not the meaning of conclusive proof as defined in § 4 of the Evidence Act, and when one fact is declared to be conclu-





no untrue *Sopgan Baber v. Achmut* 14 B L R App 3-21 W R 411. An admission contained in a statement filed in plaintiff's name is not proof that they have been made by her. *Ismatomissa v. Alla Hapt*, S W R 168. Collusion will render inoperative the admissions of a predecessor or in title against his successor. *Bepin Beharee v. Rajah Admonce* 25 W R 125. Where a deed is fraudulent it is not binding on the party. *Hareesh Chunder v. Padma Nath* 11 W R 25, *Boues v. Foster*, 27 I J T x 262. *Seemth v. Bando* 20 W R 112. Ordinarily an admission is no more than a piece of evidence to be considered by the Court and would not operate as an estoppel in the defendant's favour. *Hunter Penderg v. Gnyddhar* 21 W R 108. *J P H v. Kufar* 19 W R 299. The circumstances under which an admission has been made should also be considered. *Hansa v. Sheo Gound* 24 W R 31. *Sopgan v. Achmut* 14 B L R App 3. *Li v. Simons* 1 C & K 161. *Mahomed v. Mo ham* 16 W R 280.

**Admission by mistake** It is only necessary here to add that where judicial admissions have been made improvidently and by mistake the Court will in its discretion relieve the party from the consequences of his error by ordering a replacer or by discharging the case stated or the rule or agreement, if made in Court. *Greent Fe* § 206. The principle on which a party is relieved against judicial admissions made improvidently and by mistake is equally applicable to admission *en pais*. Accordingly where a legal liability was thus admitted it was held that the jury were at liberty to consider all the circumstances and the matters taken into view under which it was made, that the party might show that the admission made by him arose from a mistake as to the law and that he was not estopped by such admission unless the other party had been induced by it to alter his condition. *Newton v. Belcher* 1 Jun 25-18 I J Q B 13-12 Q B 921. *Newton v. Fildard* 12 Q B 92. *Solomon v. Solomon* 2 Kelly 18. But in all the admissions, unless a clear error of material is made out entitling the party to relief he is held to the admission. *Greent Fe* § 206. *Gepdill v. Chundrabale*, 19 W R 13. An admission once made is binding, unless the party making it for all these purposes of the suit unless it be shown that such a limitation was recorded erroneously. *Gouree v. Mulhoosundun*, 2 W R Act X. *Rul 1*. An admission made by a party in a previous suit will be taken in evidence against him *quantum valcat* in a subsequent suit. *Sho Sura v. Iam Khelauan* 14 W R 165. *cc also Obhoy v. Lejoy* 9 W R 102. *Harrison v. Leemuth* 7 W R 219, *Gordon v. Beepoy* S W R 291.

**Admissions may estop** Admission whether of law or of fact which have been acted upon by others, no conclusive against the party making them in all cases between him and the person who conducted him that influence. *Newton v. Belcher* 1 Jun 25-12 Q B 921. *Newton v. Fildard* 12 Q B 925. The doctrine of *estoppel in pais* notwithstanding the great number of cases which have turned upon it and are reported in the books cannot be taken as a rule to rest upon any determinate legal test which will reconcile the decisions. It will embrace all transactions to which the great principles of equitable necessity wherein it originated demand that it should be applied. In fact it is becoming a purely practical doctrine of practical equity that its limited application is difficult and its reduction to the form of abstract formulas is still more complicated. An able Judge (*Baron Parke*) has suggested that only such a limited conduct should be treated as an *estoppel in pais* as would suit in an agreement of sale or representation in an action on the contract. This, however, does not seem to have been adopted by the judges. Referring again to *Ford Doum* synopsis we find where a man by his words or conduct wilfully causes another to believe in the existence of a fact of things and induce him to act on that belief, whether his own previous position the former included him from averring against the latter a different state of things, a estoppel it is at the time. *Ford v. Ly* 8 W R (Ad & 11) 174.

With regard then to the consequences of a statement first it is concluded that the aims and policy of the law favour the investigation of truth by all expedient and convenient means and that the doctrine of *estoppel* by which further investigation is precluded being an exception to the general rule.

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founded on convenience and for the prevention of fraud is not to be extended beyond the reasons on which it is founded. *Welland Canal v. Hibernia* Wend 470, *National Bank v. De Bernales*, 1 C & P 569, *Jenney v. John*, 9 Johns 9.

Admission acted upon, as giving rise to the inferences need not be in express language to the person himself. It may be implied from the general conduct of the party. For in this case the implied declaration may be considered as addressed to every one in particular, who may have occasion to rest upon it. In such cases the party is estopped on grounds of public policy and good faith from repudiating his own representatives. *Quirk v. Staines*, 1 B & P 293 *Graves v. Key* 3 B & Ad 318 *Stanton v. Rastall* 2 T R 366, *Wright v. Lord Ilchester* 3 East 147.

**Admission must be taken as a whole.** When reliance is placed upon an admission made by a witness examined by the opposite party, the whole of the admission must be taken into consideration. *Gobin Prasad v. Chatterbhoy* 6 Ind Cas 493. So where a document is partly favourable and partly unfavourable to a party, it must be read as a whole. *Handley v. Blackburn* 5 Hunt 245, *Hill v. Frogatt* 2 C & P 569. See also *Shailh Shurfuraz v. Shailh Dhunoo* 16 W R 257, *Sooltan Ali v. Chand Bibi* 9 W R 130. A plaintiff abandoning his case and falling back on the admissions of the defendant must take the admissions as they stand in their entirety. *Turnee Pershad v. Duarkanath* 15 W R 451. Where a person uses the admission of another as evidence, the whole of the admission must be put in. He cannot put in one half and exclude the other half. Who have to decide upon the evidence are not bound to believe the whole of the statement. *Vulmorey Singh v. Ramanoograh Ray* 7 W R 29, *Bray v. Iushonath* W R 1864 305. *Iallah Probhoo v. Sheonath* W R 1864 Act 26 *Sooltan Ali v. Chand Bibi* 9 W R 130. *Judonath v. Ryah* 16 W R 220. *Shailh Shurfuraz v. Shailh Dhunoo*, 16 W R 257. A party is not bound to read in evidence a mere extract from his adversary's pleading however brief, provided he does not omit a part of a sentence or clause which qualifies that part which he reads, so as to prevent the sense or render it uncertain. *Idem v. Tit* Brief Civil Jury Trials 299.

**Admissions in pleadings.** Of various kind of judicial admission is contained in pleadings command careful consideration. By reason not only of their premeditated solemn contents, but with regard to the time at which they are made, their use *de hors* that action, the change in circumstances by which amendment in brief by the circumstance surrounding their offer in evidence against the party making them including of course their verification by persons having absolute knowledge and those who speak only from information and belief. Where parties allege matters of fact in their pleadings, the other party may be offered in evidence against such parties as admissions of the facts alleged. *Austin v. Fitt* 2 Ga App 91=58 S E 318. When a fact is admitted by clear and necessary implication from other facts expressly stated in the pleading, the admission so made is as effective as though it were expressly stated, and will not be overcome by a mere general denial. *Miles v. Kellogg* 115 W R 147. Under familiar rule, the pleadings in pending cases are more than a mere form. They are until changed conclusive upon the parties filing them. A party is undoubtedly in such portion of his opponent's verified pleading as contains matter capable of being used as an admission. *Burr* 10 C & P 113. The defendant admits any sum to be due that admission irrespective of the proof offered by the plaintiff is sufficient to warrant a decree for that sum in the plaintiff's favor. *Thom Chantley v. Notchep* 6 W R 1132. See also *Smith v. Smith* 18 W R 11. If in a suit for specific performance of an agreement the defendant admits the terms of the agreement and its execution, the plaintiff need not put the defendant in evidence nor prove its execution. *Burgess v. Burgess* 11 B L R 111. *McGowan v. Smith* 26 L J Ch 8. See also *Idem v. Smith* 11 B L R 111. (P C) 11 W R 111. 29=13 M L A 12.

The weight to be given to such admissions depends on various circumstances. If the plaintiff's sworn statement and his admission are in conflict, the court may admit the evidence against him.

rebutted When the allegations are made on information and belief they are still admissible in evidence & the fact only detracts from the weight of the testimony *Doe v Steel* 3 Camp 115 *Pope v Mills* 115 U S 363

**Admissions in pleadings, when conclusive** Where a party to an action makes solemn admissions against his interest in a pleading they should be treated as admitted facts and he will not be heard to question the correctness thereof at any stage of the case in the trial Court or an appeal where properly preserved in a transcript or otherwise so long as they remain a part of the record If the statements or admissions were made by himself or by his counsel under an honest mistake or misapprehension of what the facts really were and he desires to be relieved from the effect thereof he should apply to the trial Court for leave to withdraw such admissions or pleadings and it required to do so make a showing of good faith in support of his application which should be granted or denied in the furtherance of justice Each party to an action is in that action conclusively bound by those admissions which he expressly makes in the pleadings or by stipulations, oral or written which he formally entered into for the purpose of dispensing with proofs *Burr Jones* § 274

**Other Judicial admissions** A tacit or incidental admission in one suit will not conclude the party making it in another action where precisely the same matter is not in litigation and even then admissions which are expressly made by the pleadings in one action are not conclusive in other suits unless the second action is brought on a judgment recovered in the first *Shelton v Houlting* 1 Wills 253 The affidavits and depositions of a party are of course competent to show his admissions although used in another suit, and from their solemn character are entitled to great weight but they are not conclusive against him and do not constitute an estoppel *Doe v Steel* 3 Camp 115, *Cameron v Lightfoot* 2 W Black 1190 *Stidly v Sanders* 2 Dowd & R 345 *De W helpdale v Milburn* Price 485 "If the deposition of the defendant was incompetent as substantive evidence, either because not filed as required by statute or because the deponent was present in Court nevertheless any admissions or declarations of the defendant are pertinent to be proved by the adverse party and it is immaterial whether such declarations were proved by the oral testimony of one who heard them or by the defendant's signed statement in the form of a deposition *Phoenix Mut Life Ins Co v Clark* 53 N H 161, *Proffitt & Thome v Lichford* 72 N H 73=74 Atl 697 The admission by judgment debtor of a certain rate of *usury* was held to conclude them in law *Karee Oluit v Mohrwood* 9 W R 241 "A plaintiff who thinks after having sworn to facts resting on his own observation and knowledge before one jury should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favour which will involve the conclusion that his testimony at the first trial was knowingly false A party testifying under oath is more than a witness He is an actor seeking the intervention of the judicial power in his behalf and thus subject to the rule *'allegans contraria non est audiendus'* which as stated in *Broom's Legal Maxims* p 130 expressed in technical language the trite saying of *Jacob Kenyon* that a man should not be permitted to blow hot and cold with reference to the same transaction or in it at different times on the truth of each of two conflicting allegations according to the promptings of his private interest *Smith v Boston Elevated Ry Co* 154 Fed 357

## STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

### 32 Statements, written or verbal of relevant facts made by a

person who is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears

Cases in which testimony of relevant facts by person who is dead or cannot be found etc is relevant

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to the Court unreasonable are themselves relevant facts in the following cases —

(1) When the statement is made by a person as to the cause of his death, or is to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question

(2) When the statement was made by such person in the ordinary course of business, and in particular or is made in course of business when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages

(4) When the statement gives the opinion of any such person or gives opinion as to the existence of any public right or custom or matter of public or general interest of the existence of which if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right or custom or matter has arisen

(5) When the statement relates to the existence of any relationship\* [by blood, marriage or adoption] between persons as to whose relationship\* [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised

(6) When the statement relates to the existence of any relationship\* [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged or in any family

\* These words in s. 32 cl. (2) and (4), were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s. 2

pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a)

(8) When the statement was made by a number of persons and expressed feelings or impressions on then put relevant to the matter in question

### Illustrations

(a) The question is whether A was murdered by B or

A died of injuries received in a transaction in the course of which he was ravished. The question is whether she was ravished by B or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow

Statements made by A as to the cause of his or her death referring respectively to the murder, the rape and the actionable wrong, under consideration are relevant facts

(b) The question is as to the date of A's birth

An entry in the diary of a deceased surgeon regularly kept in the course of his business stating that, on a given day he attended A's mother and delivered her of a son is a relevant fact

(c) The question is whether A was in Calcutta on a given day

A statement in the diary of a deceased solicitor regularly kept in the course of his business that on a given day, the solicitor attended A at a place mentioned in Calcutta for the purpose of conferring with him upon specified business, is a relevant fact

(d) The question is whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondent in London to whom the cargo was consigned stating that the ship sailed on a given day from Bombay harbour is a relevant fact

(e) The question is whether rent was paid to A for certain land

A letter from A's deceased agent to A stating that he had received the rent on A's account and held it at A's orders is a relevant fact

(f) The question is whether A and B were legally married

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant

(g) The question is whether A a person who cannot be found wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant

(h) The question is who was the cause of the wreck of a ship

A protest made by the Captain who attended cannot be procured is a relevant fact

(i) The question is whether a given road is a public way

A statement by a deceased headman of the village that the road was public is a relevant fact

(j) The question is what was the price of grain on a certain day in a particular market. A statement of the price made by a deceased banyan in the ordinary course of his business is a relevant fact

(k) The question is whether A who died was the father of B

A statement by A that B was his son is a relevant fact

(l) The question is what was the date of the birth of A

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A letter from A's deceased father to a friend announcing the birth of A on a given day is a relevant fact.

(m) The question is whether and when A and B were married.

An entry in a memorandum book by C, the deceased father of B of B's daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a printed caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

**Statement of persons who cannot be called as witnesses.** Sections 30 and 31 contain many important exceptions to the rule which excludes hearsay. The exclusion of hearsay chiefly depends upon the desirability of getting the person whose statement is relied upon into Court in order that he may be examined as a witness in the regular way. But this is practically impossible in many cases. *Marlby Et 32*. So the first principle on which the statements are admissible is necessity. But there must be some circumstantial guarantee as regards the trustworthiness of the statement. Under English Law such statements are relevant when the declarant is dead (*Step Dig art 24*). But under the Indian Evidence Act such statements are admissible when made by a person (a) who is dead or (b) who cannot be found or (c) who has become incapable of giving evidence, or (d) whose attendance cannot be procured without in amount of delay or expense which the Court thinks unreasonable. *Nort Et 174*. The reasons for the admission of such evidence in England is absence of any better evidence, and therefore the exceptions (b) (c) and (d) under which in India, such evidence is admissible are consonant with reason and general convenience. *Nort Et 174*.

**Nature of Hearsay, as an Extra Judicial Testimonial Assertion.** When a witness A, on the stand testifies, 'B told me that event X occurred', his testimony may be regarded in two ways. He may be regarded as a witness to the event upon his own credit, i.e. as a fact to be believed because he is certain that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected because he is not qualified by proper sources of knowledge to speak to it. (2) But upon the order to obviate that objection that we regard A as not making any assertion about event X (of which he has no personal knowledge) but as testifying to the utterance in his hearing of B's statement as to event X. To this A is not qualified to testify, so that no objection can arise on that score. The only question then can be whether this assertion of B reported by A, is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to prove event X by B's assertion, the utterance of B's assertion being itself proved by A's testimony to it. In other words merely the making of B's assertion is properly proved by A but the occurrence of event X is also sought to be proved by this assertion of B, which was uttered out of Court but is offered testimonially for the same purpose as if it were being made personally by B on the stand. *Higmore § 1361*. It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses (1) a supposed percipient and extrajudicial narrating witness stating at some antecedent point of time in the hearing of any person not of that occasion invested with the authority of a Judge some matter of fact as having had place, and (2) a deposing or say judicially narrating witness who bears testimony not to the truth of that matter of fact but to its having actually been asserted on the extrajudicial occasion in question by the extrajudicially narrating or narrating witness. *Book VI Ch IV of Bentham's Rationale of Judicial Evidence*. The Hearsay rule tells us that B's assertion cannot be admitted because it has not been made at a time and place where it could be subjected to certain essential tests or investigation calculated to demonstrate its real value by exposing such latent sources of error. *Higmore § 1361*.

**Hearsay Rule and its exceptions—its Historical development, etc.** The rule is a great head of the law of Evidence. Says *Prof James Bradley Thayer*, 'confronting indeed with its exceptions much the larger part of all that truly belongs to the forbidding the introduction of hearsay. The true historical nature of the rule is hinted by the remark of an English Court, two centuries ago and over

when they checked the attempt of a woman to testify what another woman had told her. 'The Court it was quietly remarked 'are of opinion that it will be proper for *Hells* to give her own evidence' (*Elizabeth Cunnings Case*, 19 How, St Tr 333, 406). That is to say, the objection went to the medium of communication, witnesses before the jury, in giving ordinary testimony, had by that time been allowed for some three centuries, but it must be *un oyant et voyant*, a hearer and seer, as they said in the older Year Books, one who could say as the witnesses to Courts in older times always had to say *quod vidi et audivi*, it must not be testimony at second hand. When juries, who were themselves originally witnesses as well as triers, came to be helped regularly by the testimony of other witnesses it was only by such as personally knew the truth of what they were saying, and not by witnesses who only knew what some one else had said to them. Juries, indeed could say what they 'knew', but witnesses to juries could only say what they had seen and heard. In the first half of the fourteenth century we find the Judges laying this down as applicable in the instance of attesting witnesses. What it meant was that while juries could form opinions from anything they knew, the verdict being given at their peril while they might act on what they had picked up in any way, and on such foundations might form a judgment which would count as knowledge, yet witnesses could not do this, or rather were not to state it if they did, were not to say what they thought or 'believed, or had heard from others, or had inferred from what we now call circumstantial evidence. This contrast between the function of the jury and that of witnesses which made it necessary to discriminate and define these points five or six hundred years ago, as regards the pre-appointed witnesses who went out with the jury—even before witnesses were ordinarily allowed to testify to juries,—has led to a steady and rigid adherence to the general doctrine of hearsay prohibition.

"But there came a large and miscellaneous number of so called 'exceptions. Some of these in reality, were quite independent rules, whose operation was rather that of qualifications and abatements to the generality of this other doctrine *rules which* were coeval with the doctrine itself or much older. For example, it seems always to have been true, in cases of homicide, that the dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721. Such declarations in early times, and even in late times had a peculiar credit allowed them. So in tracing pedigree, the family hearsay seems always to have been resorted to. This matter, before jury trial was developed, used to be 'tried' by witnesses, who stated circumstantially how they knew what they said, and hearsay from the family, if confirmed by circumstances was probably always a basis for their testimony. Family hearsay had the aspect of family reputation, and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony the fact of the mother's recording the age in the records of a Priory, which record he had seen. In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging to the given community was always regarded as good.

"There was another class of unsworn statements which had always been resorted to in judicial proceedings and admitted to the jury, namely written ones,—entries in registers in parson's books in the account books of the stewards in a merchant's books in contracts, deeds, wills, and other documents. Documents had always been shown to juries—long before witnesses were received to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case without even thinking of how the writer knew what he said. As regards ancient matters writings very imperfectly authenticated were one of the chief sources of information and often the only one. It appears, then that a number of the so called 'exceptions to the hearsay prohibition came in under the head of written entries or declarations, they came in, or rather, so to speak, stayed in simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Such things, continuing at the present day are, e.g., the admission of old entries and writings in proof of ancient matters, written declarations of



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deceased persons against interest, and in the course of duty or business, and to a limited extent, a merchant's own account books to prove his own case, a thing clearly recognized as customary and allowable in an English Statute of 1694 nearly three centuries ago, but immensely and often ignorantly, much qualified afterwards. So also of regular entries in public books, as matter probably never even doubted to be admissible in evidence.

"In addition to all the ancient and always approved practice in this simple, original shape, operating as qualifications of the hearsay prohibition there have come in many extensions of them, as when oral declarations of deceased persons against interest were received, and, in England even oral declarations of deceased persons in the course of duty or business. And not only has the scope of these old titles been enlarged, but new exceptions have been made, and perhaps they are rather old ones coming to be recognized and formulated, such as those relating to the *res gesta*, i. e. declarations which are a part of some fact itself admissible and declarations of present intention or present phraseology. Such things are the natural development of the subject.

Now a great deal of perplexity exists, in the law relating to hearsay from a failure to understand the scope of the exceptions and from an uncertainty whether and how far they are to be freely developed, or to be strictly limited as being mere exceptions while the main rule itself which prohibits hearsay is being more expanded. Sometimes one thing is done and sometimes the other. In a leading case in the House of Lords in 1850 *Lord Blandford*, in discussing a question of hearsay and rejecting the evidence, said "I have my judgment upon this that no case has gone so far as to say that such a document could be received and clearly unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible" (*Stirling v. Prosser*, 1 App Cas 625). On the other hand *Sir George Jessel* in a very different case in 1876, had declared it to be the Court's duty to extend the exceptions to the hearsay rule out of regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases (*Sugden v. St. Leonard*, 1 Prob Div 151). It seems a sound general principle to require that in all cases a main rule is to have extension, rather than exceptions to the rule, that exceptions should be applied only within strict bound and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule and what the exceptions? There lies a difficult and true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely that what is relevant is admissible. To any such main rule there would of course be exceptions but in the case of other exceptions so in the hearsay prohibition this classification would lead to a restricted application of them, while the main rule would have freer course. One mischief about the present state of our law is that it shows a spasmodic and half-recognized acceptance of such a theory in particular instances, while rejecting it generally. For example there is a tendency to regard a hearsay statement as admissible if it be one of a set of facts giving and reflecting credit, such to the other—on the principle of what is called circumstantial evidence. This brings in confusion, for our law really goes but a very little way in that direction. No doubt, in point of hearsay statements often derive much credit from the circumstance under which they are made, say, e. g., from the fact of being made under oath or under other oppressive conditions as being against interest or made under strong inducement to say the contrary, or as part of a series of statements or a class of them which are usually careful and accurate, and the like, credit amply enough in point of reason to entitle them to be received as evidence when once the absence of any perceiving witness is accounted for and it would in fact have been a question possible to shape our law in the form that hearsay was admissible as second-hand evidence whenever the circumstances of the case alone were enough to entitle it to credit irrespective of any credit reposed in the speaker. This point of view is for ever suggesting itself in that part of the subject relating to declarations which are a part of some admissible fact—of the *res gesta*—the phrase is often spoken of as parts of a mass of circumstantial facts described as *res gestæ*—all circumstantial supporting, and supported by each other in their tendency to prove

Some principal fact, instead of being regarded as they should be as parts of that fact itself, *pars rei gestae*. It is under the count of hearsay, but received by way of exception, on account of this special intimacy of connection with the admissible facts. This part of the subject presents an instructive spectacle of confusion, resulting from the desire on the one hand to hold to the just historical theory of our case, and on the other to resort to first principles without being aware of the size and complexity of the task which is thus unconsciously entered upon." *Thayer v. Peck* *1871* *15* *12*.

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**Theory of Hearsay Rule** The principle of exclusion of hearsay evidence is thus stated by *Chief Baron Gilbert*: "Credit being derived from attestation and evidence it can rise no higher than the fountain from whence it flows, and if the first speech was without oath and the second is such a speech makes it no more than a bare speaking which cannot be of more worth derivatively than at first, and so of no value in a Court of Justice where all things are determined under the solemnity of an oath. If a man swears to his own knowledge, he must show the circumstances and incur the risk of confusion, but if a man were allowed to swear to in hearsay it would admit general allegation for the proof or disproof of which no concomitant particulars could be expected of the witness." *Gilbert on Evidence* by *10th* Vol II p 889. So the rule which excludes hearsay has been propounded accordingly as founded upon two reasons: "what the other party said was not upon oath and the party who is to be affected by it, had no opportunity of cross-examining him." *Ibid* see also *Wigmore* § 1362. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner not only because it is not upon oath but also because the other side hath no opportunity of a cross examination. *Hawkins v. Pleas of the Crown* *11 C 46* § 44. See also the objection of *Peelham* in *Fabry v. Mostyn* *29 How St Tr 135*. In *Wright v. Tatham* *7 A & E 313*, *Coleman* J said: "The administration of an oath furnishes some guarantee for the sincerity of the opinion, and the power of cross examination gives an opportunity of testing the foundation and the value of it. In the same case *Alderson* B said: 'The general rule is that facts are to be proved by testimony of persons on oath and subjected to cross-examination.' In *Grasham Hotel v. Manning* *11 R 1 C 1* 12. *O'Brien* J said: "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross examination and would not be exempted from the general rule excluding hearsay evidence."

In some of the cases great stress is put on the right of cross examination. In *Dyball v. Pease* *6 L R 6 App Cas 503*, *Lord Blackburn* observed: "In England hearsay evidence that is to say the evidence of a man who is not produced in Court and who therefore cannot be cross-examined is a general rule is not admissible at all." See also *Immesley v. Earl of Arundel*, *17 How St Tr 1160*. *Lord Melville* *29 How St Tr 747*. So "the general rule is that hearsay evidence is not admissible for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth,—the author of the statements not being exposed to cross examination in the presence of a Court of justice and not speaking under the pressure of an oath with no opportunity to investigate his character and motives and his deportment not subject to observation." *Washall v. R* *48 Ill 476*, see also *Berkeley Peerage Case* *4 Camp 406*. *Doe v. Rudgway* *4 B & A 54*. *Ex parte Darlin* *Jebb* *Cr C 127*. *Smith v. Blakey* *L R 2 Q B 326*. *R v. Jenkins* *L R 1 C C 193*. *Sugden v. St Leonards* *L R 1 P D 14*.

**Exception to the Hearsay Rule** The purpose and reason of the Hearsay Rule is the key to the exceptions to it. The theory of the Hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can be brought to light and exposed, if they exist by the test of cross examination. But this test or security may in a given instance be superfluous it may be sufficiently clear in that instance that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross examination would be a work of supererogation. Moreover, the test may be impossible of employment—for

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(1) Where the test of cross examination is impossible of application by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand we are faced with the alternative of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative. Whatever might be thought of the general policy of choosing the former alternative without any further requirement, it is clear at least that, so far as in a given instance some substitute for cross examination is found to have been present, the ground for making an exception. The mere necessity alone of taking the untested statement instead of none at all might not suffice, but if, to this necessity there is added a situation in which some degree of trustworthiness more than the ordinary can be predicated of the statement, there is reason for admitting it as not merely the best that can be got from that witness but better than could ordinarily be expected without the test of cross examination.

(2) There are many situations in which it can be easily seen that such a required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. Supposing that such a situation exists, the statement could properly be received especially if no other evidence from that person was now available. A perception of these two principles and their combined value has been responsible for most of the *Hearsay* exceptions. *Wigmore* § 1420

**First Principle—Necessity.** The scope of the first principle may be briefly indicated by terming it the Necessity principle. It implies that now we shall lose the benefit of the evidence entirely unless we accept it untested there is thus a greater or less necessity for receiving it. (1) The person whose statement is offered may now be dead or out of the jurisdiction, or insane or otherwise wise unavailable for the purpose of testing. This is the commoner and more palpable reason. It is found in the exception for dying declarations and the seven ensuing ones. The principle is not always fully and consistently carried out in the rules but the general notion is clear and unmistakable and it is acknowledged in these exceptions with more or less directness and strictness. The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. This appears more or less fully in the exception for spontaneous declarations (vide notes under section 6) for reputation, and in part elsewhere. Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same. *Wigmore* § 1421. *Hearsay* evidence is not receivable when there is better evidence. There are certain subjects which cannot possibly from their very nature admit of the production of immediate evidence such as relationship character custom, prescription and the like. *Raynham v. Olt* W R Act X Rule 30

**Second Principle—Circumstantial Guarantee of Trustworthiness.** The second principle which combined with the first satisfies us to accept the evidence untested is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial guarantee of trustworthiness is found in a variety of circumstances sanctioned by judicial practice and it is usually from one of the salient circumstances that the exception takes its name. There is no complete

attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation. *Hignore* § 1422

Witness qualifications, and other Rules, also to be applied to statements admitted under these exceptions. The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements by way of exception to the rule therefore presupposes that the assessor possessed the qualifications of a witness in regard to knowledge and the like. In *Dysart Peckage Case* L R 6 App Cas 489 at p 504, Lord Blackburn said: 'It is impossible to say that if a person said something and could not himself if alive have been permitted to give testimony to prove it, he can by dying render that statement admissible. I think that is a self-evident proposition.' The qualifications are fundamental as rules of relevancy. Thus these extra-judicial statements may be inadmissible because of their failure to fulfil the ordinary rules about qualifications even though they meet the requirements of a hearsay exception. For example, in the Pedigree Exception there are rules about membership in the family which rest solely on the necessity of knowledge in the person whose statement is offered, not a rule of testimonial qualifications. *Hignore* § 1424. But *Justice Cunningham* says as regard dying declarations: 'The English ruling in *R v Pile* C & P 598 according to which the dying declaration of a child of such tender years that he could not understand the doctrine of a future state, was rejected is not applicable under the present section, nor it would seem is the question of the competence of the person to bear testimony, one which affects the admissibility of the statement. If it complies with the requirements of this section it is relevant, though, possibly, of small importance.' *Cun Ev* 162

Scope of Section 32. This section is also an exception to the Hearsay rule of the evidence. Secondary evidence of any oral statement is called hearsay. The repetition by a witness of that which he was told by some one else who is called as a witness is hearsay, and is therefore, as a general rule inadmissible. The reasons for this rule are obvious. We can generally trust a witness who states something which he himself has either seen or heard but when he tells us something which he has heard from another person, his statement is obviously less reliable and satisfactory. A multitude of probable contingencies diminish its value. The witness may have misunderstood or imperfectly remembered or even may be wilfully misrepresenting the words of a third person or the latter may have spoken hastily inaccurately or even falsely. Moreover the person who is really responsible for the statement did not make it on oath he was not cross-examined upon it, and the Court had no opportunity of observing his demeanour when he made it. It is a fundamental principle of our law that evidence has no claim to credibility, unless it be given on oath, or what is equivalent to an oath and unless the party to be affected by it has an opportunity of cross-examining the witness. *Poult, Li* 305. There are various exceptions to the general rule and they are based on good reasons. The exceptions as stated in this section are as follows:—Statements written or verbal of relevant facts when made by a person (a) who is dead or (b) who can not be found or (c) who has become incapable of giving evidence or (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are admissible. (1) when it relates to the cause of his death or (2) when it is made in course of business or (3) when it is made against the interest of the maker or (4) when it gives opinion as to public right or custom or matters of general interest or (5) when it relates to existence of relationship, or (6) when it is made in will or deed relating to family affairs or (7) when it is made in document relating to transaction mentioned in section 13 clause (ii) or (8) when it is made by several persons and expresses feelings relevant to the matter in question. In the absence of the conditions prescribed by section 32 of the Evidence Act a plaint filed in a prior litigation is not admissible to prove a statement by a superior landlord. *Lal Chau v Talim* 39 C I 190=29 C W N 103,=80 Ind Cas 557. A recital in a document is

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admissible in evidence against parties who are not parties to the document only where the conditions laid down in section 32 of the Evidence Act are fulfilled. *Ram Sarup v Bhagwant Prasad* 57 Ind Cas 191

**Requisites of admissibility under section 32** Statements oral and written made by persons not parties to the suit, and not witnesses therein, are not admissible to prove the truth of the facts stated except in two classes of cases (a) where they are rendered necessary by the difficulty of obtaining other proof, and where the circumstances under which they are made furnish some guarantee of their reliability other than the mere fact of their having been made. *Atkinson v Evans* p 251. The above is a statement of the rule of evidence commonly called the 'rule against hearsay' and perhaps is satisfactory as a statement as now. Roughly speaking two general notions underlie these exceptions to the Hearsay rule and these notions have already been said are suggested by the principle of the rule itself. The first of these is that of necessity, i.e. the situation in which it is no longer possible to subject the person to oath and cross-examination so that if his statements are to be had at all they must be had without applying these securities (i.e. securities guaranteed by oath and cross-examination) for truthworthiness. The law on the subject is thus laid down by *Telegraph Co v J. M. Garwood & Dennis* 4 Binn 328. "It is objected that, however important the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath. The general rule certainly is so but subject to relaxation in cases of necessity or extreme inconvenience." The second notion is that even though a necessity exists for relaxing the Hearsay rule nevertheless this is not to be done unless there is, in the particular circumstances offered some circumstantial guarantee of truthworthiness which shall in some degree at least—supply the test of oath and cross-examination otherwise required. *Green v Li* Vol I p 196. In *Southwell v Williams* 4 Conn 507 *Loomis v Sud* "The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony unless it discovers in the nature of the evidence some other verification or test equivalent for ascertaining the truth. So statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in s 32 and 3. *Steph Intro* 140. On the principle of necessity the rule excluding hearsay is relaxed, and circumstances under which statements are made under the section guarantee the truthworthiness of the statements. *Jude Marley Li* 33. The whole scope and object of the section centre upon securing the highest degree of truth, possible in the circumstances, for the statement. *Sethna v Mir* a 9 Bom L R 1047. Section 32 imposes restrictions upon the admissibility of statement made by persons who cannot be brought before the Court to give their own evidence. The object of these restrictions and the reasons for them are plain. The basic principle of legal evidence being that the Court must always have the best it follows that where persons can be they must be brought before the Court to tell what they know at first hand. Their veracity can then be tested by the art of cross-examination. Where however witness cannot be brought before the Court their previous statements are at best indirect evidence of a kind that a Court would not except under necessity receive at all. The conditions which are compelled by necessity to take this evidence or none are imposed upon it. Its admissibility plainly must afford some guarantee of its truth. As there is no chance of testing the man by cross-examination his statement will not be admitted unless it is made under conditions which looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement. *Per Braman J in ibid*

**Written or verbal** The rule regarding hearsay is so sweeping that it excludes all written hearsay irrespective of the mode in which it is procured. It is very often in the form of official record but more frequently according to a particular commercial transaction to which it relates. Of course the fact that a written hearsay is in the form of letters or telegrams does not avail to make it admissible. The fact that hearsay is printed no matter in what form does not affect the application of the rule. *Barr Jones* § 298. A written statement is excluded

if they fall within the hearsay rule, it is but proper that they should be admitted as evidence if they fall within any of the exceptions to that rule.

'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section were 'oral' it might be that the statement must be confined to words spoken by the mouth. But the meaning of the word 'verbal' is something wider. The words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. *Per Petheram C J in Queen Empress v Abdulla* 7 A 355 (397) F B. In the same case *Straight J* said: 'I am also of opinion that the signs made by the deceased *Dulani* in response to the question put to her may be given in evidence with the object of supplying material from which the inference may properly be drawn that he either adopted or negatived the matter of such questions. If the significance of these signs is established satisfactorily to the mind of the Court then I think that such questions taken with her assent or dissent to them clearly proved, constitute a verbal statement as to the cause of her death within the meaning of s 32 of the Evidence Act. I am not disposed to draw such a purely technical distinction as to say that while questions adopted or negatived by a mere 'yes' or 'no' constitute a verbal statement within s 32, they become inadmissible when a sent or dissent is expressed by a nod or a shake of the head. But *Mehmood J* expressed a different view in the same case. At page 393 he said: 'I should accept the view expressed by the learned Chief Justice if we had not to interpret the language of the Statute and if I did not feel unable to extend the meaning of the term "verbal" in s 32 of the Evidence Act beyond that of word to mere verbal cannot mean more than by means of a word or words. Nodding the head or waving the hand is not a word. As regards dying declarations *Prof Greenleaf* observes: "The testimony here spoken of may be given as well by signs as by words" thus where one lying at the point of death and conscious of her situation, but unable to utter by reason of the wounds she had received, was asked to say whether the prisoner was the person who had inflicted the wounds and if so to squeeze the hand of the interrogator, and she thereupon squeezed his hand it was held that this evidence was admissible and proper for consideration of the jury. *Greenleaf* § 179(b). In *Machab v Com* 78 Ky 552 *Hines J* said: "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought as the pursuer of the hand and a nod of the head or a glance of the eye." See also *R v Louie* 10 L R C 1, 3 9, *R v Steele*, 12 Cox Cr C 168.

Rejection of evidence by the lower Court. When the Court below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others but the Court had considered it from both points of view and held it admissible the Judicial Committee was no reason to differ from the estimate which the Court had formed as to the credibility of the witness in the former case nor in the latter case, to question the manner in which the Court had applied the provisions of section 32. *Shafiq un nissa v Shabou Ali Khan* 26 A 781=9 C W N 105=6 Bom L R 779.

Relevant facts. This section lays down that the statement whether written or verbal must be a statement as to relevant facts. *Per Petheram C J in Queen Empress v Abdulla* 7 A 355 (386) F B. As regards relevant facts the rule notes under sections 3 and 5. Now the question is whether facts in issue are relevant facts. In *Raghu Bhushana v India Varidhi*, 34 M 877 it was contended that facts in issue are not relevant facts. In that case *Phillips J* in delivering his judgment said: 'If a fact is in issue it is undoubtedly a fact relevant to the case or proceeding. Facts must be either relevant or irrelevant and I am not prepared to uphold the learned Advocate General's contention that there are 3 separate classes of facts, i.e. relevant irrelevant and facts in issue. To hold that facts in issue are not relevant facts within the meaning of section 32 cannot see that the meaning in that section can be different to that of facts in issue.'

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1 In *Jacobi v State* 133 Ala. 1 a fruitless search for him in every country in which there is any apparent likelihood of his being found was held sufficient so to make a living person's statement admissible under this section it must be shown that even after a reasonable exertion to find him, he was not found. *Queen v Lalhumarai* 24 W R Cr 18 (19), *Jude notes under s 33* Where a person making a dying declaration chances to live his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act but it may be relied on, under s 177 of the Evidence Act to corroborate the testimony of the complainant when examined in the case. *Imperial v Rama Sattu* 4 Bom L R 434

**Incapable of giving evidence** In a murder case one of the witnesses for the prosecution was deaf and mute, and the question whether the gesticulation of that man at the place, where the body of the murdered boy was found and during the police inquiry, and subsequently in Court, were evidence against the prisoner and if so what was their value. The Sessions Judge was satisfied that the deaf mute could not understand the questions that were put to him and for the most part could not make his meaning intelligible. Held that the deaf mute was not a competent witness within the meaning of section 118 of the Evidence Act. The signs made by him if regarded as conduct were not admissible as evidence against the prisoner under section 8 of the Evidence Act and if regarded as statements, they were equally inadmissible under section 32 of that Act. *Samaidun v King Emperor*, 5 O C 246. In delivering the judgment the Court observed at p 249 "In the present case we are not satisfied that *Bikari* was during the police enquiry capable of understanding questions put to him, and he has therefore not become incapable of giving evidence within the meaning of section 32. He has all along been incapable of giving evidence." For further meaning of the word 'incapable', vide notes under section 33 where the matter has been fully discussed.

**Delay or expense** Plaintiffs were the agents of the defendants for the sale of certain produce shipped to Europe. Such produce was disposed of by plaintiffs sub agents, at various markets abroad who were submitting accounts to the plaintiffs for the sums realised by the sale of the produce. These account sales were admitted in evidence under s 32 of the Evidence Act as written statements of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense such statements having been made in the ordinary course of business, and consisting of documents used in commerce and written or signed by persons making them. *Mayer v Ram Sattu* 16 M 238. Vide also notes under section 33.

## CLAUSE I

**Dying declarations when admissible under English Law** A declaration made by a declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed to be relevant only in trials for murder or manslaughter of the declarant, and only when the declarant is shown to the satisfaction of the Judge to have been in actual danger of death and to have given up all hopes of recovery at the time when his declaration was made. *Steph Dig Art 26*. So declarations are not admissible upon charges other than homicide, or as to homicides other than that of the declarant. The deceased must be proved to the satisfaction of the Judge to have been at the time of making the declaration in actual danger of death and to have abandoned all hope of recovery. *Phyp Fd 3d Ed p 277*. In England this evidence is peculiar to homicide. So the application of the rule is strictly and absolutely limited to cases in which the death of the person who made the declaration is the subject of enquiry or is part of the same transaction. *R v Head* 2 B & C 605. So dying declaration is not admissible on an indictment of perjury. *Ibid*. So when on an indictment for administering swin to a woman pregnant, but not quick with child, with intent to procure abortion evidence of her dying declaration was tendered (the woman being dead) *Baley J* rejected the evidence observing that although the declaration might relate to the cause of the death still such declarations were admissible in those cases alone where the death of the party was the subject of enquiry. *R v Hutchison*, 2 B & C 608 (note), see also *I v Hind*, 29

S 32



**S. 32.** L J M C 117. So also in robbery, the dying declaration of the person killed has been frequently disallowed. *Ex v Lloyd* 1 C & P 273. Such declaration is also not admissible when in a charge of rape. *Ex v Drummond* 1 Lea 337. In *R v Baker*, 2 M & Rob 7, it appeared that poison was administered to a wife which killed her brother immediately after which he was taken ill and his maid servant who was present and had made the cake, and that he was not afraid of it and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death and was conscious of her own approaching death) as to the manner in which she had made the cake and that she put nothing bad in it and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it were tendered in evidence and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of enquiry at the trial. But *Coltman J* after consulting *Paule* admitted the evidence on the ground that it was all one transaction. *Russ* (1 Vol II p 2086, *Roe* C 11 32 *Phy* 12 *Rich* L 8 C 394) also *State v Wilson* 23 In An 559, *State v Terrell* 12 Rich L 8 C 394. The proceedings in which the statements are admissible may not be a crime. *Stobart v Dryden* 1 M & W 615.

To render a dying declaration admissible in evidence it is necessary to show the Judge beyond reasonable doubt not only that when it was made the declarant was in *articulo mortis* or actual danger of death [*See* *Pierce* Case 11 Cl & L 108 (112)] but also that he had given up all hopes of life, i.e. was settled, hopeless expectation of impending death. *Ex v Woodcock*, 1 Leach 20. In that case *Eyre C J* said "The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and so awful that considered by the Law as creating an obligation equal to that which is created by a positive oath administered in a Court of Justice." Similarly in *Ex v Fike*, 6 C P 595, *Faite J* said "We allow the declarations of persons in *articulo mortis* to be given in evidence if it appears that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker." Similarly in *Ishton's Case* 2 Lew C C 117, *Alderson J* said "When a person comes to the conviction that he is about to die, he is in the same practical situation as if called on in a Court of Justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath but there are nevertheless open to observation for though the sanction is the same the opportunity of investigating the truth is very different and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." In *Ex v Haywood* 6 C & P 160 *Andal C J* observed that "any hope of recovery however slight existing in the mind of the declarant at the time of the declaration being made would undoubtedly render the evidence of such declarant inadmissible."

At the Old Bailey in September Session 1784 George was indicted by the Baron Eyre pursuant to Justice Gould, for robbing the Jail of Clermont of a gold watch chain seals and trinkets. During the trial the prisoner counsel informed the Court that a young man of the name of Edward very much resembling the person of the prisoner had been recently executed for a robbery and immediately previous to the awful moment of his fate, he had communicated something to the Rev. Mr. Villetle the chaplain in ordinary of the prison touching the commission of the identical robbery then under consideration. He therefore submitted to the Court that as Mr. Villetle's knowledge of this subject had proceeded from the solemn declaration of a dying man it was admissible evidence in favour of the prisoner. The Court observed that it was inconsistent with the rules of evidence which are rules of justice to exclude a witness to the declaration of a person dying under the circumstances described. The principle upon which this species of evidence is received is that the prisoner is impressed with the awful idea of approaching dissolution and under a great



**S. 32.** appear to have been laid down that dying declarations are only admissible where the death of the declarant is the subject of enquiry. The existence of this rule of exclusion is asserted in *R v Mead*, page 605, but *Mr Justice Colman* in *Mr Baron Pule* in *h v Bates* Mordy and Robinson's Report Vol 2, page 33 did not act upon it. In *R v Hind*, 29 Law Journal Magazine's Cases 145 the rule as laid down in *R v Mead* was again enunciated and acted on. Neither in *R v Mead* nor in *R v Hind* is a single argument given or authority quoted in support of the rule. It cannot, therefore, be said that the authority of English decisions is very strong, in support of the exclusion. With regard to the English treatises Best, Phillips, and Taylor, all recognise the exclusion of the evidence in such cases, they all treat the admissibility of dying declarations as an exceptional and place this limitation on the exception, that the declaration must relate to the death of the person making the declaration, and is only evidence when that is the subject of enquiry, but there is little force in their reasoning. Our reason for thinking that this evidence ought to have been admitted is that no possible reason can be given for its admission in the case where the death of the party making the statement is the subject of the enquiry, which does not apply with equal force to its admissibility in the present case. The ground on which dying declarations are admissible is that when they are made the declarant is in a condition in which, according to experience of mankind it is not less likely that what he says is true than if it had been said before a Magistrate under the sanction of an oath and in presence of the prisoner. It is therefore put on a level with a deposition, technically called which is admissible in case of the deponent's death or absence from illness. But this has nothing to do with the nature of the crime to which the evidence relates it is just as applicable to one crime as to another. It has been said that Courts have been driven to accept this evidence by the necessity of the case, the necessity arising from the fact that the injured person, who might be the principal witness against the prisoner is dead. We may remark that such necessity, as it is called is not a ground for receiving evidence which ought on other grounds to be excluded nor is it the reason why this evidence is admitted, but, even if it were so that necessity is just as likely to exist where the deceased person has been robbed or raped or assaulted as where he has been murdered. See also *Queen v Unwin* 3 D W P 212. In England to render a dying declaration admissible, the declarant must have been in actual danger of death he must have been fully aware of the danger and death must have ensued. *Taylor* E 1 § 718, *Sussex Peerage* 11 Cl & F 109, *R v Curtis* 21 F & L 87, *h v Woodcock* 1 Leach 46, *R v Osman* 15 Cox 1, *R v Gosler* 16 Cox 471, *R v Iorrest*, 10 Cox 2, *Whitely Stiles Anglo Ind Codes* Vol. II p 828. It is not necessary that the apprehension should be of death in a certain number of hours or days the question turns rather on the state of the person's mind at the time of making the declaration than upon the interval between the declaration and the apprehension of death. It is not necessary that the deceased should express his apprehension of danger for his consciousness of approaching death may be reasonably inferred not only from his declaring that he knows his danger, but from the nature of the wound or state of illness or other circumstances of the case. *R v John* 1 East P C 357, *R v Woodcock* 1 Leach 500, *h v Morgan* 14 Cox 337. But in India the statement is relevant, whether the person who made it was or was not at the time when it was made under expectation of death. See also *Queen v Dnyamber* 19 W R Cr 44. Before the passing of the Indian Evidence Act the law of India was somewhat on this point that of England. So according to Act XXV of 1861, the declaration of a deceased person was only evidence when the deceased "at the time of making such declaration believed himself to be in danger of approaching death" although he entertained at the time of making it hopes of recovery. Section 29 of Act II of 1855 also enacts that where dying declarations are evidence they shall be received if it be proved that the deceased was "at the time of making declaration and then thought himself to be, in the danger of approaching death etc." Both these enactments then required that before a dying declaration is received in evidence it should be proved that the person making it believed himself to be in danger of approaching death. It appears that the





sible under s 32 (1) *Taylor v Empire* 17 P R 1901 Cr. In the proceedings before a Magistrate on a charge of causing grievous hurt two (among other) witnesses one of whom was the person injured were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person is injured died in consequence of the injury inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. *Held*, that the evidence was admissible either under s 32 (1) or s 33 of the Evidence Act notwithstanding the additional charges before the Sessions Court. *Empress v Joshua* 7 C 12-8 C L R 27. A statement of a witness as to what he heard from the deceased when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death is hearsay and is not admissible, they must be proved in the ordinary way, i.e. by evidence of a primary character and not by hearsay testimony. *Queen Empress v Suresh Nath* 3 C W N 374-28 C 397. This clause rests on the doctrine of necessity, i.e. that the injured person is dead and is generally the principal witness and so is likely to know more or as much about the circumstances of his death than or any other person. So this doctrine does not apply where the object of the trial is to ascertain whether certain persons in the dock or not a matter which has nothing to do with the declarant's death. *Vijaya Kumari Empress* 20 Ind C 1590-14 Cr L J 510.

**Rule against opinion evidence—Application to dying declaration.** Dying declarations are admissible only to the extent to which the deceased declarant would have been competent to testify if sworn in the case. He must therefore in general speak to facts only and not to mere matters of opinion and must be confined to what is relevant to the issue. *Taylor v 10th Id 720 R v Sellers* Crim Supp 233 *Luss v 2092*. But according to *Prof Wigmore* Opinion rule has no application to dying declaration. 'The theory of that rule says *Prof Wigmore* '1 that whenever the witness can state specifically the detailed fact observed by him the inferences to be drawn from them can equally well be drawn by the jury, so that the witness' inferences become superfluous. Now since the declarant is here deceased it is no longer possible to obtain from him by questions any more detailed data than his statement may contain and hence his inferences are not in this sense superfluous but are indispensable. Nevertheless most Courts accept the opinion rule as applicable. Moreover the rule is by some Courts applied here with more than the ordinary strictness of its application. Some of the rulings in their pedantic technicality are a scandal to any system of evidence supposed to be based on reason and common sense. *Wigmore* § 1447.

**Testimonial qualification of the declarant.** The declaration of the deceased is admissible only to the extent to which he would have been competent to testify if sworn in the case. *Taylor v 10th Id 720*. In *Vijaya Kumari* 15 C 198 the dying declaration of a child of such tender years that she could not understand the doctrine of a future state was rejected. See also *Vijaya Thammam* 11 C 143-38 R v *Perlin* 9 C L P 39. In America also the same rule is followed. In *Donnelly v State* 26 N J J 620 *Ogden v Ind*. Whatever would disqualify a witness would in the such (dying) declarations incompetent testimony. Similarly in *People v Sanchez* 21 Cal 26 *Sanderson v Ind*. They stand upon the same footing as the testimony of a witness sworn in the case and are governed by the same rules except as to leading question. See also *People v Gilmartin* 10 Mich 434 *People v State* 97 Ind 22 *State v Johnson* 15 Walsh 15. So if the declarant would have disqualified to the stand by reason of infancy or minority or interest in extrajudicial declarations must also be inadmissible. The declarant must have had actual observation or opportunity for observation of the fact which he relates. *Wigmore* § 1445. But this limitation according to *Justice Cunningham* is not applicable under the present section. So according to him the question of competency of the person to bear testimony does not affect the admissibility of the statement. If it complies with the requirement of this section it is relevant though possibly, of small importance. *Cunningham v 162*. But in an *Oudh*

**S-32** case it was held that the gesticulations of a deaf mute at the place where a dead body was found during the police enquiry, and subsequently in Court "could not be used in evidence against an accused person, as he was not a competent witness under s 118 of the Evidence Act *Samaulin v King Emperor*, 30 C 246

**Testimonial Impeachment and Rehabilitation** The dying declaration being in effect a testimonial statement made out of Court, the declarant is open to impeachment and discrediting in the same way as a other witness, so far as such a process is feasible. Thus impeachment by bad testimonial character is allowable (*Carier v U* 8 164 U S 694, *Carier v State*, 191 Al 3, *Lester v State* 3 Fla 392) or by conduct showing a revengeful or irrelevant state of mind at the time or by conviction of crime, or by subsequent or prior inconsistent statements. *Higmore* § 1446. In *State v Thawley*, 4 Harringt Del 362 general evidence of the declarant's intemperate habits and of his low state of health at the time was admitted & similarly evidence may be given that the deceased does not believe in future rewards and punishments. *Carier v U S*, 164 U S 694. The declarant may also be corroborated by evidence of similar consistent statements, so far as this is allowable by the principles of that subject. *Higmore* § 1446.

**Form of dying declaration** According to this section the declaration may be written or verbal. In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. Held by the Full Bench (*Mahmood J* dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s 32 of the Evidence Act and were therefore admissible in evidence under that section. *Queen Empress v Abdulla*, 7 A 385 (F B). Where a dying declaration is made by signs in response to questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what, in point of fact occurred, and should bear on its face the questions put and the nature of the gesticulation made in response as a result of which death ensued later made certain gestures in reply to questions put by the police. Held the gestures were admissible in evidence. The interpretation of the gesture is for the Court alone and the opinion of witnesses as to their meaning is not evidence. *Chandulal v Ram Kahan*, 1 Pat 401 = 3 Pat L T 71 = (1922) P 535 = 71 Ind Crs 353. Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak in answer to questions put to her pointed out the record as the accurate. Held that questions and answers taken to the cause might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible. *Emperor v Sadhu Churn* 26 C W N 114 = 49 C 600 = 111 = 1922 Cal 409 = 77 Ind Crs 993. See also *Ranga v Emperor*, 84 Ind Crs 31 = 3 Lah 307. See also *Greenfield* § 19 (b), *Moolabai v Com*, 28 Key 38 = 15 = *Lowe*, 10 Br C 1 3, 9. *R v Steele* 12 Cox Cr C 103. In the last mentioned case the deceased had told Dr Patchatt his story then when dying and he asked what happened, he said, "Tell him, Patchatt and Dr Patchatt reported the story in declarant's presence. In admitting Dr Patchatt's statement the *J* said, "It is equivalent to saying it himself. So it is clear that dying declarations may be communicated by any adequate method of communication whether by words or by signs or otherwise provided the indication is positive and direct and seems to proceed from an intelligence of its meaning. *Higmore* § 144.

A statement giving the substance of questions and answers is not admissible the actual words of the deceased must be given and so must the question put if any for answers even if taken word for word seem to me to be useful without the questions and when a person is in such a condition the declaration arising from leading questions is enormously increased. *Per Cur J* 171 = *Mitchell* 17 Cox C C 503. Although a dying declaration if properly received

a valuable piece of evidence, but if while the statement is being recorded a third person is present and prompts the deceased to give out names of certain accused, it would be exceedingly unsafe to attach any weight to such a dying statement. *Bishan Singh v Crown* 8 L L J 296=96 Ind Cas 215=27 P L R 484=27 Cr L J 903=A I R 1926 Lah 496

**Nature of the proceeding in which dying declaration is admissible** A dying declaration as to the cause of death is admissible even when the charge is not one of homicide. *Lalji v Emperor* A I R 1928 Pat 162=67 Pat 747=106 Ind Cas 698 In delivering the judgment *Mullick A C J* said "The words of section 32 are very wide and it is not necessary that the charge should be one of homicide. The evidence as to the cause of death was relevant to the charge of robbery and consequently the cause of death that is to say the assault committed by the appellant came in question in the trial. Before the Indian Evidence Act was enacted it was held in *Queen v Bissooanjun Mookerjee*, 6 W R Cr 7 that there was no necessity in India for following the very narrow rule of English law and that a dying declaration could be used as evidence in a charge of rape. One of the illustrations to section 32 of the present Indian Evidence Act expressly provides for such evidence where the charge is not culpable homicide but rape. A dying declaration can be used as evidence even though the accused is not charged with the offence of homicide. *Dusadh v Emperor*, 6 Pat 747=106 Ind Cas 698=29 Cr L J 106=A I R 1928 Pat 162

**Proof of dying declaration** A dying declaration may be either verbal or written. A verbal dying declaration recorded by a Magistrate cannot be accepted in evidence, when it has not been proved by taking the statement of the Magistrate. *Shah v Crown*, 17 P R 1911 Cr =289 P L R 1912=14 Cr L J 131=18 Ind Cas 883 When what purports to be the dying declaration of a deceased person is not taken down by the committing Magistrate it cannot be admitted in evidence without proof of solemn affirmation that the deceased person actually made such a declaration. *Crown v Harder Ali*, S C 29 Oudh, see also *R v Fata Majeed*, 11 B H C 247 Where the dying declaration of a deceased person taken down in writing by a head constable is admissible in evidence under s 162 Cr P Code, the proper course is to put in the document itself and have it formally proved by that officer and not to allow him to give evidence orally as to its purport. *Empress v Thalwara*, 7 C P L R Cr 14 So a dying declaration recorded by a head constable, who certified in Court that he had recorded it correctly is admissible in evidence in proof of its own contents and it is unnecessary that the person who recorded it should repeat exactly what was said. *Irotap Singh v Emperor*, 7 Lah 91=92 Ind Cas 167=27 Cr L J 215=A I R 1926 Lah 310 *Emperor v Balaram Das* 49 C 358=A I R 1922 Cal 382

When a declaration is in writing the question may arise whether it is his narration at all. If the declarant has written it, or signed or otherwise approved it after reading it, or hearing it read aloud to him, it may be offered as his declaration. Otherwise it is not his declaration but merely the written statement of the person taking the declaration. *Hignore* § 1445 The dying statement of a deceased person must be taken in the presence of the accused, if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. *Empress v Samruddin*, 8 C 211 *Sarat Chandra v Emperor*, 52 C 446=88 Ind Cas 860=26 Cr L J 1244=A I R 1925 Cal 821 A declaration made by a person in expectation of death recorded in the absence of the accused and in a language different from the one in which it is made by an officer who is not examined in the case cannot properly be used in evidence against the accused and at any rate, such a declaration should not be relied upon in convicting the accused. *King Emperor v Mathura*, 6 C W N 72 In the same case *Lalji*, I observed "With regard to the so-called dying declaration the witnesses should not have been allowed to prove the document as if it was a substantial piece of evidence in the case. The relevant fact to be proved was the statement made by the deceased person admissible under section 32 of the Evidence Act. That statement is not; the document made by the Magistrate but by the verbal statement made by the deceased person



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The document made by the Magistrate does not amount to a deposition or evidence. It was not taken in the presence of the accused, nor was it taken in their absence under the provisions and conditions prescribed by section 32 of the Cr. Pro. Code. The only way of proving the statement was therefore by the evidence of some witnesses who heard it made, the said witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases. I may note that the record by the Magistrate is in English. It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a record of the statement made. But as it is most probable that the statement was not a continuous statement by the dying person but was elicited in answer to one or more questions the document to be really of use should have clearly set out the exact questions put and the answers made to them. See *Kunz Lal v. Emperor* 67 Ind. Cas. 577 = 23 Cr. L. J. 417 = 4 U.P.L.R. (L.C.) *Gouridas v. Namasudra* 2 Ind. Cas. 841 = 36 C. 659 = 13 C.W.N. 680 = 10 Cr. L. J. 186. A dying declaration was recorded in the presence of a witness and over to the deceased in the presence of the witness and admitted by the deceased to be correct. If the witness, who heard that statement swears that the witness statement correctly reproduces the words used by the deceased that is sufficient to prove that the deceased did use the words contained in that statement. *Emperor v. Balaram*, 49 C. 358 = (1922) A. J. R. 382. A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the evidence preliminary to commitment to the Court of Sessions is not admissible in evidence unless and until it has been proved by the Magistrate, who recorded it, that the order sheet that the document was admitted without any objection on the part of the accused does not make any difference. *Panchu Das v. Emperor* 34 C. 11 C.W.N. 666 = 5 Cr. L. J. 427 see also *Zaidad v. Emperor* 29 P.R. 188. The written record of a dying declaration is not admissible in evidence, but if it was recorded in the absence of the accused person. Such writing is a document under s. 32 (1) of the Evidence Act but must be proved in the ordinary way. *Abdul v. Emperor*, 13 P.R. 1886 Cr., see also *Gharzi v. Crown*, 17 P.L.R. 269 P.L.R. 1912 = 18 Ind. Cas. 883. The proper method of proving the statement of a dying man was by the oral evidence of any person who heard that person being allowed to refresh his memory by reference to the note made or read at the time. *Baqan v. Emperor* 10 N.L.J. 19 = 1 Cr. L. J. 243 = 23 Ind. Cas. 195, see also *Queen Emperor v. Shettya* 2 Bom. L.R. 141. It is of the utmost importance that evidence as to the dying declaration should be as exact and as full as possible. When what is sought to be proved is a verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement the words the deceased said. If the statement was taken down in writing by the deceased or by some one in the presence of the witness, the witness would be allowed to refresh his memory, if he so wanted, by referring to such writing, otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased and is writing admissible under s. 32 of the Evidence Act. But even if what was taken down by some one in writing and signed by the deceased it is not debar a witness who heard the statement from proving it by the oral evidence of the writing. And ordinarily it would be desirable to have on record the evidence of the witness is able to reproduce from memory what he heard the deceased say in addition to the writing in which the statement was taken down. See *Emperor v. Balu Vagu* 11 M.L.T. 214 = 1912 M.W.N. 40 = 22 M.L.J. 40 = 1 Cr. L. J. 468 = 15 Ind. Cas. 308. It is of the utmost importance that evidence as to a dying declaration should be as exact and full as possible. When a dying declaration was heard by witness who spoke to it but was apparently fuller than what the record of their depositions showed, the Magistrate should have recorded all they said on the point. Held that there was no objection

*Ibid* Though a dying declaration may be made in the absence of the accused or of a judicial officer yet whenever it is possible, the declaration should be taken by a judicial officer, is a guarantee of its authenticity *Crown v Ghazee*, 3 P R 1870, see also *Empress v Gurdita* 18 P R 1886 C. Where a statement made by the deceased as a dying declaration had been used as evidence against the accused, though the Magistrate who recorded it was not the committing Magistrate, and though it was not recorded in the accused's presence, s 80 Evidence Act, was held to have no bearing on the question of the admissibility of the statement, and the document was held to be inadmissible to prove the facts stated therein *Hoshum v Empress*, 9 P R 1900 Cr. Although a dying declaration is not recorded in writing, oral evidence of what the deceased said is receivable *In re Hanumadu*, 2 Wier 757; see also *King Emperor v Daulat Ram*, 6 C W N 921, *Kusal Singh In re*, 2 Wier 753, *Samadun v King-Emperor* 5 O C 246. A statement made by the deceased to a Sub Inspector of Police before his death, cannot be used in evidence unless the Sub Inspector be examined as a witness—*Lachmi v Emperor* 3 Pat L T 398=65 Ind Crs 1002. A statement of a deceased person as to who would be his successor on his death in case of his not having a son is not admissible in evidence *Rani Prayag Kumari v Sua Prosad*, 42 C L J 208=95 Ind Cas 385. Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits—*Dannu Singh v Emperor*, 85 Ind Cas 643=26 Cr L J 547=A. I R 192, All 227.

**Rule of Preferring Written Testimony** “The principles which determine whether a written report of another person's statement is to be preferred to oral testimony and must therefore be produced, have already been examined in their general applications. It is, however, more convenient to consider here their application to dying declarations—(a) Where an auditor of a dying declaration makes in written form a note or report of the oral utterances, this written statement of the auditor is not preferred evidence and need not be produced, for there is not and never was any principle of evidence preferring a person's written memorandum of testimony to his or another's oral or recollection testimony. Nor is the case different when the person thus making the written report was a Magistrate having power to administer oaths or take testimony on a preliminary examination, for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses. (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one because, since the transaction is not a contract or other legal act between two parties thereto, the rule of Integration or Parol Evidence rule has no application. The first oral declaration is therefore provable without producing the latter written one. Nevertheless, the majority of Courts—accepting the superficial analogy of the Parol Evidence rule or of Depositions—require the writing to be used excluding testimony to the oral statement (*R v Gay* 7 C & P 230, *Per Coleridge J*). It may be noted that of course so far as the proponent is offering to prove the terms of the writing, not of the oral utterance, the writing must be produced. (c) Where the declarant makes one oral statement and afterwards at another time a second statement, the latter being in writing or reduced to writing there are here two distinct statements and either one may be offered without testifying to the other, for the principle of completeness requires only that the whole of a single utterance should be offered together and in the present instance the declarant, though referring to the same occurrence is nevertheless making distinct statements each of which is independently admissible. It is thus clear (1) that separate oral utterances are admissible even though the written one has been proved (2) that even before or without proving the written one, the separate oral ones are admissible—though on the latter point the Courts are not always explicit’—*Higmore* § 1450, see also *A v Leason and Transfer* 16 How St Tr 73. In that case *Pratt L C J* said “You know in the Court of Chancery, when the party is examined on his oath he gives in a first answer and on exceptions taken to it he gives in a second and so a third, all these are

- S 32.** The document made by the Magistrate does not amount to a deposition or record of evidence. It was not taken in the presence of the accused, nor was it taken in their absence under the provisions and conditions prescribed by section 5 of the Cr Pro Code. The only way of proving the statement was then for by the evidence of some witnesses who heard it made, the said witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases. I may note that the record by the Magistrate is in English. It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a true record of the statement made. But as it is most probable that the statement was not a continuous statement by the dying person but was elicited in answer to one or more questions the document to be really of use should have elicited and set out the exact questions put and the answers made to them. See *Kunj Lal v Emperor* 67 Ind C 577=23 C L J 417=4 U P L R (L) 46 *Gourdas v Namasudra* 2 Ind C 841=36 C 659=13 C W N 680=10 Cr L J 186. A dying declaration was recorded in the presence of a witness and over to the deceased in the presence of the witness and admitted by the deceased to be correct. If the witness, who heard that statement swears that the statement correctly reproduces the words used by the deceased that is sufficient to prove that the deceased did use the words contained in that statement. *Emperor v Balaram*, 49 C 59=(1922) A I R 382. A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the enquiry preliminary to commitment to the Court of Sessions, is not admissible in evidence unless and until it has been proved by the Magistrate, who recorded it, that the order sheet that the document was admitted without any objection on the part of the accused does not make any difference. *Panchu Das v Emperor* 34 C 60 11 C W N 666=5 Cr L J 427 see also *Zaidad v Empress* 29 P R 177. The written record of a dying declaration is not admissible in evidence, because it was recorded in the absence of the accused person. Such writing is admissible under s 32 (1) of the Evidence Act but must be proved in the ordinary way. *Abdul v Empress* 13 P R 1886 Cr see also *Ghara v Crown*, 17 P R Cr 1911 289 P L R 1912=18 Ind C 883. The proper method of proving the statement of a dying man was by the oral evidence of any person who heard that person being allowed to refresh his memory by reference to the note made or read at the time. *Bagwan v Emperor* 10 N L R 19=1 Cr L J 243=23 Ind C 195, see also *Queen Empress v Shethya*, 2 Bom L R 111. It is of the utmost importance that evidence as to the dying declaration should be as exact and as full as possible. When what is sought to be proved is a verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person, who heard the deceased make the statement, the words of the deceased said. If the statement was taken down in writing by the deceased or by some one in the presence of the witness, the witness would be entitled to refresh his memory if he so wanted, by referring to such writing, otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement as it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased and is writing admissible under s 32 of the Evidence Act. But even if what was said was taken down by some one in writing and signed by the deceased, that does not debar a witness who heard the statement from proving it independently of the writing. And ordinarily it would be desirable to have on record the statement if the witness is able to reproduce from memory what he heard the deceased say in addition to the writing in which the statement was taken down. *Pachha v Emperor v Bala Nagi* 11 M L T 214=1912 M W N 40=22 M L J 411 Cr L J 468=15 Ind C 308. It is of the utmost importance that evidence as to a dying declaration should be as exact and full as possible. Where a dying declaration was heard by witness who spoke to it but was apparently fuller than what the record of their depositions showed—the Sessions Judge having recorded all they said on the point. *Held* that there must be a

*Ibid* Though a dying declaration may be made in the absence of the accused or of a judicial officer yet when it is possible, the declaration should be taken by a judicial officer, as a guarantee of its authenticity. *Crown v Ghazee*, 3 P R 1870, see also *Empress v Gurdita*, 18 P R 1886 Cr Where a statement made by the deceased as a dying declaration had been used as evidence against the accused, though the Magistrate who recorded it was not the committing Magistrate, and though it was not recorded in the accused's presence, s 80 Evidence Act, was held to have no bearing on the question of the admissibility of the statement, and the document was held to be inadmissible to prove the facts stated therein. *Hoshim v Empress*, 9 P R 1900 Cr Although a dying declaration is not recorded in writing, oral evidence of what the deceased said is receivable. *In re Hanumadu*, 2 Wier 755 see also *King Emperor v Daulat Ram*, 6 C W N 921 *Kusal Singh In re*, 2 Wier 753, *Samardin v King Emperor*, 5 O C 246 A statement made by the deceased to a Sub Inspector of Police before his death, cannot be used in evidence unless the Sub Inspector be examined as a witness. *Lachmi v Emperor*, 3 Pat L T 398=65 Ind Crs 1002 A statement of a deceased person as to who would be his successor on his death in case of his not having a son is not admissible in evidence. *Rani Prayag Kumari v Sna Prosad* 42 C L J 208=95 Ind Cas 385 Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits. *Dannu Singh v Emperor*, 85 Ind Cas 643=26 Cr L J 547 = A. I R 1925 All 227

**Rule of Preferring Written Testimony** "The principles which determine whether a written report of another person's statement is to be preferred to oral testimony and must therefore be produced, have already been examined in their general applications. It is, however, more convenient to consider here their application to dying declarations. (a) Where an auditor of a dying declaration makes in written form a note or report of the oral utterances, this written statement of the auditor is not preferred evidence and need not be produced, for there is not and never was any principle of evidence preferring a person's written memorandum of testimony to his or another's oral or recollection testimony. Nor is the case different when the person thus making the written report was a Magistrate having power to administer oaths or take testimony on a preliminary examination for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses. (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one, because, since the transaction is not a contract or other legal act between two parties thereto the rule of Inter-ratation, or Parol Evidence rule has no application. The first oral declaration is therefore provable without producing the latter written one. Nevertheless, the majority of Courts, accepting the superficial analogy of the Parol Evidence rule or of Deposition, require the writing to be used, excluding testimony to the oral statement (*R v Gay* 7 C & P 230, *Per Coleridge J*). It may be noted that of course so far as the proponent is offering to prove the terms of the writing, not of the oral utterance, the writing must be produced. (c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing there are here two distinct statements and either one may be offered without testifying to the other for the principle of completeness requires only that the whole of a single utterance should be offered together, and in the present instance the declarant, though referring to the same occurrence is nevertheless making distinct statements each of which is independently admissible. It is thus clear (1) that separate oral utterances are admissible, even though the written one has been proved. (2) that, even before or without proving the written one, the separate oral ones are admissible,—though on the latter point the Courts are not always explicit. *Higmore* § 1450, see also *R v Iveson and Transfer*, 16 How St Tr 33. In that case *Pratt L C J* said 'You know in the Court of Chancery, when the party is examined on his oath, he gives in a first answer and on exceptions taken to it he gives in a second and so a third, all these are

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taken but as one answer and entire confession of the party. (Now in the case of alleged murder) the minister came to enquire of this (dying) gentleman about the circumstances of his death, after that, the same gentleman is present when the Justices of the Peace come, thereupon the Justices of the Peace desire him to take it in writing, he asks the same questions as he did before, and then are taken in writing, he takes it designing to make the first examination more authentic to charge the person that gives the examination. Now really, when all this is done the examination of him before the Justice, taken in writing by the same person that enquired of him before, and all this is done in order to perfect and consummate the examination, whether you will not take them both together as one entire account given by the deceased." In the same case *Fortescue J* observed "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no Justice of the Peace was then present so that the examination stands distinctly by itself. The opinion of *Fortescue J* prevailed. *Hignore* § 1450

**Dying declaration, value of, as evidence.** Under the English and American law the circumstantial guarantee of dying declaration are the following: (1) The declarant, being at the point of death, "must lose the use of all deceit." There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human wrongdoing, the fear of this punishment will outweigh any possible motive to deception, and will even counter-balance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief there is a natural and instinctive awe at the approach of an unknown future,—a physical revolution common to all men, irresistible and independent of theological belief. In view of the three elements what may be laid down as to the condition of the declarant's mind at this moment before dissolution? First, the declarant may exhibit such strong feeling of hatred or revenge that the effect of all the above influences appears to be lacking. If he is in such a frame of mind the supposed guarantee of trustworthiness fails, and the declaration should not be admitted. *Reeves v. State* 64 Mo 846 *Waymore* § 1443. In *Tracy v. People*, 97 Ill 105 *Mulkey J* said: "The fact—on it to be shown (profane language) was important in another point of view. It strikes at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guarantees of the truth of dying declarations grown out of the solemnity of the time and circumstances under which they are made."

It was clearly the right of the accused to show that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases—that the deceased was in a reckless irreverent state of mind and entertained feelings of ill will and hostility towards the accused. Secondly, if we suppose the second element to be essential, and not merely usual, then a theological belief of a particular sort—a belief in a punishment in a future state—must be required. In *R v. Pule* 3 C & P 598, *Larke J* said: "As if a child was but four years old it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible." (Her remark) does not show that she had any idea of a future state—indeed I think that from her age we must take it that she could not possibly have had any idea of any kind." So in *h v. Perkins*, 4 C & P 395 the dying declaration of a child of ten was received. Here he said that he expected "to go to hell if he told a lie and to heaven if he told the truth, but if (as seems better)" says *Prof. Wigmore* "the third element—the physical revolution peculiar to the moment—is to be regarded as the essential element of the guarantee, then the theological belief is immaterial. This distinction has not been expressly pressed upon by the Courts. The majority of the few cases hold that the theological belief is material." *Wigmore* § 1444. So consciousness of approaching death is a condition precedent of the admission of dying declarations under English and American law. *Jude Woodcock's Case*, *Leach Cr L*, 411. *100 L v. John* 11 Lat Cr 15. *R v. Womley* 5 Cox Cr 318. *R v. Verelst* 1 Cox Cr 121. In *h v. Spillbury*, 7 C & P 187. *Colebridge J* said: "When I consider that this species of proof is an anomaly and contrary to all the rules of evidence and that if received it would have the greatest weight with the jury I think I ought not to receive the evidence, unless, I feel fully convinced that the

deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover as he was very ill. Now people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovery, I should expect him to be saying something of his affairs and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends or relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears I think there is no sufficient proof that he was without any hope of recovery and that I therefore ought to reject the evidence. But even in cases where all the guarantees of the trustworthiness of dying declarations are present, we must receive it with certain degree of caution. It may be seldom that a dying declaration is made willfully false but there are many circumstances in the situation of a wounded man which may introduce fallaciousness into his statement. Thus the effects of the wound itself may diminish memory, or weaken or confuse his intellectual powers. The very suddenness of the attack may have rendered him mistaken in his identification of his assailant, the darkness, the disguise may tend to the same result. *Vort. Et. 176*

"So dying declarations have not the same weight as if they were made by the declarant as a witness in Court subject to cross examination before a jury having the opportunity to observe his demeanour, the accused is deprived of the opportunity of calling the attention of the declarant to certain facts which if brought to his attention might cause him to modify his statements or make none at all and there is no opportunity to test the declarant's judgment the strength of his recollection or his bias. Unquestionably every discount should be made from the free value of the declarations which it might be supposed that a competent cross examination would necessitate. Testimony as to dying declarations is generally given by relatives and friends of the deceased who had watched by his bed side and bias in his favour is to be expected. And even if given by police officer it should be carefully scanned. The declarations are liable to be misunderstood and to be reported by an unfaithful memory especially if much time has elapsed since they were made and the evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased and of involuntary sentiment against the accused. There is considerable danger that juries will be too credulous of the entire integrity of the evidence. The physical condition of the declarant is apt to make his own recollection imperfect or for the sake of ease and to bind of the importunity and annoyance of those around him he may say whatever they choose to suggest. So too as respects the declarant's statements it is to be remarked that many persons even in serious conversation, assert as facts those things of which they have only strong convictions and not knowledge derived from senses. If the declarant related his opportunities for observing the facts stated and they appear to be ample this would add to the weight of the declaration, and so if he repeated his statements rationally and uniformly until he was incapable of speech. *Moore's Weight and Value of Evidence* § 1180 see also *Taylor* § 722. After a dying declaration or any other evidence has been admitted the weight to be given to it is a matter exclusively for the jury. They believe it or may not believe it but so far as they do or do not, their judgment is not controlled by rules of law. Therefore, though they themselves do not suppose the declarant to have been conscious of death, they may still believe the statement conversely, though they do suppose him to have been thus conscious, they may still not believe the statement to be true. In other words their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility whose purpose is an entirely different one. *Wigmore* § 1451

Value of dying declarations in India. As regards the value of dying declarations in India the following observation of *Mukerji J in Emperor v. Parmanandji*, 29 C W N 738=52 C 937=88 Ind Ca 1000=42 C L J 247 is very

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important "In the case of a dying declaration which by the law of this country assumes a character very widely different from what it is under the English Law which is relevant under the Evidence Act whether the person who made it was or was not at the time when it was made under expectation of death, and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth but upon the circumstances and surroundings under which it was made and very much upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. So statements made by a dying man relating to the cause of his death are inadmissible in evidence against person causing his death, but too much reliance cannot be placed upon the details of such statements as they are heard at *Emperor v. Sukh Deva* 76 Ind Ca 330. It is not safe to base a conviction on the uncorroborated dying declaration of a deceased person, for it is well known that the inhabitants of the Punjab will often in a dying declaration not only accuse the actual offenders but will also include the names of other enemies. *Bakhshish Singh v. Emperor* 86 Ind Cas 826 = A I R 1925 Lah 549 see also *Stephen's History of Cr. Law*. When the accused is already named and the fact is known to the declarant the value of his dying declaration is very little. *Muaffer v. Emperor* 99 Ind Cas 322. "Dying declarations in India are not to be regarded as if they were made in England. Very often the murdered man himself before his death implicates every male member of his supposed murderer's family or of the supposed instigator of the murder, hoping by this means to drink the cup of revenge to its last drop and to rid his own family of all future annoyance." See a paper by Mr. Rathigan, *Lah. Mag. and Rev.* May 1885 p 249. Cases are not uncommon in this country of false deposition being made by a dying man. *In Madappa Kone* 5 M L J 217 = 4 Ind Ca 1127 = 11 Cr L J 193. So a trustworthy dying declaration alone made by a deceased person in full possession of the faculties and proved by the clearest and most reliable evidence to be the exact words of the person making it and corroborated by the surrounding circumstances, is sufficient to support a conviction for murder under s 302 I P Code. *Karim Khan v. Crown* 4 P W R 1909 Cr = 9 Cr L J 156 = 1 Ind Cas 190. But a Court should receive a dying declaration with caution. The details of the violence referred to by the deceased might have occurred under circumstances of confusion and surprise, tending to prevent their being correctly observed. The deceased might have stated his inferences from events regarding which he might have arrived at the wrong conclusion. Before the dying declaration is received in evidence any enmity between the accused and the deceased should also be taken into consideration. *Sheru v. Crown*, 117 P R 1866, *Sher Ali v. Crown* 1 P R 1868 C1. When a dying man after receiving extreme unction makes a declaration, it should generally be believed to be true and a fact upon *Patel v. Emperor* (1911) 3 M W N 188 = 12 Ind Cas 296 = 12 Cr L J 523. Though dying declarations are in some respects deserving of a great degree of consideration and of credence which ordinary statements are not, they are not subject to the test of cross-examination, and if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing. *In re Dabbulota*, 2 Weir 753. Much weight must be given to the dying declaration recorded by the Magistrate when it is supported by the consistent evidence given on behalf of the prosecution. *Sawan Singh v. Emperor*, 10 Lah L J 231. It is doubtful whether a dying declaration which contradicts itself in its various parts is even admissible in evidence. But supposing for the sake of argument that it is admissible in evidence, the evidentiary value of such a declaration is for all practical purposes negligible. *Inayat Ali v. Emperor* 108 Ind Cas 526 = 9 Cr L J 118 = 10 A I Cr R 68. Although the statement made by the deceased to the doctor just before his death is admissible in evidence as a dying declaration, and in order to convict the accused of murder there must be independent corroborative evidence of facts and circumstances to prove that offence. *Ballu Singh v. Emperor* A I F 1929 Pat 249.

**Dying declarations in the form of questions and answers** "Where a statement is not the *ipsa voce* of the person making it but is composed of a mixture of questions and answers there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the

person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer so far as to discover how much was suggested by the examining Magistrate and how much was the production of the person making it. *Per case* *In R v Mitchell* 17 Cox C C 503, see also *Imperor v Parmananda Dulla* 29 C W N 738=88 Ind C 1000=42 C I J 247=26 Cr L J 1256=52 C 987=A I R 1925 Cal 876. There is no general rule here against leading questions. *R v Laquet* 7 C & P 238. It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case, though any departure from the mode may affect the value and credibility of the declarations. Therefore it is no objection to their admissibility that they were made in answer to leading questions or obtained by pressing and earnest solicitation. *Russ v* 2092 *R v Isaacson* 184 499, *R v Woodcock* 2 Leach 51, *R v Welbourn* 1 East P C 338 *R v Smith, L & C* 607, *R v Steele* 12 Cox 168 *R v Whitmarsh*, 62 J P 680, 711.

**Statement must be taken as a whole.** But whatever the statement may be it must be complete in itself, for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making they will not be received. *Russ v* 2092. The statement as offered must not be merely a part of the whole as it was expressed by the declarant, it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the statement includes all that the declarant wished or intended to include in it. Thus if in interruption (by death or by an intruder) cuts short a statement which thus remains clearly less than that which the dying person wished to make the fragmentary statement is not receivable because the intended whole is not there, and the whole might be of a very different effect from that of the fragment, yet if the dying person finishes the statement he wishes to make it is no objection that he has told only a portion of what he might have been able to tell. *Hignore* § 1448. As regards a dying declaration, to accept a portion and reject the rest entirely out of the question, there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. *Imperor v Premananda*, 29 C W N 738=42 C L J 247=88 Ind C 1000=26 Cr L J 1256=52 C 987. Dying declarations are admissible not only against the prisoner, but also in his favour. *R v Seafie*, 1 M & Rob 551. "The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed, almost every case of man slaughter in which such declarations have been admitted is an authority to that effect, as the *prima facie* presumption is that the prisoner has murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true as it is not probable that a person should make a statement favourable to the person who has inflicted a mortal injury upon him but rather the contrary." *C S G, Russ v* 2092. *Prof Hignore* says: "Owing to the present peculiar limitation of this evidence to public prosecutions for homicide, and the tenor of the declarations usually made by the dying person it has sometimes been argued that the declarations cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated. *Hignore* Lr § 1442 see also *Mattox v U S*, 146 U S 151 *Moore v State*, 12 Ala 767 *People v Southern* 120 Cal 645, *Com v Bednorck*, 264 Pa 124.

**Dying declarations—Cases.** One of the dacoits engaged in a dacoity was captured in a seriously wounded state and before his death he made a dying declaration as to the circumstances of the dacoity before the Magistrate and also as to the circumstances causing his death. *Held*, that the statement of the declarant was admissible to prove his own participation in the dacoity but was not admissible



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against the other accused *Dattu Singh v Emperor* 1 R 201 Cr. Where the declaration of a person wounded by the accused in committing a crime was made on the 13th August 1899, and he died on the 20th of that month, and there was no other evidence to prove that the death was caused or accelerated by the wounds received at the dacoity or that it was the transaction which resulted in his death the High Court held that his declaration ought not to have been admitted in evidence *Imperatrix v Rudra* 25 B 15=2 Bom L R 331. In a case of murder the statement made by the deceased before his neighbours and in the presence of a head constable was admitted as evidence under s 32 (1) of Act of 1872, that section providing that such statement is relevant, whether the person who made the statement was or was not, at the time it was made, under expectation of death *Queen v Digumber*, 19 W R Cr 44. Where the police recorded certain statements relating to the cause of the death, made by the deceased during the investigation of a criminal case held that they were admissible in evidence *Bahauala v Emperor* 17 P R 1886 Cr. A declaration made by a person who was dying at the time he made it is a dying declaration in the legal sense of the term and is admissible under this section, though the person making it may have lingered for six days afterwards and then died *Shaloo Singh v Emperor* A I R 1929 I 61=10 I L J 163. The first information report against an accused is admissible under s 32 (1) of the Evidence Act, as a declaration as to the cause of a declarant's death *Muddy v Emperor* 44 C L J 23. A I R 1927 Cal 17. Where a person making a dying declaration chooses to live his statement cannot be admitted in evidence as a dying declaration under section 32 but it may be relied on under section 157 of the Act, to corroborate his testimony *Emperor v Ram Satru*, 4 Bom L R 434. The statement of a deceased person was recorded in the absence of the accused. Subsequently in the presence of the accused, the statement was read over and the accused were allowed to cross-examine the dying person. Held that the statement was not a dying deposition under s 33 of the Evidence Act and was not admissible under section 32 (1) unless it was proved by examining the person who recorded it or some one who heard it made *Ayo Po v Emperor*, 14 Cr L J 396=20 Ind Cas 220=6 Bur L 1 68. The statement of a deceased person that she was confined in the house of an accused that H was keeping watch over her and that another accused had raped her on account of which she had become pregnant and that they were getting ready to give her medicine to miscarry and so to put an end to her life is admissible under s 32 (1), as a statement made by a person as to the circumstances of a transaction which resulted in her death in a case in which the cause of death comes into question *Ilalud Bur v Emperor* A I R 1929 Sind 250.

## CLAUSE II

**Scope of the Clause** According to English law when a person in the regular course of his duty or office performs some business transaction and makes forthwith a return or record of it which he has no interest to falsify, such return or record is after his death evidence against all persons of the performance of the transaction and is known as a declaration in the course of duty *Price v Tower* 1 Sm L C, *Polini v Gray* 12 Ch D 411, *Sturley v Freceen*, 5 App Cas 623 640. The guarantee of its credibility consists in the obligation to discharge the duty faithfully, and the accuracy which is generally produced by business routine *Halls Et* 2nd Ed p 178. There are three principal restrictions upon the admissibility of its evidence in English law, namely (i) that it should be by a person having personal knowledge, (ii) that it should be contemporaneous, (iii) that it should not be an entry of any collateral fact over and above what it was the strict duty of the person entering it to record. These restrictions have been advisedly omitted by the Legislature so that Courts will be committing an illegality if they exclude any evidence which falls within the terms of the present section *Cunningham Et* 163. The statements may be verbal or written *Sussex Peerage Case*, 11 Cl & F 113, *Stipleton v Trough* 2 D & B 933, *R v Bulley* 13 Cox 293. The effect of the statement as to weight may be very different in the two cases, but both are equally receivable and relevant. The words "and in particular, in this section seem to point to the superior force of written over verbal statements: Illustrations (b), (c), (d), (g), and

(i) refer to this clause. *Vort F* 177, see also illustration (b) and (c) of S 32 section 21

Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases. *Rama Saunni v Ramu Nandan*, 22 Ind Cas 627=(1911) M W N 240=1 L W 136. The phrase "in the ordinary course of business" in this section is used to indicate the current routine of business which was usually followed by a person whose declaration it is sought to introduce. *Ibulla v Ma E Lun*, 11 Ind Cas 974=1 Bur L T 195. A statement of a relevant fact which is inadmissible under s 32, will not be admissible under s 11. *Bala Ram v Mahabir* 34 A 341.

**Principle.** As has already been stated in connection with clause (a) such evidence is admissible on two distinct principles, namely (1) the *Necessity principle*, and (2) the *principle of Circumstantial Guarantee of Trustworthiness*.

**Necessity principle.** On the principle of Necessity this exception sanctions the use of statements by persons whose testimony though not necessarily the sole evidence available on the subject is yet the only testimony now available for that purpose. Hence the usual rule applies that the person must be unavailable as a witness. *Wigmore* § 1521. In *Lefebvre v Warden*, 2 Ves Sr 511 Lord Hardwicke LC said "On proof that the defendant was dead, such entry has been read, by reason of the difficulty of making of proof in cases of this kind the Court has gone so far." In *Welsh v Bartlett* 15 Mass 380, Parker CJ said "The question was thought to fall within the general rule which requires the best evidence the nature of the case admits of." It is analogous to the exceptions to other general rules of evidence. Similarly in *Archolls v Webb*, 8 Whart 326 Story J said "If a party is dead we cannot have his personal examination upon oath and the question then arises whether there shall be a total failure of justice or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality. It is of course at least necessary that the witness should be somehow unavailable. Where the absence of the desired witness is not somehow accounted for the entries cannot be used. *Wigmore* § 1521. See also *Burd v Reilly* 63 U S App 157, *Stolt v Scott* 292 Ida 117. The death of one member of a firm does not admit the books of the firm. *In re Fontaine In re Doulan*, (1909) 2 Ch 382 (390). Of the various facts sufficiently excusing from production death, as in other hearsay exceptions is a common and commonly conceded instance. Insanity should be equally sufficient. *Bulgewater v Roxbury* 51 Con 217, *Union Bank v Anapp* 3 Pick 109. Illness effectively preventing the attendance of the witness should suffice. *Taylor v R Co*, 80 Ia 435. Such statement of a witness who is absent from the jurisdiction of the Court and whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable can also be admitted. *North Bond v Abbott* 13 Pick Mass 471, where Shaw CJ said "It was satisfactorily proved not merely that the witness was out of the jurisdiction of the Court, but that it had become impossible to procure his testimony. We cannot distinguish this in principle from the case of death or alienation of mind. The ground is impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial. In a case in Madras the mere fact that a witness happens to live at Rangoon is not a ground for holding that his evidence cannot be procured without unreasonable delay and expense. *Kadappa v Thirupathi* 21 L W 210=86 Ind Cas 776=1 I R Mad (1923) 411 see also *R v Dwyer* 19 Cox C 360.

**Circumstantial Guarantee of Trustworthiness.** The reasons justifying the admission of this class of statements, untested as they are by cross-examination have not been clearly defined by the Judges as in other hearsay exceptions but they seem fairly clear. The situation is one where even though a desire to state the truth may actually have subsisted more powerful motives to accuracy over power and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealing, experience of human nature indicates three distinct though related motives which operate to secure in

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against the other accused *Dattu Singh v Emperor*, L R 10 A 201 Cr. Where the declaration of a person wounded by the accused in committing dacoity was made on the 13th August 1899, and he died on the 20th of that month, and there was no other evidence to prove that the death was caused or accelerated by the wounds received at the dacoity or that it was the transaction which resulted in his death, the High Court held that his declaration ought not to have been admitted in evidence *Imperatrix v Audra*, 25 B 15=2 Bom L R 331. In a case of murder the statement made by the deceased before his neighbours and in the presence of a head constable was admitted as evidence under s 32 (1) of Act 1 of 1872, that section providing that such statement is relevant, whether the person who made the statement was or was not, at the time it was made, under expectation of death *Queen v Digumber*, 19 W R Cr 44. Where the police recorded certain statements relating to the cause of the death made by the deceased during the investigation of a criminal case held that they were admissible in evidence *Bahadur v Empress*, 17 P R 1886 Cr. A declaration made by a person who was dying at the time he made it is a dying declaration in the legal sense of the term and is admissible under this section, though the person making it may have lingered for six days afterwards and then died *Shakar Singh v Emperor*, A I R 1929 Lah 64=10 L L J 163. The first information report given by an accused is admissible under s 32 (1) of the Evidence Act as a declaration in the cause of a declarant's death *A muddy v Emperor*, 44 C I J 93. A I R 1927 Cal 17. Where a person making a dying declaration chances to live his statement cannot be admitted in evidence as a dying declaration under section 32 but it may be relied on under section 157 of the Act, to corroborate his testimony *Emperor v Ram Satu*, 4 Bom L R 434. The testimony of a deceased person was recorded in the absence of the accused. Subsequently in the presence of the accused, the statement was read over and the accused were allowed to cross-examine the dying person. Held that the statement was not a dying deposition under s 33 of the Evidence Act and was admissible under section 32 (1) unless it was proved by examining the person who recorded it or some one who heard it made *Nyo Po v Emperor*, 11 Cr L 396=20 Ind Crs 220=6 Bur L T 68. The statement of a deceased person that she was confined in the house of an accused, that H was keeping watch on her and that another accused had raped her on account of which she had become pregnant and that they were getting ready to give her medicine to miscarry and so to put an end to her life is admissible under s 32 (1), as a statement made by a person as to the circumstances of a transaction which resulted in her death, in a case in which the cause of death comes into question *Hahid Bur v Emperor*, A I R 1929 Sind 250.

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(b) refer to this clause. *Vort F* 177, see also illustration (b) and (c) of section 21. S 32

Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases. *Rama Saami v Rama Nandan*, 22 Ind Cas 627=(1914) M W N 210=1 L W 156. The phrase "in the ordinary course of business" in this section is used to indicate the current routine of business which was usually followed by a person whose declaration it is sought to introduce. *Abdulla v Mir F Kur*, 11 Ind Cas 874=4 Bur L J 185. A statement of a relevant fact which is inadmissible under s 32, will not be admissible under s 11. *Bela Ram v Mahabir* 34 A 311.

**Principle.** As has already been stated in connection with clause (a) such evidence is admissible on two distinct principles, namely (1) the *Necessity principle*, and (2) the *principle of Circumstantial Guarantee of Trustworthiness*.

**Necessity principle.** On the principle of Necessity this exception sanctions the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available for that purpose. Hence the usual rule applies that the person must be unavailable as a witness. *Wignome* § 1521. In *Lefebvre v Warden* 2 Ves Sr 511, Lord Hardwicke LC said: "On proof that the defendant was dead, such entry has been read, by reason of the difficulty of making of proof in cases of this kind the Court has gone so far. In *Welsh v Barrett* 15 Mass 380 *Parker* CJ said: "The question was thought to fall within the general rule which requires the best evidence the nature of the case admit of. It is analogous to the exceptions to other general rules of evidence. Similarly in *Nicholl v Welch* 8 Wheat 326, *Story* J said: "If a party is dead we cannot have his personal examination upon oath and the question then arises whether there shall be a total failure of justice or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality. It is of course at least necessary that the witness should be somehow unavailable. Where the absence of the desired witness is not somehow accounted for the entries cannot be used. *Wignome* § 1521, see also *Burd v Reilly* 63 L S App 17, *Stoll v Scott* 282 Ida 117. The death of one member of a firm does not admit the books of the firm. *In re Fountaine In re Doulton* (1909) 2 Ch 382 (390). Of the various facts sufficiently excusing from production, death in other Hearsay exceptions is a common and commonly conceded instance. In many should be equally sufficient. *Budgecater v Porbury* 51 Con 217, *Union Bank v Knapp*, 3 Pick 109. Illness effectively preventing the attendance of the witness should suffice. *Taylor v R Co*, 80 Ia 175. Such statement of a witness who is absent from the jurisdiction of the Court and whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable can also be admitted. *North Bank v Abbott*, 13 Pick Mass 171, where *Shaw* CJ said: "It was affirmatively proved not merely that the witness was out of the jurisdiction of the Court but that it had become impossible to procure his testimony. We cannot distinguish this in principle from the case of death or alienation of mind. The ground is impossibility of obtaining the testimony and the cause of such impossibility seems immaterial. In a case in *Madras* the mere fact that a witness happens to live at Rangoon is not a ground for holding that his evidence cannot be procured without unreasonable delay and expense. *Kalyaji v Thorupathi* 21 L W 210=8, Ind Cas 576= A I R Mad (1923) 111. See also *L v Dexter* 19 Cox Cr 360.

**Circumstantial Guarantee of Trustworthiness.** The reasons justifying the admission of these statements, untested as they are by cross-examination, have not been clearly defined by the Judges as in other Hearsay exceptions but they seem fairly clear. The situation is one where, even though a desire to state falsely may occasionally have substituted more powerful motive to accurately report and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in

**§. 32.** the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy

(1) The habit and system of making such a record with regularity call for accuracy through the interest and purpose of the entrant, and the influence of habit may be relied on, by very inertia to prevent casual inaccuracies and to counteract the possible temptation to misstatements. In *Poole v Ducas* 1 Bing N C 849, *Tindal C J* said "It is easier to state what is true than what is false in the process of invention implies trouble, in such a case unnecessarily incurred"

(2) Since the entries record a regular course of business transactions an error or misstatement is almost certain to be detected and the result disputed by those dealing with the entrant, misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, the fact (if no motive of honesty obtained) would deter all but the most daring and unscrupulous from attempting the task, the ordinary man may be a coward to decline to undertake it. In the long run this operates with full effect to secure accuracy

(3) If, in addition to this the entrant makes the record under a duty to his employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies—a motive on the whole the most powerful and most palpable of the three. In *Poole v Ducas* 1 Bing N C 849 *Tindal C J* said "The clerk had no interest to make a false entry, if he had any interest it was rather to make a true entry, a false entry would be likely to bring him into disgrace with his employer. Again the book in which the entry was made was open to all the clerks in the office so that an entry if false would be exposed to speedy discovery. Wigmore § 1522, see also *Taylor Et* § 67 *The Mills Et* 2nd Ed p 181, *Plumson Et* 3rd Ed 271. Justice Taylor says "The considerations which have induced the Courts to recognise this exception appear to be principally these—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble it is easier to enter what is true than what is false, that such entries usually form a link in the chain of circumstances which mutually corroborate each other, that false entries would be likely to bring the clerks into disgrace with their employers, that a most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery, and that as the facts to which they relate are generally known but to a few persons, a relaxation of the strictness of evidence in favour of such entries may often prove convenient if not necessary, for the due investigation of truth." *Taylor Et* § 697

"Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The subject of those restrictions and the reason for them are plain. The basic principle of legal evidence being that the Court must always have the best evidence that where persons can be they must be brought before the Court to tell what they know at first hand. Then veracity can then be best tested by the cross examination. Where however witnesses cannot be brought before the Court, then previous statements are not best indirect evidence, of a kind that the Court would not, except under necessity, receive at all. The conclusions which when compelled by necessity to take this evidence or none are imposed upon the admissibility plainly aim at affording some guarantee of its truth. As there is to be no chance of testing a man by cross examination his statement will not be admitted unless it has been made under conditions which looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the best evidence."

*Per Beaman J in Sethna v Mir* a 9 Bom L R 1047 at p 1048

**Statement made in ordinary course of business.** This clause provides that a written statement of a relevant fact made by a person who is himself a relevant fact, when the statement was made by such person in the ordinary course of business. The applicability of this clause entirely depends on the exact meaning of the words "ordinary course of business." The expression has more than one place in the Evidence Act. Thus in section 33 where it is

question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done is a relevant fact. Illustration (a) to that section is evidently the case of *Hetherington v Kemp* 4 Camp 193. The course of business there put forward was a certain usage in the plaintiff's counting-house. It was not a usage in a private house which however methodical, cannot carry the same weight as the ordinary routine of an office. So too, by section 114 the Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. What is meant by 'the common course of public and private business'? Illustration (f), with its explanation refers to the public business of the Post Office. Private business would apparently apply to such a case as that alluded to above (*Hetherington v Kemp*). If the expression was meant to include the dealings of a private individual apart from his avocation or business, different language would have been used. The explanation to illustration (c) of the same section (114) speaks of a man of business' which in its well known popular sense must mean a man habitually engaged in mercantile transaction or trade. Again in the explanation to section 17 it is said that a person is said to be acquainted with the hand writing of another person when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. Here, too the expression must mean in the ordinary course of a professional avocation. The illustration is that of a broker to whom letters are shown for the purpose of advice.

Again by section 34, entries in books of account regularly kept in the course of business are relevant. In *Maheishau Berony v The New Dhurumsey Spinning and Weaving Company* 1 L R 4 B 576 at p 583 (not approved by the Privy Council in *Deputy Commissioner, Bira Bank v Ram Pirshad* 27 C 118=4 C W N 147 P C) *West J* referred to a private account book tendered in evidence, which had been entered up casually, once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour in transactions take place. 'These only' (he said) 'are I think regularly kept in the course of business'.

"Having regard then to the above considerations there can I think, be no doubt that the expression in the ordinary course of business in section 32 (2) must be read in the same sense. It may in one sense be true that it is, in the ordinary course of business, for a mortgaged deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is whether the mortgage deed itself is a statement made in the ordinary course of business. Looking at the particular set out in clause (2) of section 32 the nature of the statements 'made in the course of business,' and looking at the sense in which the expression is apparently used in other sections of the Evidence Act it can not be said that a mortgaged deed executed by an agriculturist falls within that term. It is not the profession, trade, or business (to borrow the words used in section 27 of the Contract Act) of an agriculturist to execute mortgage deeds. Per *Candy J* in *Ningau v Bhorrappa* 23 B. 68 at pp 65 67. In the same case *Fulton J* at p 70 observed 'It can hardly be said that the execution of a mortgage deed is an act done in the ordinary course of business.' Doubtless when a person has determined to mortgage his land, the insertion of the boundary is made in the ordinary course of business in the course of the transaction, but I think that in using the phrase 'in the ordinary course of business' the legislature probably intended to admit in evidence statements similar to those admitted in England as coming under the same description. The subject is dealt with in chapter XII of Mr Pitt Rivers' Treatise on the Law of Evidence and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an extrajudicial kind such as the execution of a deed of mortgage, but of business or professional employment, in which the declarant was ordinarily or habitually engaged. See also *S. v Jeonandian* 13 C W N 71. The present case is apparently one of the latter kind, and the current routine of business, which was followed by the declarant whose declaration is sought to be proved, was, upon these

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evidence that there was any such current routine of business but actually no evidence that the practice had ever been adopted in any other occasion much less that it was habitually adopted on all occasions. Held that a statement made by a person, since deceased, to his wife that the defendants had asked him to lend them money and that he had lent them money on a demand note was inadmissible. *Abdulla v Ma E Kim*, 4 Bur L R 185 = 11 Ind C 854. The business referred to may be of a temporary character. *Sheonandan v Jeonandan* 13 C W N 71.

Under the English law also the requirement is that the entry must have been made in the regular course of business. *Wignore* § 1523. In *Doe v Tinsford* 3 B & Ad 890 *Parle v J* and *Taunton v J* used the term 'in the ordinary course of business' while in *Pook v Duas*, 1 Bing N C 619, *Findell v J* used the expression 'made in the usual course and routine of business.' In *Ravlin v the Rifaids* 28 Beav 473 *Romilly M R* in admitting a solicitor's book used the expression 'in the exercise of his business and duty' and in the regular course of business. See also *Nicholls v Webb*, 8 Wheat 326, *Halls v Howard* 7 Mete Mas 481 *State v Pham*, 49 Vt 378 *Don v Sayer*, 29 Me 119. So also in America and England the entry must have been made in the way of business. 'This may be defined' says *Prof Wignore* "to mean a course of transaction performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It would probably exclude for instance, a diary of doings kept merely for one's personal satisfaction but it would not exclude any regular record that was helpful though not essential nor usual in the same occupation is followed by others. There is, therefore, no special limitation as to the nature of the occupations." *Wignore* § 1523.

In *Champneys v Peal*, 1 Stark 326, a memorandum of delivery of copy bill by a clerk who usually made such a memorandum upon the copy kept was admitted. Similarly in *R v Cope*, 7 C & P 726, an endorsement of every given in order of the aldermen, the writer's duty being to serve orders and endorse them when served was also admitted. So also an endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of a statement by the person and would be admissible either under section 32 (2) or section 33 of the Evidence Act if the requirements of those sections are fulfilled. *Gobinda v Dearth* 20 C L J 45. Where account books were admitted in evidence before the Commissioner under section 32 of the Evidence Act it is having been kept in the ordinary course of business by persons deceased it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries of the book relate without further proof. *Daji Alaji v Gornal* 10 Bom L R 511. The *Post mortem* report of a Civil Surgeon who unfortunately died before his examination by the trial Court is admissible under 32 (2) of the Evidence Act as being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. *Mohan Singh v Emperor*, L R 6 All 49 = 85 Ind C 854 = 26 Cr L J 551 = 1 I R 192. All 413. *Jama usul bali* and *Jamabandi* papers can be admitted in evidence under this clause but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. An entry as to the rate of rent cannot be distinguished from other entries therein as not made in the ordinary course of business. *Dulhu Mia v Jagedish Nath* 90 Ind C 564.

Since it is not essential that the occupation should be a mercantile or an industrial one, nor even that it should be a secular one it follows that a register of marriages or the like kept by a priest or minister is admissible. *Kennedy v Doyle* 10 All Mr 8 161. In that case *Gray J* said "An entry made in the performance of a religious duty is certainly no less valuable than one made by a clerk or messenger or notary or attorney or solicitor or a physician in the course of his secular occupation."

A deed of conveyance was tendered in evidence which purported to be the mark of C as vendor, and which was duly attested by four witnesses. C however, denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew

the hand writing of one of the attesting witnesses and who swore that the signature of the witness to the attestation clause of the deed is genuine. *Held* on the authority of *Whitlock v Musgrave* Cr M 510 that the deed was admissible in evidence its execution by G being sufficiently proved. *Abdulla v Gannabai*, 11 B 690. In a suit to recover loss sustained on the sale by plaintiff of goods consigned to them by the defendant for sale by their London firm account sales are good *prima facie* evidence to prove the loss unless and until displaced by substantive evidence put forward by the defendant. *Barlow v Chum Lal*, 23 C 209. But the execution of a mortgage deed can not be said to be an act done in the ordinary course of business. *Vingana v Bumappa*, 23 B 63. Certificates issued by the Manchester Chamber of Commerce that there was a natural strike of coal miners and consequent stoppage, congestion and disorganisation can not be admitted under this clause as they are not certificates issued in the ordinary course of business or written by a person who is dead. *Gudharidas v Kerauala*, 28 Bom L R 232=93 Ind Cas 622= A I R 1926 Bom 253. Entries in a *purolit* book as regards the date of death of a *jayman* cannot be admitted under this section as the register is not of such a character as to enable the Court to pronounce affirmatively that the entry in question was made in the ordinary course of business. *Malraje v Koppunairi*, 26 Bom L R 363=20 L W 1 P C=46 M L J 341. A statement in a document by the writer that a particular mark is that of the executant is admissible in evidence under this clause where the writer is dead and it is proved that the document is written by him. *Lahori v Bala*, 77 Ind Cas 795=18 N L R 45=1922 Nig 227. Where entries relating to the deaths of the inhabitants of a place had been made in the diary of a deceased chowkidar not by the chowkidar himself but by some other person, the entries are inadmissible in evidence unless it is proved that it was the duty of that person in the ordinary course of business to make the entries. *Chandramu v Rungyan*, A I R 1922 P 111=67 Ind Cas 57. Where a family pedigree was sought to be proved by books kept by a family chronicler *held* that under section 32 (2) they would be admissible as books kept in the ordinary course of business by a professional man or a person whose business it was to keep such a book. *Mohan Singh v Dalpat Singh* 16 Bom 753=24 Bom L R 289=67 Ind Cas 237, see also *Kartil v Gossain* 25 C W N 903. *Hazari Lal v Han Gobind*, 48 Ind Cas 377. But entries in the diary of a deceased chowkidar relating to birth and death are not admissible under this clause. *Vama v Gobardhan* (1919) Pilt 352=37 Ind Cas 424=2 Pat L J 42.

**Statement includes verbal statement.** The statement may be written or verbal (vide s 32). The general prevailing doctrine in America requires the declarations to be in writing, the exception relate to entries strictly speaking and does not extend to oral statement. *Wymore* § 1528. In England however, it seems settled that an oral statement is equally admissible. In the *Susser Peerage Case*, 11 Clark & L 85 *Ford Campbell* says at p 113. 'By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions. First where a declaration by word of mouth or by writing is made in the course of business of the individual making it there it may be received in evidence though it is not against his interest. See also *Stapleton v Clough* 2 Ll & Bl 933 937. *Eddie v Kingsford*, 11 C B 759 (763). In *Reg v Bully*, 13 Cox Cr Cas 293 which was a trial for murder the prosecution offered to show the verbal report of the deceased who was a constable, to his superior officer as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused who on a previous occasion had been convicted of larceny, chiefly on the evidence of the deceased. It was held admissible. But in a recent case it has been held by one English Court that a declaration made by a physician to a patient with respect to the cause of her illness was inadmissible and it may indicate a tendency to a narrowing of the rule. *Dawson v Dawson* 22 1 L R 32. A comment on this case will be found in 19 *Harvard Law Review* 301. As regards admissibility of oral statement, *Prof Wymore* says. Since in that jurisdiction the third motive of trustworthiness (vide *supra* under the head circumstantial guarantee of trustworthiness) is regarded as most important, and the statement must be



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made under a duty to a third person, it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*vide supra* under the head *circumstantial guarantee of trustworthiness*). Nevertheless, in the actual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the element of duty (as required in England) does in fact exist, and where it does exist the case seems a proper one for the adoption of the broader English rule admitting oral statements. Apart from the above considerations, there is no reason for distinguishing between oral and written statements and of the disadvantage of the former, no such distinction is made in most of the other exceptions.

**Section 32 (2) and section 34.** In *Rampyabai v Balaji*, 23 B 294-6 Bom L R 50 the plaintiff relied on entries in the hand writing of her deceased husband kept in the ordinary course of business. The lower Court rejected certain items for want of corroboration. On appeal, *Jenius C J* in delivering the judgment observed "The plaintiff sues to recover a sum of money and in support of her claim she produces certain accounts and also calls oral evidence. The accounts are relevant both under section 34 and under section 32 (2) of the Indian Evidence Act, 1872. The learned Judge has considered that corroboration of these accounts is required, and by that we understand that he considered corroboration necessary as a matter of law. Entries in accounts relevant only under section 34 are not alone sufficient to charge any person with liability; corroboration is required, but where accounts are, as here, relevant also under section 32 (2) they are in law sufficient in themselves and the law does not as in the case of accounts admissible only under section 34 require more. Entries in accounts may in the same suit be relevant under both sections as here and where this is so, it is clear that, in as much as they are relevant under section 32 (2) corroboration is not required by the Act. The learned Judge was in error in supposing that the requirements of section 34 applied to the accounts, though they were relevant under section 32 (2). At the same time we wish it to be distinctly understood that though the accounts which are relevant under section 32 (2), do not as a matter of law require corroboration, the Judge is not bound to act on them without corroboration, that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration the only point being that the law does not require corroboration." See also *Musst Rini v Firm Bahadur*, 62 Ind. Cas 916. So also where entries in *Jama bandi* papers began over 70 years before the action was tried the presumption was that the person who made them was dead and could not be called and as they were made in the ordinary course of business by the landlord's agents, they were relevant without any corroboration, as evidence against the tenants under sub section (2) section 32 of the Indian Evidence Act which does not require corroboration as under section 34. *Dhulha Mandli v W Grant* 16 C L J 24 see also *Utowl v Farak Nath* 16 C L J 398=17 C W N 774=17 Ind Cas 266 *Khero v Bejoy*, 7 W R 533, *Rama Saurin v Raju nandan* 22 Ind Cas 627. Such documents both signed and unsigned would be admissible not only as corroborative evidence but as independent evidence if the landlords comply with the requirements of this clause. It is no doubt necessary for the landlords to establish the antecedent condition that the persons who prepared the papers are dead or cannot be found. *Charitar v Kairish*, 41 Ind Cas 422=4 Pat L W 213. So also *Talub Baki* papers may be evidence under section 32 Cl (2) of the Evidence Act but before they can be admitted a landlord is to show that the person making the statement is dead and the entries were made by him in the ordinary course of business. *Uned Ali v Yauab Ali*, 31 Ind Cas 31 C L J 63=47 C 266=56 Ind Cas 38 *Duku v Jogadish* 90 Ind. Cal 761=A I R 1926 Cal 359 *Jonab Biswas v Sua Kumari* A I R 197 Cal 955. But in *Gopeswar Sen v Burduanathpuri*, A I R 1923 Cal 854 *Mr Jeyaraj v Mookerji* said "The only material difference as between an entry relevant under section 34 and one relevant under section 32 cl (2) is that in the former case the person who

made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 32 cl (2) from the disability that it imposed on entries relevant under s 31 by the second part of that section, and personally I have always felt inclined to take the view that such entries no matter whether they are relevant under the one section or under the other are not to be considered as alone sufficient to charge any person with liability.

**English Law** A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, and in the discharge of professional duty, at or near the time when the matter stated occurred (*Doe v Terford*, 3 B & Ad 890) and of his own knowledge. Such declaration are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty, or if they do not appear to be made by a person duly authorised to make them. *Steph art 2*. The leading case on this rule is the case of *Priest v Earl of Torrington* 1 Salk 285 = 2 Smith L C 320. The short report of it is called as follows:—The plaintiff being a brewer, entered an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual course of the plaintiff's dealing was, that the drayman came every night to the clerk of the warehouse and gave an account of the beer they had delivered out which he set down in a book kept for the purpose, to which the drayman set their names; that the drayman was dead, but this was his hand set to the book, and this was held good evidence of a delivery, otherwise of the shop book itself singly without more. That case was decided by *Chief Justice Holt* in 1703. Previously to that in *Pitman v Maddox* 1 Lord Raym, 732, before the same learned Judge the plaintiff produced in evidence his shop book written by one of his servants who was dead. And upon proof of the death of the servant and that he used to make such entries of debt, etc, it was allowed by *Holt, Chief Justice*, to be good evidence, without proof of the delivery of the goods, etc. And he said, this was a good proof as the proof of a witness's hand (who was dead) subscribed to a bond, etc. And (by him) notwithstanding the statute of 7 Jac 1 C 12, says, that a shop-book shall not be evidence after the year, yet he did not hold such book to be good evidence within the year alone. *Thayer Cas Ed 11*

**Origin** In England, formerly a party to an action was not permitted to testify in his own behalf. An apparent exception to this rule, however, existed in the application of the so called "shop book rule". In early times in England parties were permitted to show by entries made in their books, the sale of goods or performance of labour, and this was so well recognised a doctrine that a Statute of 7 Jac 1, C 12 was passed in 1609 A D to limit the scope of the rule. The relevant portion of the Statute runs as follows:—Be it therefore enacted by the authority of this present parliament, that no tradesman or handicraftsman keeping a shop book as aforesaid, his or their executor or administrators, shall after the feast of St Michael the Archangel, next coming be allowed admitted or received to give his shop book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators some action for the said debt wares, or work done within one year next after the same wares delivered, money due for wares delivered, or work done. Later developments narrowed the rule to the cases where the entries were made by a clerk. *Cooper v Mawson*, 1 Lsp 1. This doubtless, seemed to the Courts more consistent with the doctrine that a party could not be a witness for himself. The clerk himself was a competent witness and entries made by him were considered equally unobjectionable. Authentication of the entries was required by the clerk who made them if living and within reach if he was not proof of his handwriting was considered sufficient. *Pitman v Maddox*, 1 Ld Raym 732. *Priest v Earl of Torrington* 2 Ld Raym 873. The rule with respect to entries made by a party in his own books did not meet with much favour from the English Judges in later times, and survived only in minor Courts. *Thayer*

**S 32** (*as* *Li 509*, *Glynn v Bant* 2 V & S 38, *Cronch v Drury*, *Keble* 21, *Smith v Williams*, *Comb* 217 *Bram v Pierce*, 11 M & W 773 Its development originally and its modern application in England and its explanation and justification on the part of the Courts in America, illustrate the fact that it is a rule which has drawn its vitality from the necessities imposed on Courts by the contemporaneous methods of business. *McKelvey* 71 302 In *Omychund v Barker* 1 Atk 21 *Lord Chancellor Hardwicke* said "A tradesman's book is admitted as evidence through no absolute necessity, but by reason of a presumption of necessity only inferred from the nature of commerce." See also *Woodroffe v Lord Cobham*, *Bomb* 180, *Ford v Hoplins*, 1 Salk 283 So parties' own book continued to go in, when the entries were the clerk's whether he was living or dead. There is reason to think that the practice of admitting similar entries when made in a stranger's book, grew out of the practice in the case of a party's own 'shop book'. *Thayer* *Li* 509

**English rule—Duty to a third person** The further limitation exists in England and Canada that there should have been a duty to a third person of the course of which the report or record was made. (*Chambers v Bernasconi*, 1 C & J 151 on app 1 C M & R 347 So in order to make such evidence admissible the declarant must be actually in the discharge of a duty to a third person. So a farmer's book of his farm labourers' work done was rejected on the ground that it was not made in the discharge of some duty for which he is responsible. *R v North* 4 Q B 132 In *Mellor v Halmesley* (1941) 2 Ch 525, to identify a boundry a field book of a deceased surveyor, employed by the Local Board to survey was produced but it was excluded. But on appeal (1935) 2 Ch 161, the decision was reversed. In delivering the judgment of the Appellate Court *Vaughan Williams L J* said "Here the duty of the surveyor was to record everything, without which he could not arrive at that ultimate conclusion. If it was his duty to record those matters at the time and he was not doing so contemporaneously I think the rule as to admissibility applies. See also *Lyell v Kennedy* 35 W R 725 *Mercer v Dume*, (1904) 2 Ch 304 (511) on appeal (1905) 2 Ch 518 (554) So there must have been a duty to a third person the very thing recorded. *Smith v Blackley*, L R 2 Q B 337 See also *Forrest v Grey* L R 12 Ch D 431 *Lyell v Kennedy*, 35 W R 725 *Stuart v Forrester* 5 App Cas 623, *Hills v Hills*, 36 T L R 772, *Trotter v McLean* 13 Ch D 579 *Money v Allen* 13 Ch D 578 In *Chambers v Bernasconi*, 1 C & J 151 the Court rejected the Deputy's return of the place of arrest, because "it was not the duty of the Sheriff's officer to make a return to the Sheriff that he has made the arrest but it is not a necessary part of that duty that he should state the particular place of the arrest. So the statement of other circumstances, however natural they may be thought to find a place in the narrative is no proof of those circumstances." *Bram v Pierce* 11 M & W 773 *R v St Mary Magdalen*, 22 J M C 109 In *Smith v Blackley* L R 2 Q B at p 332 *Blackburn J* said "There is to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do and unlike a statement against interest does not extend to collateral matter however closely connected with that thing. It is an essential fact to render such an entry admissible that not only it should have been made in the due discharge of the duty about which the person is employed but the duty must be to do the very thing to which the entry relates and then to make a report or record of it. The existence of the duty must be proved by other independent evidence." *Leggerton* 2 Deg 1 & J at p 614, *The Henry Cotton* 5 P D 166, *R v Purford* L R 2 Q B at p 332, *Perceval v Nanson* 7 Ex 3 *Chambers v Bernasconi*, 1 C M & R 347 Personal custom is not equivalent to duty and creates no responsibility towards any person. Therefore, entries, in the book of a deceased solicitor or bills of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made in the course of duty. *Pouell* 71 321 See also *Bright v Leggerton* (1877) 1 & J at p 617 *Hope v Hope* (1893) W N 21, *Perceval v Couthland* (1877) 2 N 25, *contra Raulins v Pichard*, 28 Berr 370 The office of an employer to which the duty is attached may be private, as in the case of an ordinary or public, as in that of a Sheriff (*Chambers v Bernasconi*, 1 C M & R 347

of a notary public (*Poole v Deas* 1 Bing N C 649) or of a Magistrate (*Watson v Little and another*, 29 L J Ex 267) *Hills v 2nd Ed*, 180 The duty must have been to record or otherwise report it at the time *Smith v Blackley supra*, *Polin v Gray supra*, *Doe v Trufford*, 3 B & Ad 890, *Ryan v King* 25 L R Ir 184, *The Henry Coron*, 3 P D 159, *Loole v Denne*, (1905) 2 Ch 538 *Stuala v Fieccia*, (1880) 5 App Cas 623 (640) "This limitation is a Prof Hignone as a reminiscence of the early history, and is needlessly strict."

**Duty to a third person—Necessity under this section** Under the Indian Evidence Act, the report or record need not be made in the course of a duty to a third person. "The statement or entry, in order to be admissible under the Act must relate to a relevant fact, and it would appear to make no difference so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative what is the nature of its connection with the fact, the statement of which was a matter of duty, and whether this connection was such as to raise a presumption of accuracy of information or observation must however, be questions of importance in estimating the weight due to such evidence when it relates to collateral matters merely." *Fild E 7th Ed* p 98 So in India the following observation of Lord Denham in *Chamberlain v Binascom*, 3 L J Ex 373=1 C M & R 347 has no application. "We are all of opinion that, whatever effect may be due to an entry made in the course of business by an office reporting facts necessary to the performance of a duty, the statement of other circumstances however naturally they might be thought to find place in the narration, is no proof of those circumstances. A register of marriages kept by *Istahad* since deceased who celebrated a marriage, and in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl (2) *Zalena v Salina*, 19 C 689=19 I A 19

**Contemporaneity—Necessity under the Indian Evidence Act** According to English Law, the entry should have been made at or near the time of the transaction recorded,—not merely because this is necessary in order to assure a fairly accurate recollection of the matter but because any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously. The rule fixes no time, each case must depend on its own circumstances. *Wigmore* § 126 In *Doe v Trufford*, 3 B & Ad 890, *Parke B* said "It is to be observed that in the case of an entry against interest proof of the hand writing of the party, and his death, is enough to authorise its reception at whatever time it is made it is admissible but in the other case (in declarations in the course of business) it is essential to prove that it was made at the time it purports to bear date it must be a contemporaneous entry. Similarly in *Poole v Deas*, 1 Bing N C 649, *Tindal C J* said "If there were any doubts whether the entry was made at the time of the transaction the case ought to go down to trial again." See also *Smith v Blackley*, L R 2 Q B 326 *Ryan v King* 25 L R Ir 84, *The Henry Coron* L R 3 P D 156, *Champneys v Peel*, 1 Stark 326 So where an entry was not made until two days after the event it was held not contemporaneous. *The Henry Coron* 3 P D 156 The provisions of the Indian Evidence Act contain no similar restriction as to the admissibility of this kind of evidence but in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact it relates. *Fild E 7th Ed* p 98 *Cum F 7th Ed* 163

**Personal knowledge** The declarations are only evidence of the precise facts that it was the writer's duty to record and of which consequently he had personal knowledge. *Phip E 3rd Ed* p 251 In *Bram v Peere* 11 M & W 473 an action was brought to recover the sum of £415 for coals alleged to have been sold by the plaintiff's tator to the defendant. At the trial it appeared that it was the duty of a person of the name of *Harvey* who worked at the coal pit to give notice to *Yem* the foreman of the coal which was sold. *Yem* was not present when the coal was delivered and not being able to write employed a person of the name of *Baldum* to make entries in the books from what he, *Yem*,

**S 32.** told him Both *Harey* and *Yem* were dead, but in order to prove the delivery of the coal *Paddum* was called as a witness who produced the book, and stated that he made it out from *Yem's* directions, and that every evening he read over the entries to him. It also appeared to have been the course of business for the customers to go to the pit's mouth, and take the coal away with them. There was evidence that the coal in question had been delivered to the defendant, but it did not appear to have been credited in the plaintiff's books, whenever the plaintiff concluded it had not been paid for. The undersheriff rejected the entries in the book. On appeal *Judge Thinger C B* discharging the Rule said "It is like any other case of public officer who does anything in the course of business. But the case where the books are not written by the party himself, but at his appointment by another man who is dead, is widely different. As regard the case of *Pine v Lord Torrington* it is better to adhere to that case if it stands, and not to give any extension to it." When the entry has been made on hear it will not be received. *Meier v Denne* (1905) 2 Ch 538. Similarly in the case of *the Henry Cohen*, 3 P D 178, *Sir Robert Phillimore* said "It seems to me that the authorities point to this that entries in a document made by a deceased person can only be admitted as evidence when it is clearly shown that the entries relate to an act or acts done by the deceased person and not by third parties. There can be no doubt that the general principle of testimonial evidence should apply here as elsewhere, namely, that the person whose statement is received in testimony should speak from personal observation or knowledge (*vide s 60*). This principle has often been invoked in excluding hearsay entries made by a person who had no personal knowledge of the supposed facts recorded. *See Executors v Levy* 39 Ala 195, *Halling v Morgan Co*, 126 Ala 376. In the former case *Peters* said "Such a book must contain the recitation of some fact by one who would at the time have been a competent witness to the fact which he registered." But does this principle apply to *Prof Higgins* exclude all entries made by persons not having personal knowledge of the fact entered? May not this act of personal knowledge on the part of the entrant be supplemented by the personal knowledge of some other person whose knowledge is in fact represented in the entry? In other words if the element of personal knowledge can somehow be adequately supplied by a second person it is material that the entrant himself did not have this personal knowledge. *See more s 1570*. Then after discussing the matter he says "The conclusion, is then, that when an entry is made by one person in the regular course of business, or in any oral or written report made to him by one or more persons in the regular course of business, of a transaction lying in the personal knowledge of the latter there is no objection to receiving that entry under the present exception of the testimony of the former person only provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case outweigh the probable utility of doing so." *Higgins s 1570(4)*.

According to clause (2) of section 32 of the Evidence Act account book containing entries not made by nor at the dictation of a person who had personal knowledge of the truth of the facts stated is regularly kept in course of business admissible. *Leg v Hemmatta* 1 B 610. In delivering the judgment of the Court *McNeill* said at p 616 "Put the Indian rule of evidence (*Evidence Act* section 32 clause 2 and section 34) simply requires that entries in accounts should in order to be relevant be regularly kept in the course of business and although it may be no doubt important to know that the person making or dictating the entries had or had not a personal knowledge of the facts stated, this is a question which according to the Indian rule of evidence affects the admissibility of the entries. But in *Jagat Pal Singh v Jopher* 25 A 113 P C a genealogical table purporting to have been made by a person since dead but which was shown to be merely an exhibit binding on him for the purposes of a former suit was held to be admissible in evidence, having been made without the personal knowledge and belief which must be found to be presumed in any admissible statement by a deceased person. In delivering the judgment *Judge Robertson* at p 171 said "The other document found in a different position. Its alleged author *Ru Gardat Singh*, had died before the trial. But the exhibit in question is merely a genealogical table filed on behalf of

*Gundat* in a claim made by him for certain village. The object of *Gundat* in the proceeding was to make him self out to be of the elder branch of his family and this admittedly was untrue. But the fatal objection to the admission of the document is that it is in no way brought home to *Gundat* except as being an exhibit binding on him for the purpose of that suit. His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in my statement of a deceased person which is admissible in evidence. For aught that appears the genealogical table in question might never have been seen or heard of by *Gundat* personally, but have been entirely the work of his pleader. But according to *Mr Justice Woodroffe*, the observation of the Privy Council relates to statement under (b) the terms of which require 'special means of knowledge'. *Woodroffe F.R. 5th Ed 325*. To reject a declaration on the ground that it is not based on personal knowledge would create an inconvenience. The inconvenience is thus stated by *Judge in Lebler v Collier* 13 Cal. 199. 'Should the plaintiff be compelled to go behind the books thus verified by the clerks who kept them and resort to each of the sub-agents who participated in the transaction and the sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment and as a part of the proper employment of the witnesses who prove them not only the best but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice and convenience require them to be admitted. The weighers, wharfingers and numerous subordinates who handled this cotton kept no books they report to the clerks who keep the books of the concern and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. To impose a different rule upon these establishments would interrupt commerce and amount to a denial of justice.'

**Extrinsic proof** Extrinsic proof must be given of the death or other disability of the declarant. *Duke v Jagadish* 90 Ind. Cts 761. *Chariton v Kailis* 41 Ind. Cts 122=4 Pat. F. W. 213. *Umed v Nairab* 51 C. L. J. 68. In the case of entries in shop books and other records the entries must be properly authenticated by the proof of his handwriting. *Tatum v Torrell* 6 C. & P. 17, *Bradley v Jane*, 13 C. B. 522, *Doe v Haulins* 2 Q. B. 812. Where however the document is thirty years old, and produced from proper custody the handwriting may generally, if the writing is a private one be presumed (*id.* 90. Fy. 682). In England the rule has not been acted on in the case of declarations made in the course of duty. *Doe v Dimes*, 10 Q. B. 514, *Luggs v Lutter* v. *Heathly*, 29 L. R. Ir. 144. In the latter case the handwriting of a deceased clergyman to a register more than thirty years old was required to be proved. That the declaration was made in the ordinary course of business must also be proved. *Id.* section 114 illus. (f). *Omara Das v Laboo Jantec* 6 M. F. A. 87. *Woodroffe F.R. 5th Ed p. 324*. But in *Pradnath Sahay v Anil Mohan* 29 Ind. Cts 219, a division bench of the Calcutta High Court consisting of *Mr Justice Holmwood* and *Mr Justice Mulla* held it otherwise. In that case they observed 'There is nothing in section 32 clause (2), which requires my formal proof that the papers are kept as a fact in the ordinary course of business. He (Subordinate Judge) appears to have confused section 32 clause (2) with section 1 with which we have nothing to do in this case.'

**Form or mark of the Entry** Where the statement is made in writing, there is no limitation as to the mode of written expression. Any mark or sign that is interpretable as having a definite meaning will suffice. *North Bond v Abbot*, 13 Pat. 117. *Ignore § 1, 1*.

**Cases under clause (2)** A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an illegible scribble such as might be made by an illiterate person and again each of these marks there was the statement that it was the mark of one of the executants the name being given in each case. The statements were proved to have been written by a deceased professional bond writer who wrote the whole document in the ordinary course of business. The



*Gurdal* in a claim made by him for certain villages. The object of *Gurdal* in the proceeding was to make himself out to be of the eldest branch of his family and thus admittedly was untrue. But the fatal objection to the admissibility of the document is that it is in no way brought home to *Gurdal* except as being in exhibit binding on him for the purpose of that suit. His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears the genealogical table in question might never have been seen or heard of by *Gurdal* personally, but have been entirely the work of his pleader. But according to *Mr Justice Woodroffe*, this observation of the Privy Council relates to statements under cl (1) the terms of which require "special means of knowledge." *Woodroffe L. 5th Ed 325*. To reject a declaration on the ground that it is not based on personal knowledge would cause great inconvenience. The inconvenience is thus stated by *Lampkin Fin Litcher v Collier* 13 Gr 499. Shall the plaintiff be compelled to go behind the books thus verified by the clerk who kept them and resort to each of the sub-agents who participated in the transaction and the sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment, and a part of the proper employment of the witnesses who prove them not only the best but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice, and convenience require them to be admitted. The weighers, wharfingers, and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern and then functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. To impose a different rule upon the establishments would hamper commerce and amount to a denial of justice.

**Extrinsic proof** Extrinsic proof must be given of the death or other disability of the declarant. *Duke v Jagdish* 90 Ind Cis 561 *Charlton v Kauls*, 41 Ind Cis 422 = 4 Pat L W 213, *Uned v Naulah* 11 C L J 65. In the case of entries in shop books and other record the entries must be properly authenticated by the proof of his handwriting. *Latham v Lovell* 6 C & P 157, *Bradley v James*, 13 C B 922. *Doe v Haclins* 2 Q B 512. Where however the document is thirty years old, and produced from proper custody the handwriting may generally, if the writing is a private one be presumed (rule 90 Ind Cis 652). In England this rule has not been acted on in the case of declarations made in the course of duty. *Doe v Davies*, 10 Q B 314, *Logges Miller v Heathby* 28 L R Ir 144. In the latter case the handwriting of a deceased druggist to a register more than thirty years old was required to be proved. That the declaration was made in the ordinary course of business must also be proved. *Rule section 114 illus (f)* *Ducarla Das v Baboo Janie* 6 M I A 88. *Woodroffe L. 5th Ed p 324*. But in *Badrinath Sahay v Nand Lalton* 20 Ind Cis 219 a division bench of the Calcutta High Court consisting of *Mr Justice Holmwood* and *Mr Justice Mulla* held it otherwise. In that case they observed: "There is nothing in section 32 clause (2) which requires any formal proof that the papers were kept as a fact in the ordinary course of business. He (Subordinate Judge) appears to have confused section 32, clause (2) with section 34 with which we have nothing to do in this case."

**Form or mark of the Entry** While the statement is made in writing there is no limitation as to the mode of written expression. Any mark or sign that is interpretable as having a definite meaning will suffice. *North East v Abbott* 1 Pick 417, *Hignmore* § 151.

**Cases under clause (2)** A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person and against each of these marks there was the statement that it was the mark of one of the executants. The name being given in each case. The statements were proved to have been written by a deceased professional bond writer who wrote the whole document in the ordinary course of business. The



**S 32.** told him Both *Harvey* and *Yem* were dead, but in order to prove the delivery of the coal- *Baldwin* was called as a witness who produced the book, and testified that he made it out from *Yem's* directions, and that every evening he read over the entries to him. It also appeared to have been the course of business for the customers to go to the pit's mouth, and take the coal away with them. There was evidence that the coal in question had been delivered to the defendant, but it did not appear to have been credited in the plaintiff's books, whenever the plaintiff concluded it had not been paid for. The under-sheriff rejected the entries in the book. On appeal *Lord Abinger C B* discharging the Rule said "It is like any other case of public officer who does anything in the course of business. But the case where the books are not written by the party himself, but at his suggestion or dictation by another man who is dead is widely different. As regards the case of *Price v Lord Forington* it is better to adhere to that case as it stands and not to give any extension to it." When the entry has been made on behalf of it will not be received. *Meier v Demme*, (1905) 2 Ch 538. Similarly in the case of *the Henry Cohen* 3 P D 158, *Su Robert Phillimore* said "It seems to me that the authorities point to this that entries in a document made by a deceased person can only be admitted as evidence when it is clearly shown that the entries relate to an act or acts done by the deceased person and not by third parties. There can be no doubt that the general principle of testimonial evidence should apply here, namely, that the person whose statement is received as testimony should speak from personal observation or knowledge. (Ibid.) This principle has often been invoked in excluding hearsay entries made by a person who had no personal knowledge of the supposed fact recorded. *Meier v Demme* 3 P D 158, *Walling v Morgan Co*, 126 Ala 326. In the former case *Jelks* said "Such a book must contain the recitation of some fact by one who would at the time have been a competent witness to the fact which he registered. But does this principle exclude all entries made by persons not having personal knowledge of the fact entered? May not this act of personal knowledge on the part of the entrant be supplemented by the personal knowledge of some other person whose knowledge is in fact represented in the entry? In other words, if the element of personal knowledge can some how be adequately supplied by a second person it is material that the entrant himself did not have this personal knowledge." *Meier v Demme* § 1530. Then after discussing the matter he says "The conclusion is that when an entry is made by one person in the regular course of business, or in any oral or written report made to him by one or more persons in the regular course of business, of a transaction lying in the personal knowledge of the latter there is no objection to receiving that entry under the present exception, unless by the testimony of the former person only provided the practical convenience of producing on the stand the numerous other persons thus concerned would not be particularly case out through the probable utility of doing so." *Meier v Demme* § 1530(1).

According to clause (2) of section 32 of the Evidence Act recent book containing entries not made by nor at the dictation of a person who had personal knowledge of the truth of the facts stated if regularly kept in course of business is admissible. *Pry v Hemmenda* 1 B 610. In delivering the judgment of the Court *McNeill J* said at p 616 "But the Indian rule of evidence (Evidence Act section 2 (1) and section 32) imply requires that entries in account should in order to be relevant be regularly kept in the course of business, although it may be no doubt important to show that the person making or dictating the entries had or had not a personal knowledge of the facts stated, this is a question which according to the Indian rule of evidence affects the relevancy of the entries. But in *Jagat Pal Singh v Jyoti Singh* 25 A 113 P C a genealogical table purporting to have been made by a person since dead but which was shown to be merely an exhibit binding on him for the purposes of a former suit was held to be inadmissible in evidence, but was held to be admissible in any admissible statement by a deceased person. In *Deliverance v judgment* *Lord Robertson* at p 131 said "The other document is a genealogical table put forward by the author. It is alleged that *Ru Gurdit Singh* had died before the table was put forward in question is merely a genealogical table filed on behalf of

*Gurdal* in a claim made by him for certain village. The object of *Gurdal* in the proceeding was to make himself out to be of the elder branch of his family and the admittedly untrue. But the fatal objection to the admissibility of the document is that it is in no way brought home to *Gurdal* except as being an exhibit binding on him for the purposes of that suit. His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears the genealogical table in question might never have been seen or heard of by *Gurdal* personally but have been entirely the work of his pleader. But according to *Mr Justice Woodroffe*, the observation of the Privy Council relates to a statement under cl (1) the terms of which require 'special means of knowledge'. *Woodroffe L. 5th Ed 323*. To reject a declaration on the ground that it is not based on personal knowledge would create an inconvenience. The inconvenience is thus stated by *Trumplin J in Fielder v Collier* 13 Gra 499. 'Shall the plaintiff be compelled to go behind the books thus verified by the clerk who kept them and resort to each of the sub-agents who participated in the transaction and the trial of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment and as a part of the proper employment of the witnesses who prove them not only the best but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice, and convenience require them to be admitted. The warehousemen, wharfingers and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. To impose a different rule upon the establishment would trammel commerce and amount to a denial of justice.'

**Extrinsic proof.** Extrinsic proof must be given of the death or other disability of the declarant. *Duke v Jagdish* 90 Ind Cas 764, *Chunton v Kaitis* 41 Ind Cas 123=1 Pat L W 213, *United v Naniab* 51 C L J 68. In the case of entries in shop books and other records the entries must be properly authenticated by the proof of his handwriting. *Trumplin v Toell* 6 C A P 17. *Bradley v James*, 13 C B 522. *Doe v Haulins* 2 Q B 812. Where however the document is thirty years old, and produced from proper custody the handwriting may generally, if the writing is a private one be presumed (*vide s 90* Frs s 682). In England this rule has not been acted on in the case of declarations made in the course of duty. *Doe v Dries* 10 Q B 514. *Jaggas Miller v Heathby* 23 L J Ir 141. In the latter case the handwriting of a deceased clergyman to a register more than thirty years old was required to be proved that the declaration was made in the ordinary course of business must also be proved. *vide* section 114 *illus (f)*. *Duanla Das v Laboo Jandee* 6 M L A 88. *Woodroffe L. 5th Ed p 324*. But in *Baulnath Sahay v Nandul Midton* 29 Ind Cas 219, a division bench of the Calcutta High Court consisting of *Mr Justice Holmwood* and *Mr Justice Mitter* held it otherwise. In that case they observed 'There is nothing in section 32 clause (2), which requires any formal proof that the papers are kept as a fact in the ordinary course of business. The (Subordinate Judge) appears to have confused section 32 clause (2) with section 31 with which we have nothing to do in this case.'

**Form or mark of the Entry.** Where the statement is made in writing there is no limitation as to the mode of written expression. Any mark or sign that is interpretable as having a definite meaning will suffice. *North Baul v Abbot*, 13 Pick 417, *Wigmore* § 1751.

**Cases under clause (2).** A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person and a number of these marks there was the statement that it was the mark of one of the executants the name being given in each case. The statements were proved to have been written by a deceased professional bond writer who wrote the whole document in the ordinary course of business. The

**S. 32.** two attesting witnesses were also dead and the signature of each of them was satisfactorily proved to be in his handwriting. *Held* that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond writer was relevant under s. 32 (2) of the Evidence Act. *Haria v. Man Chaud* 11 N. L. R. 9=27 Ind. Cas. 866. In order to prove that a certain reply notice had been signed and sent by the 1st defendant, plaintiff's *Kariyasthan* called who deposed that he was told by the writer of the notice in question that he wrote it at the request of the 1st defendant. The writer was dead. It was alleged that the witness made the statement to the plaintiff's *Kariyasthan* in the ordinary course of the writer's business. *Held*, that the statement did not come under s. 32, cl. 2 of the Evidence Act. *Kolongoorath v. Kannoath*, 2 L. W. 942. (1915) M. W. N. 793.

On a trial of a prisoner charged with forging a railway receipt or bill of lading for the purpose of obtaining possession of certain goods which had been sent from Delhi to Calcutta a letter from the consignee at Delhi to his partner in Calcutta advising the despatch of the goods, was tendered in evidence under section 32 of Act I of 1872 but the Court refused to receive it, and intimated a doubt whether it fell within the instances specified in the section. *Queen v. Tarunee Charan Dey* 9 B. L. R. App. 42. In a suit on a bond the defendant, in order to support his plea of limitation, produced a certificate from the Secretary of a club at Rangoon saying that he was in the service of the club on a certain date. *Held* that the certificate was inadmissible in evidence without the writer of the certificate being produced in Court and examined as a witness. *Peter v. Mahomed Hoo Miah* 22 Ind. Cas. 651. A Revenue Surveyor's reports though admissible under section 32 (2) of the Evidence Act have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses. *Mg Po Nyeu v. Maung My*, 27 Ind. Cas. 111=8 Bur. L. T. 85. A statement made in a deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl. (2) of s. 32. *Ibdulla v. Kuny Behary* 14 C. L. J. 467. In a registered sale-deed more than thirty years old in respect of a plot of land an adjoining plot was described as the property of a particular individual. *Held*, in a suit involving question of title as to that adjoining plot, that the sale deed was admissible in evidence under section 32 (2) and also under section 13 of the Evidence Act. *Notuara v. Idan*, 18 Ind. Cas. 752=11 A. L. J. 139. A receipt stating the disputed property as one of the boundaries to an adjacent plot executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under s. 32, and not under s. 13. *Umad Shaji v. Jamat Ahmad* A. I. R. 1928 Oudh 248 but see *Ibdulla v. Rejan* 41 19 C. W. N. 468=21 Ind. Cas. 1922 Cal 251. Where the *Jama Wasf* in evidence were proved to be 45 years old. If that the writer was dead at the time they were made admissible in evidence under clause (2) of section 32. *Where* executed by a deceased person in which he gave the partition the adjacent plot in the adjacent plot as a part of his business. The court has been made 585=1. *Khater* a man are a 39. *Entr* bal. *In ex* be. *110* R. *of a* *clerk* *Cas* 521. *letter* that *been* ref.

admissible either under s 32 (2) or s 33 of the Evidence Act, if the requirements of those sections are fulfilled. *Gobinda v Duanlanath*, 20 C L J 455. Where it is proved that a village watchman has been sending weekly reports of deaths in the village, an entry in the report as to the death of a person on a particular date can be presumed to be correct and can be used as a proof of the fact of death at that time. *Bani v Zanje*, A I R 927 Nag 43=103 Ind Cis 883.

**Account Books** In a suit by a landlord under section 105, Bengal Land Revenue Act, for settlement of fair and equitable rent the tenants produced *dal-hilas* to prove that certain holdings had been held at a uniform rate of rent for more than 20 years. In order to rebut a presumption in favour of the tenants the landlords tendered in evidence certain account books from their *sheristas*. The lower Court admitted them under s 32 (2), but refused to attach any value to the entries in these account books because these books were prepared in the landlords' *sheristas* in the absence of tenants, and they were uncorroborated. Held that the fact that merely because these books were prepared in the landlords' office in the absence of the tenants and they were uncorroborated was not a sufficient ground for refusing to attach any value to the entries in those books is evidence. *Mon Mohan Ray v Hari Nath* A I R 1928 Cal 408, see also *Bimpyarabai v Balaji Sudhar*, 28 B 294=6 Bom L R 50, *Dulha Mandal v N N Grant*, 16 C L J 24=16 Ind Cas 467. *Aftaul v Faral Nath*, 16 C L J 328=17 Ind Cis 266=17 C W N 774, *Umed Ali v Khaja Habibulla* 47 C 266=56 Ind Cis 38=31 C L J 68. The fact that collection papers may be inadmissible under section 34 of the Evidence Act does not prevent them also being admissible under section 32 of the Act, if the conditions prescribed by section 32 are established. *Bhaha Sundari v Tuwa Nasya*, 6 Ind Cis 369.

**Roadcess papers** Notwithstanding the provisions of sections 21 and 32 of the Evidence Act, roadcess returns could not under section 95 of the Road Cess Act be used as evidence in favour of the person submitting them. *Hem Chandra v Kali Prasanna* 26 C 832 (838). But section 95 of the Bengal Road Cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s 21 of the Evidence Act, and a roadcess return may be admissible in evidence against persons other than the one who has made the return. *Challo Singh v Jhara Singh*, 39 C 995, see also *Nusserian v Gource Sani* 22 W R 192, *Hem Chandra v Kali Prasanna*, 30 C 1033=30 I A 177. The roadcess return filed by a person in his capacity as a temporary lessee of a certain property is admissible in evidence in favour of the superior landlord, in as much as he could not be regarded as a person by or on behalf of whom the return was filed. *Seudeo v Ajodhya* 39 C 1005. Roadcess returns are admissible only against the maker. *Suarnamoyi v Soumendra*, 42 C L J 14=89 Ind Cis 747=A I R 1925 Cal 1189.

**Deposition of Patwari** A deposition made by a *Patwari* of a village in the course of the enquiry relating to the Revenue Settlement under the Bengal Regulation does not come under the provisions of section 32 of the Evidence Act and is consequently inadmissible in evidence. *Deo Narayan v Durla Prasad*, 9 Pat L T 679=109 Ind Cis 136=A I R 1928 Pat 429.

### CLAUSE III

**Scope of clause (3)** This clause makes declarations against interest admissible in evidence. Illustrations (e) and (f) apply to this clause. This section makes three classes of declarations against interest admissible in evidence, namely 1st where they affect the declarant's pecuniary interest, 2ndly his proprietary interest 3rdly, his personal liberty or property by tending on charging him with a crime, or to subject him to payment of damages. *Nori E* 179. Under this clause it is the statement and not the document containing the statement which must be against the proprietary interest of the person making it. *Aaruppanna v Rangasuami*, 107 Ind Cas 293=A I R 1923 Mad 105. see also *Re Paddappanai*, (1910) M W N 668=8 Ind Cis 268=9 M L T 91, *Penkataraja v Narasayya* (1914) M W N 779=26 Ind Cis 747. Statement against interest is admissible. *Kalyan Lal v Jagannath*, A I R 1925 All 130. The first part of sub-section (3) of section 32 enacts the well known principle

**S. 32.** of the English law of Evidence established in *Hughes v. Hughes* 10 Eas<sup>t</sup> 1<sup>st</sup>. Under this section documents are admissible against a party, if they are admissible against the interest of the person through whom he claims. *Pratt v. Khagendra*, 31 C. 871 P. C. = 9 C. W. N. 74. Under this clause the admissibility of statements against interest made by deceased persons is—  
 (1) the deceased must have had personal knowledge of the fact he made;  
 (2) the facts stated should have been to the immediate prejudice of the deceased;  
 (3) the statement must have been, to the knowledge of the deceased, contrary to his interest; and (4) the interest must be either pecuniary or proprietary.  
*Ramanathan v. Munuguppa*, 33 Ind. C. 969 = 3 L. W. 216 = (1916) I. M. N. 208.

**English law.** According to English law declaration against interest statements made by deceased persons adverse to their pecuniary or proprietary interest, and the guarantee of their credibility consists in the fact that they are thus opposed to the declarant's interest, since it is the general experience of mankind that statements so made are likely to be true. *Middleton v. Miller*, 10 B. & C. 317 (327), *Gleadon v. Allen*, (1833) 1 C. & M. 410 (1<sup>st</sup>), *Bermingham* (1861) 31 L. J. M. C. 63, 67, *Beatty v. Atkinson*, (1849) 13 D. 297. But declarations against interest in other sense is for instance admission of liability to criminal prosecution do not come within the rule. *Sussex Peerage Case* 11 Cl. & Fin. 104, 113, 114. In *Gleadon v. Allen* 1 C. & M. 410 at 424, *Bayley J.* states the rule as follows: "An entry by a man who is dead will be evidence as to strangers, if it relates to a fact peculiarly within his knowledge if he had no interest in misrepresenting it, or if the entry charges him with the receipt of money for a third person, or imports it as a debt which would otherwise be due to him is paid. In *Queen v. Lyster* (1849) 1 B. 341 *Hayes J.* observed: 'Having regard to the great change that has taken place in recent times, been made in admitting the evidence of the interested witness when alive it would be most objectionable to lay down any narrow rule upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subject to which they refer and where the Courts are frequently obliged to supply the want of evidence by presumption.'

In *Taylor v. Williams* 5 Ch. D. 605 = 45 L. J. Ch. 793 *J. Ch.* said: "There is no doubt an established rule in the Courts of this country that a declaration against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of its being against interest? I adopt the view of *Baron Parke* in the case of *Jeg v. Lower Heyford* (1841) 1 C. 333 that it must be *prima facie* against his interest that is to say the meaning of the entry standing alone must be against the man who made it. In *Massey v. Allen*, 13 Ch. D. 558 *J. Ch.* introduced a qualification to the effect that in order to be admissible as a declaration against interest the entry must relate to a fact which under no circumstances could be for advantage or benefit who made it. In *Ex parte Edwards*, 14 Q. B. D. 415 the Court of Appeal remarked that the statement must be in evidence must be against the interest of the person at the time of making it and 'not an admission which may or may not turn out at some subsequent time to have been against his interest. In *Fuelers v. Ollery* (1912) 2 K. B. 317 = 81 L. J. K. B. 603 *Lord Justice Moulton* said: "The qualification that it must be shown that the statement was to the knowledge of the deceased contrary to his interest. In this state of authority the question came up for consideration before the Court of Appeal in *Harb v. Harb* (1913) 2 Q. B. 341. The statement which was sought to be put related to an agreement of partnership and a promise made by the deceased to marry the child, who claimed compensation under the Workmen's Compensation Act, 1906, as a dependant on the deceased. *Lord Justice Moulton* after a detailed observation that as between the facts of *Harb v. Harb* and *Jeg v. Lower Heyford* 2 Q. B. 341 = 81 L. J. Q. B. 174 that the statement must be made could be made available for the person himself and that of *Jeg v. Lower Heyford* is sufficient that the statement is *prima facie* against the interest of the person

saying it, he is inclined to the former view 'if there is any real difference between them,' proceeds to lay down categorically the tests of admissibility of statements against interest. According to the learned *Lord Justice*, (a) the deceased must have had personal knowledge of the facts he was stating, (b) the statement should have been to the deceased's immediate prejudice, (c) the statement must have been to the knowledge of the deceased, contrary to his interest, and (d) the interest must be either pecuniary or proprietary. The case went up to the House of Lords. *Lords Loreburn* and *Moulton* apparently accepted the statement of the law as laid down by the Court of Appeal, but *Lord Shaw* was not prepared to agree with it. See *Floyd v Powell & Son's Steam Coal Co. Ltd.* (1914) A.C. 733 = 83 I.J.K.B. 1051. The other learned Lords made no comment on this point. The statement was held admissible by the whole House on another ground. *Ramathin v Munuguppa*, 33 Ind. Cas. 969.

In a probate suit it was alleged that the testatrix destroyed her will at the time when she was not of sound mind, memory or understanding. Under the will which had been destroyed her husband took a life interest in her estate. Whereas under an ante-nuptial settlement he was, in the event that had happened, entitled absolutely to her estate. A statement by the husband, who had died before the suit was brought that he did not think the testatrix was of sound mind when she destroyed her will was admissible in evidence as being in dispraise of his own title by limiting it to a life estate. *Taule v Miles* 27 I.L.R. 202.

**Difference between English and Indian Law.** According to English law, only declarations oral or written, of deceased persons made while the declarants were in a position to know of the matters stated, and which are against pecuniary or proprietary interest, are admissible in evidence. *Per Bayley J in Gleadon v. Wain* 1 C. & M. 423. The provision rendering relevant any statement which would have exposed a man to criminal prosecution is a departure from English law. So according to this clause a declaration which would subject the declarant to a prosecution of civil action is also admissible. This seems to be a departure from the rule laid down in *Sussex Peerage Case*, 11 C. & F. 103. In that case the question was whether A was lawfully married to B. A statement by a deceased clergyman that he performed the marriage under circumstances which would render him liable to a criminal prosecution was not deemed to be relevant as a statement against interest. *Steph Dig. Ev. Art. 28. Lord Lyndhurst, Chief Justice*, in declaring his opinion that this evidence should be rejected observed:

It is not true that the declarations of deceased persons are in all circumstances receivable in evidence when in some way or other they might injuriously affect the interest of the party making them. Nor is it true that because while living a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding propositions. *Lord Trougham* in that case added: 'To say if a man should confess a felony for which he would be liable to prosecution, that, therefore, the instant the grave closes over him all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced.' *Vort. 1. 184*. So 'the interest involved must according to the English Law be one of a pecuniary or proprietary nature, no other interest will suffice. But the Indian Law as laid down in sub-section (2) of section 32 of the Evidence Act extends the scope of this exception and puts a penal interest on the same footing as a pecuniary or proprietary interest. *Per Shadi Lal C. J. in Mahomed v. Emperor* A.I.R. 1926 I.L.R. 1189 Ind. Cas. 252 (258). So a statement which would have exposed the declarant to a criminal prosecution or to a suit for damages would be admissible as a piece of evidence in any proceeding in which such evidence is relevant to the issue or issues being tried in such proceeding. *Per Ffonde J. in Mohammad v. Emperor* 89 Ind. Cas. 252 (254).

**Principle.** The exception presupposes like most of the others first a necessity for resorting to hearsay, i.e. the death of the declarant, or some other condition rendering him unavailable for testimony in Court, and secondly, a circumstantial guarantee of truthworthiness, in this instance, the circumstance that the

**S 32.** fact stated being against the declarant's interest, is not likely to have been stated untruthfully *Higmore* § 1455

**Necessity principle** The Necessity principle, as here applied, signifies the impossibility of obtaining other evidence from the same source, the declarant being unavailable in person on the stand. Whenever the witness is practically unavailable, his statement should be received. Death is universally considered to be sufficient *Manley v Curtis* 1 Price 229, *Phillips v Cole*, 10 4 & L 106, *Barrows v White* 4 B & C 328, *Spargo v Brown*, 9 B & C 46. In *Fitch v Chapman* 10 Conn 11 *Williams J* said 'The cases where such evidence is admitted seem to proceed generally upon the principle that by the decease of the person better evidence cannot be had.' But the principle of necessity is broad enough to assimilate other causes. Illness and insanity should be equally sufficient to admit the statement, as well as absence from jurisdiction *Higmore* § 1456. The circumstances under which such evidence is receivable is stated in this section. But in England physical incapacity is not considered sufficient to admit such declarations. In *Harrison v Blake* 3 Camp 458, the declarant had suffered an apoplectic fit and was declared by his physician to be in extremis. The question was whether the declaration of such a person would be admitted. In rejecting the evidence *Ellenborough J* said "No case has gone so far as to admit such evidence and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of rules of evidence were permitted there would be very sudden indisposition and recovery. Under this section of the Evidence Act, a statement against interest is admissible when the declarant is absent from the jurisdiction and his attendance could not be procured without an amount of delay or expense, which under the circumstances appears to be unreasonable. *Asiatic Steam N Co v Bengal Coal Co*, 7 C 751

**Circumstantial Guarantee** The basis of this exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect and is thus sufficiently sanctioned, though oath and cross examination are wanting. In *Smith v Blakeley* L R 2 Q B 326, *Blackburn J* "When the entries are against the pecuniary interest of the person making them, and never could be made without a probability of their truth that such statements have been admitted after the death of the person making them. Similarly in *Labor v Labor*, 4 L R Ire 681 *Fitzgibbon C J* said "The interest against which the statement appears to be made (is required) in order to supply that sanction which after the death of the party, is accepted as a substitute for an oath. In *Meier v Admr v Meier*, 14 Buh 244, *Gibson C J* said "Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it is generally true, and because it is so the law has deemed it safe to admit evidence of such declaration. The reason for the exception to the rule against second hand evidence is that a man is unlikely to make a false statement against his own interest. Self interest is supposed to be the best guarantee of truth. But this reason does not wholly apply when a person while making a declaration prejudicial to his own interest states something which is injurious to other persons. *Cessante ratione cessat effectus* *Per Shadufal C J* in *Mahommed v Emperor* A I R 1920 Lah 141. *Ind Cis* 232. In *Tucker v Oldbury Urban District Council*, (1912) 2 K R 311, 81 L J K B 668 *Lord Justice Moulton* said "Such declarations were admitted as evidence in our jurisprudence on the ground that declarations made by persons against their own interest are extremely unlikely to be false.

**Origin of the rule** In *Union Bunbury* 16 (1719) rentals or accounts of money received by the steward were allowed at Winchester and Dorchester Assizes. This case was approved in *Harpur v Brool*, 1 Woolston 3 Lectures 333 cited in *Thayer Case* 175. There it is said "On a similar principle it appears rentals are admitted in evidence, because the bailiff or receiver charges himself with the specific sums. In *For d Hunt v Buchanan*, 7 L R 279, (1866) *Lord Ellenborough* observed "The contents of the 1719

adverse to the title of the person who had possession of it, it diminished his interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but certainly, as the contents show, by one who had an intimate knowledge of it, and it was in some degree recognized as authentic by the then owner of the estate, the tenant for life, by this endorsement written upon it. When any part of an entry against interest is admissible in evidence, the whole of it is admissible, not merely the words which tell immediately against the interest of the deceased. For instance if the deceased gave a receipt for money paid to him in discharge of a debt, the whole receipt can be read to the jury not merely the word "paid" and the amount. *Ponel Li* 307. The leading case on the subject is *Higham v Rutguy*, 10 East 109. There the question was whether one William Fowden Junior was born before or after the 16th April 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the following entries from the day book and ledger of a man mid wife who had attended the mother of William Fowden junior at his birth and was since deceased —

*Day Book Entries*

' 22nd April, 1768  
 38\* Richard Follows's wife Bramhall Filius circa hor 9 mututu  
 cum foreipe, etc  
 paid "  
 Then followed in the same page the entry in question without any  
 intervening date —  
 Wm Fowden junr s † wife, 79 ‡  
 Filius circa hor 3 post merid nat etc

*Ledger Entry*

"Wm Fowden junr, 1768  
 April 22 Filius natus, etc

	£	s	d
Wife	1	6	1
26th Hustus purg	0	15	0
	2	1	1

Pd 25th Oct, 1768

These entries were tendered in evidence to show the precise day of the birth of Wm Fowden, Junr. The evidence was objected to. But the jury found on this evidence that Wm Fowden Junr was not born on the 2nd but on the 22nd April 1768. *Lord Ellenborough C. J.* in delivering the judgment said "I should be extremely sorry if any thing fell from the Court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty and property, but in declaring our opinion upon inadmissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences nor go beyond the limits of the cases which have been often recognized beginning with that of *Harren v Greenville* 2 Strange, 1128 (1740). The question is whether the books of a man mid wife, attending upon a woman at the time of her delivery and making charges for such his attendance, which he thereby acknowledges to have been paid are evidence of the time of the birth of the son as noted in those entries?"

\* The figure 38 referred to the ledger

† This was the designation at the time of the father of Wm Fowden, Junr in question

‡ These figures referred to the ledger, the entry in which follows



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I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted, namely, that the entry made was in prejudice of the party making it. In the case of the receiver he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed and medicines furnished to his wife, and the period of her delivery is the time for which the former charge is made, the date of which is the 22nd of April when it appears by other evidence, that the man and wife were in fact attending at the house of Wm Lowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied. It is idle to say that the word 'paid' only shall be admitted in evidence, without the context, which explains to what it refers, we must, therefore look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory. The discharge in the book

in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. There fore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it if it were not true but he had an interest that he had not to discharge a claim, which it appears from the other evidence

beginning with *Warren v Greenille* *supra*, down to *Roe v Raulings* 7 Eas 279, is that if a person have a peculiar means of knowing a fact, and make a declaration of that fact which is against his interest it is clearly evidence of his death if he could have been examined to it in his life time. Per Bayley J in *Ibid*. But in *Gleadow v Atkin*, Cr & M 410 at 423, Bayley J said the expression reported to have been used by one in that case (*Higham v Ridgway*) is if he could have been examined to it in his life time. That qualification is not introduced in any other case, but the rule is invariably laid down without any such qualification and I have great doubts whether I ever used the expression. If I did *Scoile v Lord Barrington* and *Bosworth v Cotchett* decided in the House of Lords are against it. *Thayer's Case* Eas 483.

**Statements against pecuniary interest** 'Statement of a fact against pecuniary interest says Prof Wigmore "furnishes the greatest number of illustrations, and difficulties as well." Wigmore § 1462. A statement is against pecuniary interest when its tendency is to take away or lessen the pecuniary value of property of the person making the declaration or impose upon him pecuniary liability of any kind. *Wheleley*, Eas 318. So also a declaration is against the pecuniary interest of the declarant who makes it whenever it has the effect of charging him with a pecuniary liability to another, or discharging some other person upon whom he would otherwise have a claim. *Doe v Robson*, 15 Eas 32, *Davis v Lloyd* 1 C & K 275, *Wills* Eas 184. Though the statement may include verbal or written ones, yet it is more frequently exemplified in documentary evidence, and particularly in books of account. Where there are books of collectors of taxes, stewards, bailiffs or receivers subject to the inspection of others and in which the first entry is generally of money received charging the party making it, they are doubtless, within the principle of this rule. *Barry v Blandford* 4 T R 511, *Gross v Watlington* 3 Brod & Bing 132, *Middleton v Melton* 1 B & C 317, *Stead v Heaton* 4 T R 669, *Short v Lee* 2 Jac & W 461, *Wheleley v George* 8 B & C 556, *Dean v Caldercott* 7 Bing 433, *Mirley v Fort* 3 Bing N C 408, *Wynne v Pyrah* 4 B & Ald 376, *De Rutten v Fort* 1 Al & Pl 53, *Plaxton v Dae* 10 B & C 17. But it has been extended further to include entries in private books also, though returned within the custody of their owner their liability to be produced on notice, in trials deemed security against fraud and the entry not being admissible unless the party making it with the receipt of money on account of a debt or acknowledges the payment of money due to himself in either of which cases it would be evidence against him and therefore is considered as sufficient against his interest to bring it within this exception. *Greenill* Eas 1 A. *Wheleley v Greenille* 2 Str 1029, *Higham v Ridgway* 10 East 109, *Mirley* 10

*Melton*, 10 B & C 317 But the entry of a mere memorandum of an agreement is not sufficient *Greenl Et* § 150 So where the settlement of a pauper was attempted to be proved by showing a contract of hiring and service, the books of his deceased master, containing minutes of his contracts with his servants entered at the time of contracting with them, and of subsequent payments of their wages, were held inadmissible, for the entries were not made against the writer's interest, for he would not be liable unless the service were performed, nor were they made in the course of his duty or employment *R v Worth* 4 Q B 132 In general, the interest or burden involved in the fact stated must be a positive one and of such importance as would naturally be present to the mind of the declarant *Greenl Et* § 150, see also *Smith v Blakey*, L R 2 Q B 326 A given fact may or may not be against interest according to the attendant circumstances, for example, that one is a partner may or may not be against his interest according to the state of the firm's assets *Raines v Raines*, 30 Ala 428, *Humes v O'Bryan*, 74 Ala 428 In the last named case A brought a suit against X and Y as partners Y having died, the suit was pressed against X alone X denied his partnership with Y and to prove his case offered declarations made by Y to the effect that he (X) was not a partner It appeared that the business in which it was claimed X was a partner was, at the time Y made these declarations, insolvent The Court held that this fact made the declaration against interest, within the exception, saying 'This fact, it must be noticed is of vital importance, is affecting the question of interest In the absence of the fact of insolvency, it is manifest that the converse proposition that Humes (X) was a partner of the declarant would be a declaration against his interest This is so because, if true it would entitle Humes to a half interest in the partnership assets' The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts and, if true to this extent doubled the ultimate amount of Glover's (Y's) liability So it is clear that whether a statement is against interest or not depends upon circumstances A statement by Y that X is not a partner is not against the interest of Y when the firm is solvent, but it is so when the firm is insolvent

A deed whereby a mortgagor mortgaged his life interest in real estate under the Will of a person therein named is admissible after the mortgagor's death to show that such a Will existed as the deed amounted to a declaration by the mortgagor against his interest as limiting his estate to an estate for life under a particular Will *Sly v Dredge* 46 L J P 63 A declaration of F deceased that her husband made a Will, and that he thereby gave her a life interest in his property and legacies to others amounting to £8,000 or £9,000 was admitted in evidence as being a declaration against pecuniary or proprietary interest made by a deceased person on the ground that F would if her husband had died intestate have been entitled absolutely to a moiety of a certain sum mentioned in a marriage settlement *Hood v Russell* 29 L R Ir 91 Upon the principle of written declarations being admissible, where they are against the pecuniary interest of a person making them, the accounts of a deceased trustee, containing acknowledgments of money received by him on behalf of his *cestui que trust* and for which he was liable held admissible against the *cestui que trust* *Bright v Legerton* 29 L J Ch 832 In an action by an executor for a debt due to the estate a parol statement by the testator against his pecuniary interest with reference to such debt is admissible *Watson v Sandford* 40 L T 39 Declarations made by a testator are evidence against a person claiming in the character of his administrator *Smith v Smith* 7 Cir & P 401 In an action of trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff It appeared that the watch had formerly been the property of the father of the plaintiff and the defendant who were brothers The defendant proved in evidence letters of administration of his father's effects, which had been granted to him Held that the plaintiff, in answer to this evidence was entitled to give evidence of conversations in which the deceased had stated that he had given the watch to the plaintiff *Smith v Smith* 3 Bing N S 29 In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his

**S 32.** interest, it must have been actually against his interest at the time when it was made, it is not sufficient that it might possibly turn out afterwards to have been against his interest *Eduards, Ex parte*, 14 B D 415

**Against Proprietary interest** 'By declaration against proprietary interest we mean statements made by a party while in possession of an estate, a estate of a more limited interest in the land, and in disparagement of some higher title to it. These declarations are evidence for or against stranger. They have been received both as to the tenure and extent of the property, and the landlord under whom it was held without being confined to the extent of the interest of the party in possession, though they are more generally offered with reference to the title or interest in the property. The principle on which the declarations are received lies in the presumption of absolute ownership arising from possession. When a party in possession of land admits that he holds a less estate than a fee simple as for instance, that he is tenant in tail, for life for a term of years, or at will, he manifestly cuts down his own interest in the land, he cuts down his own title, and it is not likely that a man would do this if he really had a larger interest than he claimed or stated." *Nort* Lr 180, see also *Wills* Ex 2nd E 192, *Peaceable v Watson* 4 Taunt 16, *R v Birmingham*, 31 L J M C 61, *R v Exeter*, (1869) L R 4 B 341. In *R v Birmingham*, *Blackburn* J said 'It is now well settled that a statement against interest by a deceased person is, with certain limitations, admissible evidence in proceedings between strangers. There are numerous cases which show that where a person is in possession of real property, which possession is *prima facie* evidence of a tenancy *in fee*, any statement that he makes to cut down that interest is admissible in evidence after his decease, as being a statement against interest.' Similarly in the *Baron Bode's Case*, 8 Q B 208 (244) the declaration of the deceased father of the claimant, who had been in the possession of the property that he only occupied and managed it for his son was held admissible as being against the interest of the person making it. A declaration which shows that the declarant has no interest in the land whatever is also admissible in evidence under this clause *Grey v Redman*, 1 Q B D 19. This is based on the well known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof *in fee simple*. *Ibid*, see *Wills* Ex 193 *Webb v Winnwood*, 7 T R 397. The rule therefore is not applicable where the declaration simply relates to the limit of the land occupied by the declarant since there is nothing to show that it is more against his interest to deny his possession of one close than it is to assert his possession of another. *Crease v Barrett*, (1835) 1 C M & R 919 931, *Wills* Ex 17. 'It is difficult to see on the other hand,' says Mr Wills "any object in the principle to treating declarations by a deceased occupier of land which admit the existence of an easement over it as being within the rule, since although there is no presumption of law that land is held free from easements the admission of their existence might well be considered a statement against interest. It has however been decided otherwise in several cases." *Wills* Ex 2nd E 11. Thus where a question of public way was in issue the declaration of a deceased occupier of land made whilst planting a tree stating that he planted it to the boundary of road is not evidence of public right for it is not a statement of general reputation but of a particular fact. *R v Bliss* 7 Add & 1 of *Scholes v Chadwell* 2 Moo & Rob 507. As errors that one's estate is a freehold and not a freehold or that one's possession is merely as a tenant in fee for another are admissible. *Waller v Broadstorf* 1 F P 4, *Taur*, *Richard* 51 sp 1 *Doe v Jones* 1 Camp 367, *Peaceable v Watson* 4 Taunt 1, *Carne v Nicoll* 1 Bing N C 130. *Doe v Longfield*, 16 M & W 1. A declaration by the person in possession that his interest was less than a fee for his own life only would be primary evidence that it ceased to exist at death. *Dodd Welsh v Longfield*, 16 M & W 497. To make a declaration by a proprietary interest in lands evidence after the death of the declarant he must have been at the time in actual possession. *La Touche v Hutton* 1 R 1. A declaration or a written entry by a deceased person when occupier of land that he was tenant at so much rent, and had paid it, is admissible as a declaration against proprietary interest, to prove the fact of the payment as a declaration

the tenancy, *Rex v Exeter Guardians*, 10 B & S 433. Declarations of a deceased person claiming a limited interest under a particular Will of property of which he was in possession, are admissible to prove the fact that the Will had a legal existence, and certain persons were named executors therein. *Sly v Dedge*, 16 L J P 63. On an issue as to the right of L to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub-receiver, due from persons (of whom the sub-receiver was one), for fixing a net in the fishery, are evidence in support of L's right. *Perceval v Vanson* 7 Ex 1=21 L J Ex 1. Declarations made by persons in disparagement of title to land are admissible in evidence under section 32 (3) of the Evidence Act, if such declarations were made whilst the declarant was in actual possession of the property. *Ramdas v Jydhundas*, 63 Ind Cas 685.

**Criminal prosecution and suit for damages** It has already been stated that according to English law, a statement against interest in order to be admissible must be against "pecuniary" or "proprietary interest." It is not sufficient, for instance, that the statement was made under circumstances which show that the person making it would be liable to criminal prosecution (*Sussex Peerage Case*, 11 C & L 108), although that would seem to be a case in which he would be liable to a pecuniary penalty, by way of fine or to something admittedly worse, i.e., imprisonment. *Cockle Cas Lr* 198. But the *Sussex Peerage Case*, which was decided in 1844, was neither strongly argued nor did the Judges consider the precedents, so a hasty step was taken and an arbitrary limit was put upon the rule of accepting declarations against interest. Thenceforward this rule was accepted in England. *Dunn v Lloyd*, 1 C & K. 276, *Papendick v Brulquater*, 5 E & B 180. The *Sussex Peerage Case* plainly introduced a novelty even at the time of its inception. Before that such statements were admissible. In *Hulet's Trial* 5 How St Tr 1183, 1192, which was decided in 1660 the accused was charged as being the executioner of King Charles, it was disputed—and has never been clearly known—whether Gregory Brandon, the common hangman officiated on that occasion the executioner being marked, the accused Hulet tried to prove that Brandon did the deed. Witness said "When my Lord Capell Duke of Hamilton and the Earl of Holland, were beheaded in palace yard, in Westminster, my Lord Capell asked the common hangman, said he, 'Did you cut off my master's head?' 'Yes' saith he. 'Where is the instrument that did it?' He then brought the axe and kissed it, and gave him five pieces of gold. I heard him say Sirrah were not thou afraid?' Saith the hangman, 'They made me cut it off, and I had thirty pounds for my puns.' Similarly in *Standen v Standen Peeke* 32, where the marriage register entry recited the publication of bans the clergyman's declaration that he married without bans was received. See also *Pouell v Harper*, 5 C & P 590. *Wigmore* § 1476. So it is plain enough that this limitation, besides being a fairly modern novelty, is inconsistent with the broad language originally employed in stating the reason and principle of the present exception to the Hearsay rule. "Furthermore, it cannot be justified on grounds of policy. The only plausible reason of policy that has ever been advanced for such a limitation is the possibility of procuring fabricated testimony to such an admission if oral. This is the ancient rusty weapon that has always been drawn to oppose any reform in the rules of Evidence, viz the argument of danger of abuse. This would be a good argument against admitting any witnesses at all for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by them lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent. The only practical consequences of this unreasonable limitation are shocking to the sense of justice, for in its commonest application it requires in a criminal trial the rejection of a confession, however well authenticated, of a person deceased or inane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent." *Wigmore* § 1477. In the United States also the English rule is generally followed. But nevertheless some Judges expressed dissent against this "barbarous doctrine." *Ibid*. In *Donnelly v United States* 228 U S 243 *Holmes J* dissenting said "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in

**S. 32.** error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one out side of a Court of Justice believe that Donnelly did not commit the crime. The rules of Evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this Court against the admissibility of such a confession, the English cases since the separation of the two countries do not bind us, the exception to the hearsay rule in the case of declarations against interest is well known, no other statement is so much against interest as a confession of murder. It is far more calculated to convince than dying declarations, which would be let in to hang a man, and when we surround the accused with so many safe guards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length."

So also under the Indian Evidence Act, the third case in which declaration against interest are receivable under this clause, that of its not being against either pecuniary or proprietary interest, but such as to subject the declarant to a prosecution or civil action, appears to depart from the law laid down in *Sorez Peerage Case supra* (Vide illustration f). But it may well be thought that a declaration by which a man makes himself liable to a criminal prosecution, or payment of damages, affords as good a guarantee for its truthfulness as one simply against his pecuniary or proprietary interest. *Nort E. 184*. But in order to make such statement admissible in evidence, the fact stated in the statement must expose him, to a criminal prosecution or to a suit for damages at the time it was made. *Stoke's Anglo Ind Code Vol II 874*, see also *Nicholas v. Aspinor*, 21 C 216.

Where an accomplice incriminated himself and the appellant by a statement to the police detailing the incidents of the crime, and he subsequently died it was contended that the statement of the accomplice was inadmissible by reason of his death. This statement was admitted by the trial Judge under section 32 (3) of the Evidence Act as one made by a deceased person. This admission was confirmed by the High Court. *Uma v. Emperor* 20 W N 5=52 I A 101=70 P L R 129=87 Ind Cas 844 P C=46 M L J 61 P C. On a trial for forgery, one of the accused who has made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under section 32 (3) of the Evidence Act. Held that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made. *Emperor v. Keshari*, 20 Bom. L R 248. A woman stated that she had witnessed a murder to her paramour Doolal and to the Police in the course of an investigation ten days after the act. She then died before the inquiry. Doolal deposed to the statement of his mistress before the committing Magistrate and then disappeared. Held that both the statements of the deceased were relevant under s. 32 (3) of the Evidence Act for she having witnessed an offence and not having informed the nearest police officer or Magistrate exposed herself to a criminal prosecution. *Mt. Doolal v. Emperor* 16 N L R 30=56 Ind Cas 532=21 Cr L J 486.

**Statements of sundry facts against interest.** There are many facts which in their ultimate effect be against the proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character. These facts, however may never the less be facts so decidedly against interest that no one would be inclined falsely to concede their existence. If so on the general principle they should therefore be admitted. No more precise rule can be formulated except in the suggestion that the interest injured or the burden imposed by the fact stated should be one so palpable and positive that it would naturally have been present in the declarant's mind. *Wigmore § 1401*. In *Smith v. Barclay* L R 2 Q B 326, a letter by a clerk notifying the employer of the arrival of B's draft with three huge cases at the office and going on to state the terms of the contract with B was rejected. *Barclay v. Smith* said there is no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make him liable

in case of their being lost is an interest of too remote a nature to make the statement admissible in evidence.' In *Shy v Shy* L R 2 P D 91, declarations by one running a loan that his estate was a life interest under a Will were admitted to show the existence of the Will. In *Flood v Russel* 29 L R 1re 96 declaration by a wife as to the existence of a Will by her husband by which she profited less than by his intestacy was admitted. In *Lloyd v Powell Duffryn* (1911) A C 733, the question was whether a workman's compensation-claimant was a defendant, the claimant being concededly an illegitimate child, the deceased's statements admitting his paternity, held admissible as conduct. *Earl Loreburn L C* also admitted the statement as a statement of a fact constituting a legal duty to support the child and therefore *semble* a fact against interest. *Wigmore* § 1461. In *P v North* 4 Q B 134 an entry of a hiring at a certain wages in the deceased master's private book with a memorandum of payment was held inadmissible in evidence. The reason for the rejection is thus given by *Lord Denman C J*. The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on the proof that the services referred to had been performed and whether on dispute, a jury would have found him liable for the sum entered, or more or less, we cannot say. From the above statement of law it is clear that the liability involved in the fact stated must not be a mere conditional or contingent one. 'But this limitation' says *Prof Wigmore*, 'cannot be supported, and would, if consistently carried out, practically nullify the exception in this respect. The liability to pay conditionally is none the less a liability, moreover every contract is subject to some conditions imposed by implication of law. The incurring of a contract liability of any sort is on principle a fact against interest.' *Wigmore* § 1461.

**Statement, meaning of.** 'It must be remembered that it is not merely the statement that must be against the interest, but the fact stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question whether the statement of the fact could create a liability is beside the mark.' *Wigmore* § 1462.

**Preponderance of interest—Credit and debit side—No motive to misrepresent.** In some cases it has been stated on the analogy of other Hearsay exceptions that there must be no motive to misrepresent and this has been put as an additional requirement. *Gleason v Allen*, 3 Tyrw 301, *Miles v Lohr* 3 Bing N C 408. But" says *Prof Wigmore* 'there is no such additional requirement. The real object of this mode of statement is to furnish a test for a not uncommon situation,—the situation in which along with the diserving interest, there is also a more or less palpable interest to be served by the fact. The real question is, shall we attempt to strike a balance between the two opposing interests and admit the statement only if on the whole the diserving interest preponderates in probable influence? Or shall we regard the diserving interest as sufficient to admit, and leave the other merely to affect the credit of the statement? The former alternative has by the Courts been generally followed.' *Wigmore* § 1464, *Short v Lee* 2 Jre & W 477. *Clair v Whitmot* 4 Y & C 54. But in *Taylor v Witham* L R 3 Ch D 605 *Jessel MR* acted in accordance with the latter alternative. In that case he said "It is no doubt, an established rule in the Courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of its being against his interest? I adopt the view of *Mr Baron Parke* in the case of *Reg v Inhabitants of Louër Heyford*, 2 Sm L C 7th Ed p 333, that it must be *prima facie* against his interest that is to say the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *alibi* that the man had a particular reason for making it and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it and that though apparently against his interest, yet it was for it but that is matter for subsequent consideration when you estimate the value of the testimony.' See also *Runes Adm v Runes Creditors* 30 Ala

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428 "A common illustration of this question" says *Prof Wigmore* "is the entry of a merchant's credit entry of payment received (thus against his interest) which at the same stroke has included (thus in favour of his interest) the debit entry of this claim leading to the payment, and conversely an agent's debit and credit account in which the receipts creating liability are on the whole equalled or exceeded by the payments or credits in his favour. When in the former case, the entry of payment received, or, in the latter case, of an entry creating liability, is sought to be used, the argument has been made that since taking both sides of the account together, the writer is not left with any liability and perhaps appears to have a claim for a balance, the matter cannot be said to be against his interest. This argument, accepted at *Nisb Pains in De v Touels*, 1 Moo & R 261, has since been repudiated. The answer to it is that the entrant's interest in making the favouring items does not really affect, as a counter motive, his interest against the individual charging items, the entry of the latter, taken by themselves are to be trusted." *Wigmore* § 1464. Similar objections were advanced in *Roue v Brenton*, 3 M & Ry 266, by *Mr Brougham*. But *Littledale J* in rejecting the objection said "A man is not likely to charge himself for the purpose of getting a discharge." So accounts are evidence, though the writer upon the whole discharges himself. *Per Coleridge J* in *R v Worth*, 4 Q B 134, see also *Williams v Greaves*, 8 C & P 302.

**Statement admissible for all facts contained in it—Separate entries.** Since the principle is that the statement is made under circumstances fairly guaranteeing the declarant's sincerity and accuracy it is obvious that the statement guarantees the correctness of whatever he may say while under that influence. In other words the statement may be accepted not merely as to the specific fact against interest but also as to every fact contained in the same statement. *Wigmore* § 1465. The leading case on this subject is *Higham v Radgway*, 10 East 109 (*Vide supra*) 41. For the limits which it thus becomes necessary to set, these must be largely a matter of judgment in each case. For the phrasing of a rough general test, different language has been used by different Judges. In *Percival v Hanson*, 7 Exch 1 *Pollock, C B* said "If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement." In *R v Er*, L R 4 Q B 344, *Hayes J* said "The principle that a declaration against interest was evidence as to all that formed an essential part of it was since settled." See also *Stead v Heaton*, 4 T R 690, *Doe v Cartwright* Ry & M 62, *Davies v Humphreys*, 6 M & W 153, *R v Birmingham* 1 R & M 763. In *Smith v Blaley* L R 2 Q B 326, a very wide test is laid down by *Blackburn J*, where he said "It is admissible as evidence not merely of the precise fact which is against interest, but of all matters involved in or known with the statement." In *Doe v Bevis*, 7 C B 504 the accounts of the store contained on one side items charging himself with the receipt of money and on the other side items discharging him by showing how the money received had been disbursed. The discharging entries were not admitted. *Coleridge J* said "The revee has no interest in speaking falsely when he charges himself, but it is obviously his interest to falsify the account quoted the discharging part of it. Where the charging part of the accounts refers to the discharging part it may be necessary to read the whole. So where the latter contains anything explanatory of the former that may render the whole admissible. But that is not the case here." In the same case *Wills J* said "It may be that a person in charging himself, makes a declaration which is intelligible without looking at the other side of the account, and in that case recourse must necessarily be had to both sides. But the items of discharge in the accounts in question which were not referred to in or necessary to explain the items of charge which were admitted and read were properly excluded. The presumption that those entries are false is at least as strong as the presumption that the others are true." *Cresswell J* said "If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part it may be evidence." See also *Marks v Lohr* 1 Bing N C 408, *Heaton* 4 T R 690, *Knight v Waterford* 11 C & J R 294, *James v Emerson* 10 Q B 326, *Per Lord Lyndhurst* in *Bull v Wright* cited 11 R 114 115. *Wheeler v Carole*, 17 Ir L R N S 792, *Knight v Wright*.

*Waterford*, 1 Y & C Ex R 283 291 293, *The Surety*, 82 L T 389 The following test is suggested by Prof Wigmore "Going back to the living principle, a more useful test appears to be this. All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest. This being the fundamental principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement. Entries made at a subsequent occasion when the original entries are complete, are clearly excluded. *Doc v Fyler* 4 Moo & P 381, *Knight v Waterford* 4 Y & C Ex R 283 (294)

In *Reg v Overseer of Birmingham*, 1 B & S 763=31 L J M C 65, *Coe* observed "I should be prepared to say that as soon as it is established, which it now is on the authority of *Higham v Ridgway* supra and the other cases that you may receive the declaration of the deceased person as showing not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration." In *Davies v Humphreys* 6 M & W 153, *Parle J* (afterwards *Baron Parle*) said "The entry of a payment against the interest of the party making it has been held to have the effect of proving the truth of other statements contained in the same entry and connected with it. The statement of a deceased person, so far as it is against the pecuniary or proprietary interest of that person, is admissible under subsection (3), section 32 Evidence Act, not only against that person but also against persons mentioned or referred to therein, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. Although in cases of the above kind the whole statement of a deceased person is admissible in evidence the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth, also the circumstances under which it came to be made and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. *Mohammad v Emperor*, 89 Ind Cas 252

"It is now, however, well settled that declarations of deceased persons against their interest, pecuniary or proprietary, are receivable not only to prove so much contained in them as is adverse to the interest but to prove collateral facts stated in them at all events so far as relates to facts which are not foreign to the declarations and may be taken to have formed a substantial part of them, see per *Cockburn CJ* in *Reg v Birmingham Overseers*, 1 B & S 763 where a parol declaration by the deceased father of a pauper's husband as to his occupation of a tenement as tenant at a certain rent was held admissible to prove the pauper's statement per *Pollock CB* in *Milne v Leister* 7 H & N 786 (793), *Smith's Leading Cases*, Vol II, 12th Ed at p 316

A statement made by a Hindu widow in a prior suit that she had mortgaged a property for raising a loan in connection with the performance of her husband's *shraddh* and other necessary expenses was admitted in evidence under section 3 (3) in a suit by the reversioners to recover the property, which the mortgagee had purchased in execution of a decree obtained on the mortgage. Held the whole statement should be taken as one and not split up making the former part alone admissible. *Sita Ram v Khublal*, 5 Pat 168=94 Ind Cas 13=7 Pat L T 573=A I R 1926 Pat 255

When the statement must be against interest. The fact stated must of course have been against interest at the time of the statement else the influence for correctness would not operate. *Middleton v Melton*, 10 B & C 317. In that case *Littledale J* said. *Warren v Greenville* 2 Str 1129 *Darby v Bebbington*, 4 T R 514 and *Higham v Ridgway*, 10 East 109 establish this general principle, that where a person has peculiar means of knowing a fact, and makes a



**S 32.** declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death." In the same case *Parke J* observed "This case however, falls within the exception necessarily engrafted upon the rule, viz, that an admission of a fact made by a deceased person, which is against the interest of a party making it at the time, is evidence of that fact as between third persons." See also *Percival v Nanson* 7 Ex 1, per *Parke B*, *Lalor v Lalor*, 4 L R 681, *Ex parte Edwards*, 11 Tollemache 14 Q B D 415 416, *Smith v Blalcy*, L R 2 Q B 396, *Massey v Allen*, 13 Ch D 326. The chief application of this rule was to the creditor's endorsement of payment on bonds or notes before the claim was time-barred. The creditor's receipt of payment, in part or in whole, was a fact against his interest, hence his memorandum endorsing upon the instrument the fact of his receipt of payment would be a statement of fact against interest, the fact of payment thus evidenced, would be by implication an acknowledgment (or a new promise) by the debtor, and thus would at common law suffice to give a new beginning to the period of the statute of limitations. *Wignore* § 1466, *Searle v Lord Barrington*, 2 Stra 826. The reason of this rule was thus stated by *Gibson C J* in *Addams v Setzinger*, 1 W & S 244 "It is impossible to conceive of a motive for fabricating such a memorandum while the right of action remains unimpaired. To suppose that a creditor would set about the commission of what is at least a moral forgery, to obviate the anticipated consequences of his own apprehended supineness when he might by bringing immediate suit prevent the occurrence of these consequences altogether is absurd." But these endorsements cannot be properly admitted unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest. Per *Lord Ellenborough* in *Ror v Bryant* 2 Camp 322. In *Briggs v Wilson* 5 De G M & G 12, the leading case on the subject, it was held that endorsement made after the Statute had run was not evidence and that the note was barred by the Statute. See also *Turner v Crisp* 2 Str 827, *Glyn v East of England*, 2 Ves 43, *Short v Lee*, 2 Jak & W 488, *Gleadow v Atkins*, 3 Trapp 301, *Neubold v Smith* 29 Ch D 877.

When the declarant could not have had the slightest idea that he was going to be prosecuted, and so the conditions in his mind that are contemplated by sub section (3) were not in existence the statement could not be admitted under clause 3 of section 32. *Aga Po v King Emperor*, 7 L B R 33=20 In l (a) 90=14 Cr L J 510.

**Statement to be made Ante Litem Motam.** It is sometimes said that the statement (as in other hearsay exceptions) must have been made before litigation began. But this is only saying that the declarant's partial attitude during litigation must be regarded as counterbalancing the interest prejudiced by the statement. This however might not be so in a given instance, and each case should be judged on its merits. *Wignore* § 1467, see also *Whaley v Messerne* 1 Tr Jur N S *Phip Ev 3rd Ed* 243.

**Statement may be verbal as well as written.** A statement according to this section as well as under the English law may be verbal as well as written. A verbal statement of fact against interest is admissible. *R v Birmingham* 31 L J M C 63, *Bailey v Atkinson* 13 Ch D 283, *Farmingham v Le* 1 Bernard, 2 Pick 532, *Laurence v Kimball* 1 Mete 527. The doubt on this point in the English case of *Faulson v Clogg* 10 M & W 572 never had any foundation. In *R v Birmingham supra* *Blackburn J* said "Lastly is there any distinction in this respect between a written entry and entry proved by parol? I can see a great difference between them in weight, for a parol statement has in many cases no weight at all. But, when the fact of a parol statement having been made is satisfactorily proved I cannot see any distinction as regards admissibility, between it and a written one, and so no distinction is taken in the cases." See also *Jagnot v Hay* 12 Ind Jur N S 59. If the statement is in writing it is not necessary that it should have been signed if it can be shown either that the body of it was written by the person whom it purports to charge (*Barry v Debbington* 4 L R 514, *Exeter v Warren* [1844] 5 Q R) or that it has been adopted by that person, in whose name or handwriting it is

be (*Doe v Haukins* 2 Q B 212), and in the latter case it is not necessary, to call the agent who wrote it *Hills Et 2nd Ed* p 190 191

**Contemporaneousness of entry** Declarations against interest are admissible even when they are not made contemporaneously with the facts. *Doe v Truford*, 3 B & Ad 890, *Smith v Blaney* L R 2 Q B 326, *Whaley v Masserene*, 8 Ir Jur N S 281

**Personal Knowledge** The qualifications of the declarant with reference to testimonial knowledge of the fact need not be as those of the ordinary witness. *Crease v Barret*, 1 C M & R 919, *Perival v Vanson* 7 Lx 1, *Tay* § 669, *Phipson 3rd Ed* 242. In *Crease v Barret*, it was held "that it was not necessary that the deceased person should have his own knowledge of the fact stated,—that if the entry charged himself, the whole of it became admissible against all persons,—and that the absence of such knowledge went to the weight, and not to the admissibility of the evidence." See also *H v Hanmanta* 1 B 610. Although the above case refers to clause (2), yet the reasoning is applicable to this clause as well. But in England the rulings on this point are by no means uniform. Vide *Doe v Robson*, 15 East 34, *Short v Lee*, 2 Jac & W 489, *Baile v Rye*, 2 Russ 76, *Middleton v Melton*, 10 B & C 317, *Gleadon v Atkins*, 3 Tyrw 302, *Marks v Lahee* 3 Bing N C 420, *Perival v Vanson*, 7 Ex 1. In the above cases it was held that the declarant must be shown to have had a competent if not a peculiar knowledge of the facts, which form the subject matter of the declaration. *Tay* § 669. But the statement must distinctly import the fact of which it is offered as an assertion. *Wigmore* § 1471. In *Haddou v Parry*, 3 Tunt 303, a bill of lading signed "contents unknown" was rejected as being in effect no declaration of what the chest contained. Similarly in *Doe v Longfield*, 16 M & W 514 the assertion of an estate 'by life interest' only was regarded as ambiguous and inadmissible. See also *Plaxton v Dare*, 10 B & C 19, *Doe v Berton*, 9 C & P 254.

**Extrinsic Proof** Extrinsic proof must be given of the declarant's death (unless it is presumable from the lapse of time) or other circumstances which necessitate the admission of such evidence. In cases of written entry it must be shown to have been executed by the person alleged to be the declarant. In *Short v Lee*, 2 Jac & W 467 *Plumer M R* said. "In all these cases (of books by bulk, &c) the first point is to prove the character of the individual who wrote them. If you fail in this they cannot be evidence." *Wigmore* § 1472, *Phip Et 2d Ed* 243, see also *Doe v Lord Phynne*, 10 East 209, *Mauby v Curtis* 1 Price 228, *Bullen v Michel* 2 Price 427, *Baron de Rutzen v Pio* 4 & E 56, *Doe v Russ* 7 C B 486. Either the signature or the body of the entry must be in the handwriting of the declarant, but it is not necessary that it should be in his handwriting as well as signed by him. *Wigmore* § 1472. In *Barry v Babbington* 4 T R 514 *Kenyon L C J* said. "If the entry be not in the handwriting of the steward, it must be signed by him, but here all these entries were written by the steward himself." See also *Doe v Stacy* 6 C & P 139. Where it is written by another on behalf of the declarant, it must be proved that it was authorised or adopted by the deceased. *Lancum v Lovell*, 6 C & P 437, *Bradley v Jones* 13 C B 822, *Doe v Haukins*, 2 Q B 812, *Phip Et 3rd Ed* 243. Where, however, the document is thirty years old and produced from proper custody, its authenticity is assumed. *Wynne v Tyrell*, 4 B & Ald 376. A declarant's death may be presumed after a lapse of the required number of years. *Hart v Moro* 11 B 89.

Moreover if the declarant purport to charge himself as the agent, steward or receiver of another, it is necessary in addition to give some proof that he really occupied an alleged position, except (i) where the agency is a public one or (ii) perhaps where the entries are ancient, produced from proper custody, and bear strong internal evidence of genuineness. (*Tays 683, Phip Et 244*)

**Declarations against interest—Admissions** Declarations against interest must not be confused with admissions or confessions. They are received upon totally different principles. As has already been stated, admissions and confessions are waivers of proof. Declarations against interest, on the contrary, are admitted as direct evidence of the fact declared. They are the testimony



possession of certain properties on the ground that she had no right to them, her husband having died an undivided member. The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing a recital to the effect that the mortgagor was in possession of the properties. *Held* that the attestation by the co-sharers was an acknowledgment that they had no right in the property alienated and that it was admissible in evidence as a statement against interest under s 32 of the Evidence Act. *Gnanamuthu v Velu Kanda*, 19 L W 191=79 Ind Cas 2= A I R 1924 Mad 542. A statement made by a deceased *Sapinda* as to the circumstances under which he received a sum of money in connection with the adoption is admissible as made against his pecuniary or proprietary interest under s 32(3) of the Evidence Act. *Danapati v Batsundara*, 36 M 19=18 Ind Cas 989. The *varaspatha* in this case was admissible not only under section 32 clause (3) of the Indian Evidence Act, as a declaration made by the widow against her proprietary interest, but also by reason of s 90 of the Act. *Hari Chintaman v Moro Ialshman*, 11 B 59. In a suit for account by the representations of a deceased, evidence was adduced of a document purporting to be a copy made by the deceased of an account furnished him by the defendant containing an entry of a payment of Rs. 5,000 by the deceased to the defendant, and the purchase by the defendant of the company's paper for the deceased. *Held* that by itself the document was inadmissible. But when further evidence was given by a witness that the deceased had stated to him that the document was a correct statement of his account with the defendant, held that such evidence was admissible and that with the addition of this evidence the document also was admissible as containing one entry by the defendant against his interest. *Zaynub v Hadjee*, 2 Ind Jur N S 54. Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties that there was partition are admissible in evidence as they are statements against proprietary interest of the persons making them. *Jaitam v Narottam*, A I R 1929 Nag 131.

A landlord purchased the holding of this tenant at a sale in execution of a decree for money obtained by him against the tenant. In the sale certificate the area of the holding was 20 bighas in all. *Held*, that statement by the landlord that the tenant held under him 20 bighas of land was not a statement in his own favour but one against his proprietary interest within the meaning of this clause. *Mand Bivas v Maharaja Jogindra Nath*, 24 Ind Cas 283. When no other evidence is adduced in a case except the written admission in pleadings, which admissions are relevant under section 19 or section 32(3) of the Evidence Act, it is advisable that such record should be marked as exhibit and then referred to as evidence in the judgment of the Court. *Apparu v Nanappa*, 20 Ind Cas 792=25 M L J 329. A road cess return filed by a Hindu widow is admissible in favour of the reversionary heir under section 32 clause (3). *Lachmi v Jagmohan*, 18 C L J 633. A statement made by a deceased *sapinda* as to the circumstances under which he received a sum of money in connection with the adoption is admissible as made against his pecuniary or proprietary interest under s 32(3) of the Evidence Act. *Danuloti v Batsundara*, 36 M 19=18 Ind Cas 989.

**Declarations held not admissible under this clause.** An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible in evidence against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors. *Eduard Ex parte*, 14 Q B D 415. *Revell Ex parte*, 13 Q B D 720. On a question relating to the rent paid for a particular property, a statement as to receipts from an agent, signed by a deceased principal is as being against interest, equally admissible in evidence with a statement by a deceased agent as to receipts from a tenant. But a rent roll signed by a deceased solicitor who was paid to audit the accounts by testing the arithmetic but not by examining with vouchers the truth as to alleged payments, is not admissible in evidence either on the general ground of pecuniary interest, or on the general ground of the audit having been made in the ordinary course of business. *Vuran v Moat*, 44 L T 210. Entries made by a deceased attorney are not evidence of business done

- S 32** by him *Gule v Parkinton, Mclell & Y* 357 Entries of a debtor and creditor's account, in books of a deceased attorney, are not admissible as evidence merely because there are items on the other side of the account that are admissible. *Whaley v Carlisle* 17 Ir C L R 792 Entries made in books of account kept by a firm of solicitors showing moneys received and paid by them on behalf of the trust estate are not admissible in evidence against the trustees as an acknowledgment of liability by them after the death of one partner in the firm on the mere ground of being entries against interest by the deceased partner, at a rate where they are not shown to have been made by him personally or by his personal direction. *Foulatine, In re*, 78 L J Ch 648 = (1909) 2 Ch 382 In taking accounts between a mortgagor and a deceased mortgagee of a barge, an account book kept by the latter in his own handwriting containing entries of payments made by him by the mortgagor as well as disbursements made by him on account of the barge is admissible on behalf of the mortgagee's executor in evidence containing entries against interest. *The Swiftsure* 83 L T 389 The day book and ledger of a deceased broker, debiting himself with the price of shares bought is not evidence of the purchase, as an entry against interest, for it might have been to the advantage of the deceased. *Marsey v Allen* 13 Ch D 553 Where a partner during his life time said that certain moneys in his firm belonged to him individually and that statement was sought to be put in evidence after his death. *Held* that it was not an admission against his interest and was therefore inadmissible. *Huabai v Dhanjibai* 29 Bom L R 427 = 102 Ind C 143 = 41 R 1927 Bom 433 Statements of deceased persons under s 32 Evidence Act are admissible in evidence only if certain conditions specified therein are fulfilled. To prove adverse possession against a certain person a statement in the Will of another that the former left the place more than 20 years before is not admissible under s 32. *Mt Bhagbhari v Mt Khatun* 80 Ind C 118 In a suit to recover possession of a house the defendants counter-claimed a sum of money paid by their father in building a portion of the house. Reliance was placed on a statement made by the defendants' father in his will as to the amount spent by him on the disputed house and also upon a memo of expenses written up by him at the same time. The Lower Appellate Court enlarged the counter-claim. *Held* that neither the Will nor the memo was admissible under s 32, as as much as statements in the Will made by the deceased that he had spent a particular sum in effecting the repairs of the house was not a statement made against his pecuniary or proprietary interest and it could not be held that the memo was made in the ordinary course of business. *Hari Vaidya v Ambabai* 41 Bom 192 = 22 Bom L R 57 = 55 Ind C 316 The declaration of a deceased person to the effect that he had destroyed a Will which gave him a life interest in certain free hold property, was admitted as being *prima facie* against the presumption arising from his possession of it of his being the free-holder although on a full examination of all the facts it would appear that the declaration was actually to his advantage because apart from the existence of a Will, he in fact took interest in the property. *Benton v Powell* 91 L J P 203 = (1922) P 211 = 127 L T 528 A statement by a deceased landlord that there was a tenant on the land is a statement against the landlord's proprietary rights and is therefore inadmissible under cl 3 s 32. *Abdul Aziz v Ebrahim* 31 C 96 Where the question was whether certain properties in possession of the defendants were ancestral or self-acquired so as to be chargeable with the maintenance of the plaintiff, a statement by a person who gave the defendants a share in the properties in her possession on the ground that they also mixed their family properties with hers, is evidently against her interest and as such admissible under section 32 clause (3). *Mandan v Mandan* 11 Ind C 350 = 1911 M W 1 The evidence of a deceased person in a proceeding under the Land Revenue Act would be admissible in evidence under section 32 (3) where the statement was against the pecuniary or proprietary interest of the deponent or the person which related solely to a question of title. *Shyamanand v Rama* A C 6 (Revised G A L J 374 = 9 C L J 497 P C) In a suit for recovery of certain lands as plaintiff's *nistar brahmatter* on behalf of the plaintiff's Will of the purchaser of the title was produced showing the recital of the title. *Held* that the recital of *brahmatter* title in the Will was not admissible.

*Satindra v. Krishna Kumari*, 36 Ind Cas 882. A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under this section. *Mt. Nga Ma v. Nga Tulak*, 29 Ind Cas 607=1 B R (1915) 1st Qr 56. An recital in a conveyance by one of the defendants though admissible against the maker of the conveyance is not admissible against the other defendants under section 32 (3) of the Evidence Act. *Ambar Ali v. Lutfee Ali*, 21 C W N 996.

**Statement as regards boundary.** In *Rajah Leelanund v. Mt. Lakhaputee*, 22 W R 231, it was held that a mortgage deed is a statement against the proprietary interest of the person making it and therefore a statement in a mortgage deed that so much rent was payable on the property, was also a statement admissible in evidence. It is difficult to see how this argument could be founded on section 32, and possibly the learned Judges considered themelves governed by Act II of 1855. In *Vingana v. Bharmappa*, 23 B 63 the above case was followed and it was held that a mortgage is against the proprietary interest of the executant, and therefore a statement of boundary in the mortgage was admissible. This view was disented from by the Madras High Court in *R. Puddipana v. Narayana*, (1910) M W N 668=8 Ind Cas 268=9 M L J 91 and *S. Venkataraya v. Narasimha*, (1914) M W N 779=26 Ind Cas 747. Under this clause it is the statement not the document which must be against the proprietary interest of the person making it. Parties making statements which are not material to their interests have no occasion to be accurate. It is for this reason that statements to be admissible must be against the interest of the person making them. It cannot be said that a statement of boundaries is against the proprietary interest of the person making it except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. On the contrary a person may be presumed to own nothing until he brings into existence an effective deed with the boundaries stated therein and as such it is a document not against but in favour of his proprietary interest. *Karuppanna v. Ianga Suami*, 107 Ind Cas 293=A I R 1928 Mad 105. But a different view was taken by the Calcutta High Court in recent cases. So according to that High Court where the executant of a document containing recitals of boundaries of other lands is dead, such documents are admissible under section 32. *Sherik Ketabuddin v. Nafar Chandra*, A I R 1927 Cal 230=44 C L J 582=99 Ind Cas 907. In that case *Mt. Justice B. B. Ghose* said: "That such documents are admissible under s. 32 of the Evidence Act has been held in a long line of cases in different Courts in India. There is a question whether under the English law a statement in such document would be admissible. It is unnecessary to cite any English case other than the leading case of *Higham v. Hodgman*, 2 Sm L C 307=10 List 109. Whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases the earliest of which is *Leelanund Singh v. Mt. Lakhaputee*, 22 W R 231. The case was elaborately discussed and followed in the case of *Ningana v. Bharmappa*, 23 B 63, which again was followed in the Bombay High Court in case of *Haji Bibi v. H. H. San Sultan Mahamed Sha*, 11 Bom L R 409=2 Ind Cas 874, and in our Court in the case of *Abdullah v. Kunj Behary Lal*, 16 C W N 252=14 C L J 467. The cases were followed in Allahabad in the case of *Natwar v. Allhu*, 11 A L J 139=18 Ind Cas 752 and all these cases were subsequently followed in this Court in *Imrit Chaman v. Sirdhar Pantley*, 15 C L J 7=13 Ind Cas 120=17 C W N 103 and in the case of *Ambar Ali v. Lutfee Ali*, 45 C 159=21 C W N 996=41 Ind Cas 116=25 C L J 619. It is contended however, by the learned advocate for the appellants that section 32 of the Evidence Act does not really apply to statements in such documents and his contention is supported by the case in *Pramatha Nath Chaudhari v. Krishna Chandro*, A I R 1924 Cal 1067=28 C W N 1092. The other cases cited by him do not really touch the question. In the case of *Soraj Kumari Icharya v. Umed Ali* A I R 1923 Cal 251 which is purported to have been followed in the case of *Madha Krishna v. Sarbeswar Naq* A I R 1925 Cal 684 and in the case of *Choom Lal v. Nilmadhab* A I R 1925 Cal 1034, the question of admissibility of such a document under s. 32 of the Evidence Act has not at all been considered. See also *Pramatha Nath v. Rajah Bejoy Singh*,

**S 32.** 14 C L J 587=99 Ind Cas 910=A I R 1927 Cal 234, *Reayaddi v. Gujra* 33 Ind Cas 563 *Trimbal v. Ganesh*, 68, Ind Cas 311, *Abdul v. Jonabali* 65 Ind Cas 329

In *Rajah Leclawund v. M. Lal hpatte*, 22 W R 231, the question before the Court was whether the rent payable to the zemindar by the *Ghatual* during a certain period was Rs 75 or Rs 175. The zemindar relied upon a statement prepared by the then zemindar many years previously of the *Ghatual* villa in the mehal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent was so much. Mr Justice Markby held that this statement was inadmissible. He said "I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in evidence. It does not appear to me to be a statement in any way detrimental to his interest. On the contrary so far as regards the rate of rent, of course it would be his interest to state it to be as high as possible." It is clear that the view of law taken by Mr Justice Markby, is consonant with the principle underlying this clause. There is absolutely no warrant to the trustworthiness of such a statement. Nevertheless on appeal *Couch C J* and *Justice J*, said "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mehal of the person making it is reduced or affected. It is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be in favour of his interest but in his favour, namely the amount of the original rent and increased rent payable by him. But when a document of this kind is considered in evidence it is not to be divided into parts, and the part which is in favour of the person making it rejected and that which is against his interest accepted. The question is, whether taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it that may be looked at, but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done bona fide and the statements are true. This judgment has already been criticised at the beginning of the para. To give this clause a proper interpretation, statements contained in a document must be distinguished from the document itself. Moreover as has been pointed out by *Prof. Wigmore* in order to make a declaration admissible under this section the fact contained in a statement and not the statement for less the document containing the statement, must be against the interest of the declarant. The fact contained in the statement is that the rent is Rs 175 and not 75 which is not against the interest of the declarant but in his favour. In the circumstances there was nothing to impeach the judgment of Mr Justice Markby. The case reported in 22 W R 231 was followed in 23 B 63 and 11 Bom L R 409=2 Ind Cas 874 without any discussion on principle. But following the decision in 22 W R 231 a Bench of the Calcutta High Court consisting of *Moorerjee J.* and *Carnduff J.* extended the rule even to the recitals of boundaries in the deeds of sales as well. *Abdullah v. Anny Bhat* 11 C W N 252=12 Ind Cas 149=11 C L J 467. In delivering the judgment the Court observed "Now the statement in these deeds that the transfer was made of the land conveyed or mortgaged and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction on it by way of a mortgage was undoubtedly one against the pecuniary or proprietary interest of the person making it. Consequently the statement as a whole would be admissible in evidence. In *Natuar v. Alkhu* 11 C L J 139=18 Ind Cas 722 Chinnay followed 23 B 63 and 16 C W N 252 without assigning any reason. In *Charmar v. Siddhar Pandey* 17 C W N 108=15 C L J 7, it was held that a recital as to the boundary of a land in a lease was admissible in evidence as a person who was no party to that document. In *Imbora v. Lutfi* 45 C 159=21 C W N 996=25 C L J 619 a new reason of such a statement being thus stated by Mr Justice Mookerjee "The statement by the vendors that the land then conveyed was limited by certain boundaries was an admission that their proprietary interest did not extend over any land outside the boundaries."

mentioned. The entire statement was, consequently, admissible (*Higham v Redjary*, 10 Eit 109, *Conner v Pittsford*, 11 L R Ir 106, *Percival v Nanson* L R 2 Q B 326, and *R v Frier* L R 4 Q B 341). The principle is that the statement is accepted not merely as to the specific fact against the interest, but also as to every fact contained in the statement." See also *Kangali v Ben* 31 Ind Cas 531. But in *Pham v Nath Choudhury v Krishna Chandra*, 28 C W N 1092=A I R 1921 Cal 1067 *Greaves J* dissenting from *Abdullah v Kunj Behari*, 16 C W N 252 observed "But with great respect to that learned Judge (*Mr Justice Moolerjee*) the reasoning by which he arrives at this view does not seem to me at all conclusive and I find great difficulty in seeing how a mere description of boundaries in a document between third parties can be said to be a statement against the proprietary interest of the person making it. It may well be that, for some ulterior purpose boundaries may not be correctly described in a document and if this is so, how a statement of that nature can be said to be against the proprietary interest of the person making it, it is some what difficult to ascertain." This view is supported by the following observation of *Sir Richard Garth* in *Brojesuar v Budhanudhi*, 6 C 268, where the learned *Chief Justice* observed "A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be." See also *Brojomohan v Gaya Prosad*, 30 C W N 761 *Choom v Nilmdhab*, 41 C L J 374, *Radha v Sobes-sar*, 29 C W N 169.

It has already been stated that any declaration made by one who is in possession of any description of hereditament tending to limit his interest therein to any less estate than the whole fee simple is admissible in evidence after his death as a statement against his proprietary interest *Wills Ev* 192. And *a fortiori* if it shows that he has no interest in the land whatever. *Ibid*. This is based on the well known rule of law, that a person in possession of land is presumed until the contrary appears, to be the owner thereof in fee simple. *Grey v Redman*, 1 Q B D 161, *Crease v Barrett* 1 C M & R 931. The rule therefore is not applicable where the declaration simply relates to the limits of the land occupied by the declarant, since there is nothing to show that it is more against his interest to deny his possession of one close than it is to assert his possession of another. *Crease v Barrett*, 1 C M & R 919, *Wills Ev* 2nd Ed 193, *Phip Li* 5rd Ed 246. The view that such a statement made by a person cannot be made admissible in evidence against a stranger is supported by the principle of the decision of their Lordships of the Judicial Committee in *Srinivas Das v Meher Bai*, 49 I A 36=41 B 300=21 C W N 558. So the statement by a person since dead that certain lands lie on the boundary of the land forming the subject matter of the document cannot be regarded as having been against the pecuniary or proprietary interest of the person making it within the meaning of section 32 (3) of the Evidence Act and is consequently inadmissible in evidence. *Kumud Kumari v Dilsol Roy*, 101 Ind Cas 512=45 C L J 138, see also *Dandapani In re*, 8 Ind Cas 268, *contra Lahu Singh v Sahadeo Singh*, 36 Ind Cas 610.

#### CLAUSE IV

**Principle** The grounds of admission of such evidence are (1) death or other inability (2) necessity, ancient facts being generally incapable of direct proof and (3) the guarantee of truth afforded by the public nature of the rights, which tends to preclude individual bias, and to render misstatements difficult by exposing them to constant contradiction. *Phip Ev* 257.

**Death or other inability** That such declarations are admissible in evidence in case of death is well established. In the *Berkeley Peerage Case* 4 Camp 415, *Mansfield C J* said "The declarations of deceased persons, who are supposed to have had a personal knowledge of the facts and to have stood quite disinterested, are received in evidence. In case of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge of what has passed in their own time, and to supply the deficiency, the law receives



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the declarations of those who are dead" Similarly in *R v Bedfordshire*, 4 E & B 535, Lord Campbell C J said "The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted on only at distant intervals of time, direct proof of their existence therefore ought not to be required"

**The Necessity principle** The necessity is here to be found in the great dearth of other satisfactory evidence of the desired fact, by reason of which we are thrown back upon reputation as a source of information In the exception for land boundaries and customs this necessity is found to exist where the matter is an ancient one, and thus living witnesses are not to be had *Wigmore* § 150

**Circumstantial guarantee of truth** The third requisite is that such declarations must guarantee a fair degree of trustworthiness In *Wright v Tait*, 47 A & E 359 on appeal 5 Cl & F 720, Coltman J asked "Where boundary is proved by reputation what is the guarantee for sincerity?" Mr Sturt (counsel) answered "The publicity of the transaction and the general interest in the fact being rightly ascertained" Coltman J said "The principle on which I conceive the exception (of reputation as to public rights) to rest is this,—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which in most cases direct proof can no longer be given" In the same case Alderson B said "There are, no doubt, exceptions to this rule, in which hearsay evidence is admissible One such exception is to be found in the case of public rights There the general interest which belongs to the subject would lead to mutual contradiction from others, unless the statement proved were true, and the public nature of the right excludes the probability of individual bias and make the sanction of an oath less necessary" This principle is very lucidly explained by Mr Justice Loomis in *South West v Williams*, 18 Conn 507, where he observed "The law does not dispense with the sanction of an oath and the tests of its credit examination is a prerequisite for the admission of verbal testimony, and it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases, and the matters are presumably the subject of frequent discussion and criticism which accomplishes in a manner the purpose of cross examination After passing such an ordeal, it is reasonably safe to receive the result as an established fact" *Wigmore* § 158 So the guarantee of credibility consists in the concurrence of a large number of persons, all interested in, and therefore, likely to ascertain the truth of an opinion which, if untrue, would be surely challenged *Will Es 2nd Ed 222 Wright v Doe, 7 A & F 313 in H L 4 Bing N C 499 R v Bedfordshire, 4 E & B 53*

**Origin of the Rule** At the time of the definite emergence of the hearsay rule—that is by the end of the 1600s there remained in existence a more or less loose of receiving the reputation of the community on various matters At that time, the jury's traditional mode of resort to common reputation as a source of its knowledge was still a rural practice It can be understood that the exclusion when offered by the jury could in any case have considered to be unnatural and objectionable But with the statement of the limits, and the doctrine that the evidence in Court cases *Wigmore* the Courts clearly picked up their own reputation to be of value in the matter

**Scope of the Section** "Evidence is to be admitted from old persons of what they have heard other persons, of the same neighbourhood, who are deceased say respecting the right *Wecks v Sparks*, 1 M & S 689 "The law of England lays down the rule that, on the trial of issues of fact before a jury hearsay evidence is to be excluded, as the jury might often be misled by it, but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of the questions relates to matters of public and general interest.

But the relaxation has not been and ought not to be extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing.

If the question were whether a bridge be a public bridge, which the public have a right to use and the country is bound to repair, there seems to be no doubt that evidence of reputation would be admissible, and there seems to be no reason for following a different course where the question is, whether the country or an individual is bound to repair. Here the private liability of the individual comes in but the question of the liability of the country remains'. *Per Lord Campbell C J in R v Bedfordshire*, 4 E & B 535 "The exceptions to the general rule excluding hearsay evidence, which permit the introduction of reputation or tradition, or of declarations of persons deceased, as to matters of public or general interest, or questions of pedigree, do not extend to a question of private boundary, in which no considerable number of persons have a legal interest." *Per Gray J in Hall v Mayo* 97 Mass 416, *Green v Chelsea* 24 Pick 80, *Dumaren v Llewelllyn* 15 Q B 791, *Queen v Bedfordshire*, 4 E & B 535

The best way to prove ancient rights is to prove particular acts and usages, as far back as living memory goes, and then adduce evidence of reputation in regard to the preceding time. *Anglesea v Hatherton*, 10 M & W 218, 239. It is not however essential to the admissibility of reputation that there should be any evidence of modern user, the absence of it only affects the weight, not the admissibility of such evidence. *Cicase v Barret*, 1 C M & R 919, 930, *Dumaren v Llewelllyn*, 1 Q B 791 (804), *Wills Ev* 229

This clause permits proof to be given of a statement of a deceased person that in his family or in the subdivision of the caste to which he belonged such and such a custom obtained of the existence of which that person would have been likely to be aware but it does not seem to permit evidence to be given of a statement by such a person that on a particular occasion the custom was followed. *Parbat v Chandra Pal* 8 O C 94 (104). It is admissible evidence for a witness to give his opinion on the existence of a family custom, and to state, as the grounds of that opinion information derived from deceased persons. But, it must be the expression of an independent opinion based on hearsay and not mere repetition of hearsay. *Gururu Ithaya v Suparamdhaya*, 23 A. 37=10 M. L J (P C) 267=5 C W N 33=27 I A 238=2 Bom L R 831

**Statement** Such statements may come in the shape of individual assertions, provided they genuinely purport to represent reputation, and many other forms are to be recognized in the precedents. For example the official return of an assembly of the tenants of a manor rehearsing customs, fees, and the like was always regarded as equivalent to a reputation among the tenants, and as such is always receivable. *Goodwin v Spray*, 1 F R 473, *Bubbe v Parker* 5 T R 14. So also maps of parish boundaries prepared from information of old men are also receivable. *R v Milton* 1 C & K 62, *Wigmore* § 1592 see also *Alcock v Cool*, cited 1 Ph Ev 251 N1 but see *Pollard v Scott* Pea R 19. The same rule is applicable in the case of old surveys. *Bullen v Michel*, 4 Dow 297, *Smith v Earl Brownlow* L R 2 Eq 253, *Fouke v Berrington* (1914) 2 Ch 308. Map prepared by or by the direction of persons interested in the matter may also be received. *Hammond v Bradstreet* 10 Ex 390. *Pipe v Fulcher*, 1 E & E 111. Copies of Court rolls can also be admitted under this section. *Plaxton v Dare*, 10 B & C 17. So also deeds and leases, between private

**S. 32.** persons may, in a given case just effectually be the vehicle of reputation. *Duke of Newcastle v Bryant*, 5 B & Ald 273, *Sasser v Harring*, 3 Dev L 312, *White v Leslie*, 1 Modd 223, *Cooms v Coethers*, 1 M & M 399, *Brett v Beale*, 1 M & M 418. The verdict of a jury may also amount to a reputation. In *Reed v Jackson*, 1 East 377 *Lawrence J* said "Reputation would have been evidence as to the right of way in this case, *a fortiori*, therefore, the finding of twelve men upon their oaths." But now there is no justification of admission of such verdict on the ground of reputation in as much as it is a relic of the time when a jury's verdict was a conclusion upon their own knowledge. *Thayer Case* 1st Ed 422, *Wigmore* § 1593. Similarly in *Pim v Currell* 6 M & W 241 *Alderson B* said "That was when the jury was summoned *de vicineto* and their functions were less limited than at present." In *Brisco v Lomax*, 8 A & E 211 *Littledale J* said "It is not reputation, but it is as good evidence as reputation." So also *Patterson J* said "Now it is certainly difficult to say that a verdict can be received merely as evidence of reputation for a jury are summoned from the country at large, and are not themselves likely to know of the matter." Yet where the matter has been before a jury, the verdict is generally given in evidence as a sort of reputation. See also *Neill v Duke of Devonshire*, L R 8 App Cas 147, *Wigmore* § 1593. Similarly judgments, decrees, and orders of Courts and similar bodies, if final, are admissible as evidence of reputation. *Step Den Ex At 30*. But here also the persons acting as Judges had no knowledge of the fact except what they derived in the course of that proceeding. *Rogers v Wood* 2 B & Ald 256 *Evans v Rees* 10 A & E 155 but see *Duke of Newcastle v Braxtouw*, 4 B & Ald 279. Under this section a statement may be either written or verbal. The absence of reputation is the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged should be admissible as a negative reputation. *Drumwater v Porter*, 2 C. & K 182, *Angley v Hatherton*, 10 M & W 239, *Wigmore* § 1595.

**Declarations as to public or general interest.** In proof of public or general rights or customs or matters of public or general interest statements made by deceased persons of competent knowledge as to existence of such rights, etc. and as to the general reputation thereof in the neighbourhood if made *ante litem motam* are admissible. Such statements are known as declarations as to public and general rights. *Cockle Cas* 213. In *Weels v Sparke*, 1 M & S 690 *Bayley J* said "I take it that where the term 'public right' is used, it does not mean 'public' in the literal sense, but is synonymous with general,—that is what concerns a multitude of persons." In the same case *Dampier J* said "In public rights it is not disputed that reputation is admissible, and that it has been extended to other rights which cannot be strictly called public such as manors, parishes and a modus, which comes the nearest to this case. That strictly speaking is a private right, but has been considered as public as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district. The above case is generally taken as the leading case, which for the first time laid down the law clearly although it has been disapproved of on the point whether the right in question was public or private. *Cockle Cas*, 213. "Sometimes the word 'public' means the public at large some times it means a section of the public such as tenants of a manor, or the conventional tenants in the district of Cornwall mentioned in *Rowe v Benton* 8 B & C 77." *Per Vaughan Williams L J* in *Mercer v Denne*, (1905) 2 Ch 639 at p 641. Public rights are those in which all the subjects of the King are interested, as for instance rights of highway (*Read v Jackson* 1 East 355 *R v Bliss* 7 A & E 550) of taking tolls on the highway (*Brett v Beale*, M & M 416) of landing on a river bank (*Drumwater v Porter* 7 C & P 181), of using ports (*Sailing Ship v Hickie* 15 Q. B D at p 595) ferries and the like. General rights are those in which some class of the community has a common interest, as for example those which are based on the customs of manors (*Doc v Session* 12 East, 62, *Crease v Barrett* 1 C M & R 919) parishes (*Berry v Banner* Per 156, *Evans v Mathew* [1899] 1 Ch 241) or cities (*Laybourn v Crisp* 4 M. & W 320) or which are connected with the boundaries of countries (*Evans v Rees*, 10 A & E 111) hamlets (*Thomas v Jenkins* 6 A & E 525) and manors and ancient districts of manors (*Burnes v Mawson*, 1 M & S 77), *Wills Ex* 2nd Ed 222.

The question next arises, about what sorts of matters my reputation be received as trustworthy. The principle already examined prescribes the answer, —that the matter must be in its nature one about which a trustworthy common reputation could fairly arise, i.e. about which an active, constant and intelligent discussion by the members of a community would result in a residuum of fairly trustworthy conclusions. As a rough and ready test we must say that the matter should be one of public or general or public and general interest and this is the common phrasing, though it varies loosely. But this is still only a rule of thumb. To decide difficult cases it is necessary still to seek the living principle and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant and intelligent discussion a fairly trustworthy reputation is likely to arise. *Wigmore* 1586, see also *R v Antrobus* 2 A & E 793, *R v Bedfordshire*, 4 E & B 535. Declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest even if they be no more than evidence of reputation or hearsay evidence, are admissible. *Busold v Neuay*, A I R 1929 Ctl 533.

**Interest** "The term 'interest' here does not mean that which is interesting, from gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected." *Per Lord Campbell, C J in Queen v Bedfordshire*, 4 E & B 535.

**Opinion** What is offered must be in effect a reputation not the mere assertion of an individual. But reputation includes and is often learned through the assertions of individuals, it is therefore constantly necessary to distinguish between (a) assertions involving mere individual credit and (b) assertions involving a community reputation. The common form of question put to a reputation witness was "What have you heard old men, now deceased, say as to the reputation on this subject?" Thus, though in form the information may be merely what deceased persons have been heard to say about a custom yet in effect it comes or ought to come from them as a statement of reputation. *Wigmore* § 1584, see also *Daines v Morgan*, 1 C & J 590 *Drinkwater v Porter*, 2 C & K 182 *Earl of Camarion v Villebois*, 13 M & W 332, *Brodebauld v Thompson*, (1903) 2 Ch 344, 352. The Judges constantly speak of "reputation from deceased persons." But 'reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another. *Hugham v Ridgway* 10 East. 120. So in such a case it is usual to 'admit the evidence what old persons who are deceased have been heard to say on those occasions.' *Per Le Blanc J in Weeks v Sparke*, 1 M & E 679. In *Mercer v Dene* (1904) 2 Ch 534, the suit was for enforcing fishing right. I that case depositions taken in 1639 under an information by the Attorney General stating the point to which the sea extended was excluded. In rejecting the evidence *Farwell J* observed at p 543 "I am of opinion that these depositions are not admissible. I will assume that this was in the nature of a public right which the Crown was attempting to enforce. The question is whether the depositions of witnesses taken in that suit are admissible in the present case on the question to what point the sea extended. The depositions of deceased witnesses in other actions are admissible against strangers amongst other cases if they relate to a custom where reputation would be evidence, but then those depositions must be depositions of matters of reputation and not of matters of fact. It appears to me to be well settled by authorities that reputation as to the existence of particular facts is rejected" see also *Ireland v Powell*, cited in *Rey v Bliss* 7 Ad & E 555. In *Ireland v Powell*, *supra*, the question was whether a turnpike stood within limits of a town and though evidence of reputation was received to show that the town extended to a certain point yet declarations by old people since dead that those houses formerly stood where none any longer remained were rejected on the ground that those statements were evidence of a particular fact. In *Mercer v Dene* (1905) 2 Ch. 538 on appeal from (1904) 2 Ch 344 352 the decision of *Farwell J* was affirmed, see also *Att Gen v Horner*, (1913) 2 Ch 140 (152), *Foulke v Berington* (1914) 2 Ch 308. So the reputation must be general. So the hearsay statement "I know the right and custom to be such and such is not receivable, but I

**S. 32.** understand the general acceptance of the custom by the community to be such and such" is admissible. The deceased individual declarant is merely the mouthpiece of the reputation. Whenever, therefore, individual declarations are offered they must appear to be in the words of *Baron Hood*, "the result of a received reputation." *Wigmore* § 1584. In *Moseley v Davies* 11 Price 180, *Hood B* said: "It must be proved that the declaration establishing the reputation and the acts done (by the community) in consequence were the result of a received reputation." The principle use of evidence of this sort is to show that the act done or declaration made was not a new thought adopted to serve some particular occasion, but the consequence of a received notion of the existence of a custom requiring the performance of the act, and accounting for or explaining it by such declaration. Such evidence should always be general. In *R v Bliss* 7 A & E 550 *Coleridge J* said: "It is a rule that evidence of reputation must be confined to general matters and not touch particular facts." In the same case *Denman, L C J* said: "He does not assert that he has heard old people say what was the public road, but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual. That is he knew it to be so from what he had himself observed, and not from reputation." So if the declaration should merely express the declarant's own opinion it would obviously not comply with the definition of reputation. In order to do this it should not only be declaration of one of the members of that body whose common opinion makes the reputation current in their day but should also express the current opinion of himself and all others who are similarly interested. But if the declarant's circumstances were such that he was apparently competent to testify as to what the common report upon the subject was, it will be presumed, till the contrary is shown, that his utterance was an expression of opinion common both to himself and others. Not only the declaration report or the common report is opposed to individual opinion, but this common report or reputation must assert not particular or individual facts tending to prove or disprove the right, but a general conclusion as to the existence of the right itself. It must be, so to speak, a general verdict not only of all the persons, but of a to general effect of all the facts. *Wills Ev 2nd Ed pp 224, 225*. *Berkeley Perry Case* 4 Crim 411, 415. see also *Crease v Barrett*, 1 C M & R 925, *Drinkwater v Porter* 7 C & P 181. But in *Barraclough v Johnson*, 8 A & E 99, *Lord Denman C J* said: "I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found themelves on reputation, although these statements ought in reality to be founded on some reputation. The statement of each of the deceased persons was reputation to some extent." In *R v Berger*, (1894) 1 Q B 823, *Case J* said: "The authorities establish that, although hearsay evidence is good evidence of reputation in matters of public interest it is not good evidence of particular facts from which an inference of fact may be drawn in respect of individual rights."

**Opinion must be of competent person.** The reputation to be admissible must obviously have been formed among a class of persons who were in a position to have sound sources of information and to constitute intelligently the formation of the reputation. *Wigmore* § 1591. In *Weeks v Sparks* 1 W & S 698 *Le Blanc J* said: "And the only evidence of reputation which was received was that from persons connected with the district. The rule generally adopted upon questions either of prescription or custom is that, after a foundation is once laid of the right of proving acts of ownership, the evidence of reputation becomes admissible such evidence being confined to what old persons who were in a situation to know what these rights are, have been heard to say concerning them." "Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is as if that they would discourse together about them, having all the same means of information." *Per Lord Kenyon in Morewood v Wood* 14 East 329. The rule is thus laid down by *Parke B* in *Crease v Barrett* 1 C M & R 928. "In cases of rights or customs which are not properly speaking, public but of a general nature and concern a multitude of persons it seems that Hearsay evidence is not admissible unless it is derived from persons conversant with the neighbourhood. But where the right is really public—a claim of highway &c."



**S 32.** same situation, touching the matter in contest, with the party relying on the declaration (*Monlton v Att Gen*, 2 Russ & My 160) *Pouell Et* 343 Declaration made in the obvious interest of the declarant will, generally speaking, be rejected (*Brockelbank v Thompson*, (1903) 2 Ch 344, 352), though, if no dispute has arisen, or no claim has been contemplated, the mere fact that the declaration might tend to support the declarant's own title will not of itself be sufficient to exclude them *Doe v Davies*, 10 Q B, 314 *Halsbury Vol* 13 p 469. So there must be, not merely facts which lead to a dispute, but a *lis mota*, or suit or controversy preparatory to a suit, actually commenced, or dispute arising, and that upon the very same pedigree or subject matter which constitute the question in litigation' *Per Lord Denman in Davies v Loundes*, 7 Scott N R 314. Also *Stanley v Wade*, 1 Myl & Cr, 338, *Butler v Mountgarret*, 7 H L Ca 633, *Frederick v Att Gen* 14 L J Pr & M 1

**Statement admissible under clause (4)** Where a *Wajib ulur* bore the signature of the settlement officer and there was internal evidence that it was prepared on the information furnished to the settlement officer by the Zamindar of the village it was held that entries in it were admissible under section 35 of clause (4) as well as under section 35 of the Evidence Act *Boy Nath v R. Singh*, 12 O L J 571=2 O W N 872=L R 6 O 101. Neither clause (4) nor clause (5) of section 32 of the Evidence Act justifies the admission of hearsay evidence upon the question whether a particular person survived another or upon the question whether a man was at the time of his death joint with or separate from other members of his family, nor can the grounds of opinion of a declarant person as to the existence of a custom, even if stated to a witness be admitted proved under that section *Musammatt Parbat v Ram Chandrapal* 8 O C 91

## CLAUSES V AND VI

**Scope of clause (5)** Clause 5 in fact, re-enacts section 47 of Act II of 1859. By the English law these declarations are not admissible unless made by members of the family *Johnson v Lawson* 1 Bing 86. But according to clause 5 of Act II of 1855 as well as by this section declarations of any person on any special means of knowledge would be admitted *Oriental G S Co v Varanasi* 25 M 183. Thus, in India the declarations of servants, etc. are admissible *Mohima Chunder v Mothora Nath*, 9 W R 151. Evidence of status made by a deceased family priest as to the relationship of the members of the family may be given under this clause which is wide enough to include family priest *Shamlal v Radha*, 4 C L R 173, *Anandilal* 45 A 9. So also where the question was as to the existence of relationship between a person (since deceased) employed as *mulhtar* by certain members of a family which appeared to have been made simply from his knowledge of the family from his being instructed as such *mulhtar*, he not having been a member of the family, nor intimately connected with it nor having had any special means of knowledge it concerns was held inadmissible under sub-section 5 of section 32 of the Evidence Act *Sangram Singh v Rajan Bahu* 12 C 219=12 I A 131. But this clause does not cover statements of facts made by interested parties in the course of litigation, of pedigree, set up by the opposite party *Varan v Chandu*, 9 A 167=A W N 1887, 118. The statement of a person to be relevant by the 5th clause is a statement relating to the existence of a relationship between persons alive or dead (the language imposes no restriction as to who the relationship the person making the statement has special means of knowledge) *Field Et* 6th Ed 179. It has been held by the Calcutta High Court that this clause is not limited, as in the corresponding clause in England (*Humes v Guthrie*, 13 Q B D 818) to cases in which the question in dispute is the existence of a particular relationship between certain persons but applies also to cases in which the question is when such relationship terminated *Ism Chandra v Jageswar*, 20 C 78 *Dhannull v Ism Chandra* 14 C 10 *Oriental G S Company v Varanasi* 25 M 183 *Varanasi v G. G. Goudh & Co* (1906) 26. But it has never been held that this clause justifies the admission of what for the sake of brevity we will call 'hearsay' upon the question whether a particular person survived another, and it is of necessity that clause does not justify the admission of hearsay upon the question whether





**S 32** knowledge" But this clause nowhere mentions that special knowledge is necessary. The scope of the section is thus stated by *Mr Field* in his Evidence Act "The statement provided for by the sixth clause is a statement relating to the existence of relationship between deceased persons only. It is not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait or other thing on which such statements are usually made" *Field Ev* 6th Ed p 139

Pedigrees which did not constitute ancient family records handed down from generation to generation and added to as a new member of the family died or was born, but were drawn upon a particular occasion for a specific purpose by members of the family—must be treated as mere declarations made by the persons who respectively drew up them or adopted them. Such of them as were made *post litem motam* are inadmissible in evidence. But in order to make such a statement inadmissible on this ground, the same thing must be shown to have been in controversy before and after the statement was made. *Kalka Pershad v Mathura Prasad*, 13 C W N 1=10 Bom L R 1038=8 C L J 447=1 Ind Cas 175. The word marriage in clause (5), Indian Evidence Act, will include a *muta* marriage, as such a marriage is recognised as lawful by the law governing the *Shia* sect of Mahomedans. *Anjuman v Sadik Ali*, 2 O C 115

**English Law** Declarations relating to pedigrees are allowed where they were made, before the commencement of the suit, by a deceased person provided the person making them was related by blood to the person to whom they refer or was the husband or wife of such person. *McKelvey's Ev* 271, see also *Shrewsbury Peerage Case*, 7 H L Cas at p 26. Under the term "Pedigree" are embraced, not only general questions of descent and relationship, but when forming part of the then genealogical fact, the particular ones of birth, marriage, and death, and their dates, either absolutely or relatively to some others or some other event, as well as that of a failure of issue. *Goodale's Ev* 447

**Difference between English and Indian Law as regards pedigree** It is necessary to observe that the English law with regard to evidence on matters of pedigree differs in some respects from the Indian law which is contained in clauses (5) and (6) of section 32 and in section 50 of the Evidence Act. Only such evidence in this case will be admissible which consists of (1) statements by a deceased person regarding relationship who had special means of knowledge when the statements were made before the question in dispute was raised, and (2) like statement in a deed or will relating to the affairs of the family or in any family pedigree etc, when made before the question in dispute was raised. Section 50 provides that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who, as a member of the family or otherwise has special means of knowledge on the subject is relevant. *Per Mullick J in Bibi Fatma v Abdul Kasim*, A I R 1928 Pat 539=110 Ind Cas 428. In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry conviction to the mind. *Nawal Sha Ara Begam v Arsh Begam*, 11 C W N 130 (P C)=1 M L T 429

**Necessity principle** The Necessity principle is here satisfied by the general difficulty in obtaining any other than traditional evidence in matters of family history. *Wigmore* § 1431. In *Foules v Young*, 13 Ves 140. *Erskine v L C* said "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence as it would be impossible to establish descent according to the strict rules by which contracts are established and subjects of property regulated (by) requiring the facts from the mouth of the witnesses who have the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence—the best the nature of the subject will admit of—listing the descent from the only sources that can be had. In *Peckham v Peckham*, 1 Camp 409. *Mansfield C J* said "In matters of pedigree"



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relating to the existence of relationship between deceased persons only. It is not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon tombstone, family portrait or other thing on which such statements are usually made. *Field's Evidence 6th Ed p 139, Norton Ex 18*

**Statement in clause (5)** According to the general testimonial principle the testimonial statement may be in any form. It may be oral or written, it may consist in words or in conduct, it may be made by the declarant's own writing or by assenting to or adopting the writing of another. This is equally true, whether the statement offered be an individual's assertion or the family reputation. *Wilmore § 1495, see also Colbert's Estate, 51 Mont 455, Young v State, 36 Or 41*

**Relations by blood, marriage, etc** whose declarations are admissible. As to persons—whose declarations are received, and the limits of admissible relation there was much more uncertainty in England than now. In 1743 in the case of *Craig d Annesley v Earl of Aglesea*, 17 How Tr 1166 11, 9, 11 which involved the question of pedigree, the general reputation in the neighbourhood was called for and given in evidence. In *Morwood v Wood* 14 East p 330, which was decided in 1791 *Mr Justice Grose* said "I remember the case of a pedigree tried at Winchester where there was a strong reputation throughout the country one way and a great number of persons were examined to it." *Mr Justice Grose* joined the bar in 1766. In *R v Erisuell* (1790) 3 T R 25 *Lord Kenyon* said "I admit that declarations of the members of a family as to pedigree" In *Walker v Winsfield*, (1812) 18 Ves p 416, *Lord Ellenborough* said "The question whether a physician or a servant who has attended the family can be admitted as one of the family has not I conceive, been decided." In *Johnson v Lauson*, (1821) 2 Bing 86, it was held that declarations of a servant and intimate acquaintances are not admissible. In *Davies v Leicesters*, 7 B & N R P 188, *Baron Parke* remarked, during the argument, that as to blood relations there was no limit, but as to a connection by affinity the rule did not seem to go farther than the husband not including the wife. But in *Shrewsbury Peerage Case* (1857) 7 H L C pp 23, 26 while *Lord Wensleydale* repeated the intimation, it was thought by *Lord Brougham* that the declarations of a wife had been held receivable and by *Lord St Leonards* with the concurrence of both the other Lords that clearly they should be received. *Thayer Cas Fd 407*. In *R v Randall*, 2 M & P 20, it was held that the declaration of a deceased woman's statements made by her former husband that his estate would go to J F and then to J F's heir, were admissible to show the relationship of the latter to the plaintiff to J F. In delivering his judgment *Best C J* said "Consanguinity or affinity by blood, therefore is not necessary and for this obvious reason that a party by marriage is more likely to be informed of the state of the family which he is to become a member than a relation who is distantly connected by blood as by frequent conversations, the former may hear the particulars of characters of branches of the family long since dead. The declarations of deceased persons must be taken with all their imperfections and if they appear to have been made honestly and fairly, they are receivable. If however, they are made post mortem they are not admissible, as the party making them cannot be presumed to have an interest, and not to have expressed a premeditated and unbiassed opinion. See also *Doe v Henry Ry & Moo* 297, *Laurie v Ry* 13 Ves 140. In England, wife & relatives are not competent to make declarations as to husband & family, for the reason that (except in the case of a wife & her husband) the relationship must be a blood relationship. *Shrewsbury Peerage Case* 7 H L C 23, 26. Similarly the declarations of those who are connected by illegitimate ties with the family to which the declaration relates are also inadmissible on the ground that a bastard is in law *plus nullius* (*Bar v Ry* 2 M & P 28). Similarly in *Craig v Bingley* 3 B & Tr 412 *Lord Ellenborough* observed "I can well understand that where a person is likely to be dishonest and well known in a family as a member of the family he will be well to give evidence of it but in this case the plaintiff is a relation to the

own account, is *plus nullus* by our law. The question is, whether a declaration by one brother may be admitted as to another brother having had intercourse with a woman and having had a child by her, I think it ought to be excluded. But under clause (5) the declaration of an illegitimate member of the family would be receivable, if, for instance, he lived with and was treated as a member of the family, *aliter*, if he was kept apart from the family, and his existence and connection ignored or kept secret. *Vort F 119*. The peculiar state of India, however, and more particularly that of its native inhabitancy, has given rise to the adoption of a different principle there and the Indian Evidence Act enacts that in cases of pedigree, the declarations of illegitimate members of the family, and also of persons who though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family. *Goodale F 419*.

The law presumes against vice and immorality and on this ground presumes strongly in favour of marriage. It will be very hard if strict proof of the marriage ceremony is invariably insisted upon years after it took place without any regard to the class to which the parties belong. The law therefore relaxes the rules of evidence and in the absence of evidence to the contrary considers it safe to presume marriage on proof of repute and conduct as may be indicated by reliable statements of persons most favourably situated for knowing the relationship the behaviour of the couple to each other, and the treatment accorded to them and their general repute. It is these principles that underlie s. 32 (5) and (6) and s. 50 of the Evidence Act. *Chandrasekara v. Sannaputta* 6 Mys L J 163.

Statement must be made before the dispute arises. Declarations made during the course of a controversy are to be regarded as lacking in the guarantees of truthworthiness. In the traditional phrase, the declarations, to be receivable, must have been made *ante litem motam*. *Wigmore § 1153*. In *Berkeley Peccage Case* 1 Camp 401, *Minsell C J* said: "In the *Inglessea Cause* many declarations of deceased persons were given in evidence but after an attentive examination I can not find that any of these had been made after the dispute had occurred."

I am not aware of any other authority upon the subject in our law, but the distinction of declarations *ante litem motam* and *post litem motam* is clearly taken in a foreign treatise of great learning, entitled *De Probationibus*. I have now only to notice the observation that to exclude declarations you must show that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is, the origin of controversy and not the commencement of the suit. After the controversy has originated all declaration are to be excluded, whether it was or was not known to the witness. If an enquiry were to be instituted in each instance whether the existence of the controversy was or was not known at the time of the declaration much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible." In the same case, the reason for the exclusion is thus stated by *Heath J*: "When the contest has originated, people take part on one side or the other, their minds are in a ferment, and if they were disposed to speak the truth, facts are seen by them through a false medium. It would hold out an invitation to fabricated testimony if declarations could be received in evidence which have been made when the contest was actually begun." Similarly in *Monkton v. Ath* Gen 2 Russ & M 160 *Brougham L C* observed: "If there be *lis mota*, or anything which has precisely the same effect upon a person's mind with *lis contestata* that person's declaration ceases to be admissible in evidence. It is no longer what *Lord Eldon* calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it but because he feels it to be profitable or that it may thereafter become evidence for him or for those in whom he takes an interest after his death it is excluded. The question then always will be, Was the evidence in the particular circumstances manufactured or was it spontaneous and natural?"

*Wigmore § 1483*. So where declarations are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest,

**S 32** and not to have expressed an unprejudiced or unbiassed opinion *Per Best C J in Doe v Randall*, 3 M & P 20

This rule of evidence was familiar in the Roman law, but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to any earlier period of dispute. But in our law the term *lis* is taken in the classical and larger sense of the controversy, and by this *lis* is understood the commencement of the controversy, and not the commencement of the suit. *Tay* § 692, see also *Berkeley Peerage Case*, 4 Camp 417, *Monkton v Att Gen* 2 Russ & My 161 *Gee v Ward*, 7 E & B 509. The ground on which evidence of this description is excluded is the supposition that, when a controversy had once arisen, parties would be likely to range themselves passively, if not actively, either on one side or the other, or to have imbibed their impressions from those who had, and thus the testimony would become tainted at its very source. *Goodrich Ev* 457. In *Berkeley Peerage Case*, 4 Camp 417 Mr Justice Lawrence said "We know that passion, prejudice, party, and even good will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence." In defining the meaning of the word *lis* *Willse J* in *Butler v Mountgarret* 6 H L C 641, observed "The *lis* would surely have dated at least from the time when the parties had respectively assumed a hostile attitude. Similarly *Broughman L C* in *Monkton v Att Gen* 2 Russ & My 160, observed "Prove that the person concocting or making the declaration took part in the controversy. Show me even that there was a contemplation of law proceeding, with a view to which the pedigree was manufactured, and I hold that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve."

It was once said by *Baron Alderson* in *Walker v Beauchamp*, 6 C & P 30, that it was sufficient if at the time of the declaration the state of facts existed (for example the birth of a child) as to which the controversy afterwards arose. This, however, obviously cannot be sound, for it is to the controversy, and to nothing else, that the *bias* is to be attributed. Although the dictum of *Baron Alderson* was upheld by *Lord Cottenham* in *Davies v Lowndes* 7 Scott 19, 198 has since been overruled *Tay* § 629, see also *Shedden v Att Gen* 1 L J P & M 217. In *Railly v Fitzgerald* 6 Ir Eq 344, *Sugden L C* said "The point of enquiry respecting the admissibility of such evidence is, not the existence of a state of facts out of which a claim has arisen but the existence of a controversy or dispute respecting the claim." Similarly in *Davies v Lowndes*, *supra* *Lord Denman* also observed "There must be not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy preparatory to suit actually commenced or dispute arisen, and that upon the very pedigree or subject matter which constitutes the question in litigation." *Berkeley Peerage Case* 4 Camp 401, *Slaney v Wade* 1 Myl & Cr 33, *Butler v Mountgarret*, 7 H L C 633, *Friedel v Att Gen* 44 L J P & M 11. *Bahadur Singh v Mohar Singh* 24 A 91 (107) P C, the principal oral evidence consisted of statements made by the plaintiff as to their descent. The information to which they had received from their ancestors. Objection was taken that some of these statements as were made since 1847 were inadmissible in evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) as being proved. The Judicial Committee held that they were admissible the heirship of the then claimants not being really in dispute.

There seems to be no doubt that the principle of exclusion would not apply to what was done in prevention of dispute even were it in support of the declarant, and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration. Thus in *Goodright v Voss Cowper* 591, *Lord Mansfield* in receiving evidence said "I have known advice given to a father and mother to get



**S 32.** be evidence, because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question who embarked to a certain degree with the feelings and prejudices belonging to that particular side you are drawing evidence from perfectly unpoluted source. But where the point in controversy is foreign to that which was before controverted, there never has been, a *lis mota*, and consequently the objection does not apply.

**Personal knowledge** It is not necessary according to English law that the declaration should contain only matters within the personal knowledge of the declarant *Wills Ev* 218 In *Monkton v The Att Gen* 2 Ru & W 147, Lord Brougham said "Another restriction was a good deal pressed on you cannot mount, as it were a *hearsay upon a hearsay*, but that what is given in evidence as hearsay must only be of the first degree, so to speak, in other words, that after connecting A with the family, it is competent, after his death to give in evidence declarations made by A as to what came within his own personal knowledge, but no declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or as is much more frequently the case to what he heard from others to whom he gave credit, for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can be perpetuated in testimony." So declarations may be based on statements made to him by a relative who has such personal knowledge (*Doe v Davies*, 10 Q B 314) or they may be based on tradition involving any number of degrees of hearsay so long as it is the tradition of deceased members of the family and not of strangers *Goodright v Moss* 2 Cowp 591 (594) *Whitelock v Baker* 13 Ves 511 (514), *Shedden v Att Gen* 30 L J P & M 217. But if in fact the declaration is found on family hearsay or tradition, the declaration is extracted solely from different documents which are not produced it will be admissible, since it is more than a reproduction of documents which might indeed be good evidence of reputation themselves but ought for that purpose, to be produced in Court. *Davies v Lowndes*, 6 M & G 471, *Wills Ev* 218. But the declaration of a deceased widow, respecting a statement which her husband has made to her as to who his cousins were,—as also the declaration of a relative, in which he asserts generally that he has heard what he states—have been received. If this were not so the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their personal knowledge. *Tay* § 639, see also *Doe v Baker* 2 M & P 20 *Stanley v Wade* 7 Sim 611, *Robson v Att Gen* 10 Cl & Fin 500. So also proof by one of a family that many years before a young brother of the person last seized had gone abroad, that the reputation in the family was that he had died there and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v Banniny v Griffin*, 15 East 293.

**Declarant's means of knowledge** The ordinary principle applicable to the situation would be that the declarant must appear to have had fair knowledge or fair opportunities for acquiring knowledge on the subject testified to. In England 'the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connection, that they are speaking the truth, and that they could not be mistaken,' (per Lord Eldon in *Whit Cloke v Baker*, 13 Ves. 514) so that it is not necessary that the declarant should have had personal knowledge of the facts stated. It is not that they have, each and all a knowledge by personal observation but that they at least know the facts as accepted by family understanding and tradition, and that this understanding, based as it was originally on observation is *prima facie* trustworthy. *Wignore* § 1486. Personal knowledge of facts is therefore necessary. *Monkton v Att Gen* 2 Russ & M 165, *Barkley v Jones* Case 4 Camp 416. The difficulties, then that arise are concerned with drawing the line between declarants that may fairly be supposed to be trustworthy and those that may not. The question here are of two general sorts. First, those





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be admissible in evidence under 32(5) *Anandi v. Nand Lal*, 22 A L J 604 46 A 665 Unless it is shown that the person who files a pedigree in Court has special means of knowing relationship between the parties the pedigree cannot be received in evidence and it cannot be accepted as evidence that he had knowledge Proof of special source of knowledge is a pre-requisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statement contained in it *Bhima v. V. Sender*, 9 O L J 186=4 U P L R (O C) 79

**Qualifications of the declarant** Upon the general principle of testimonial knowledge, the qualifications of the deceased declarant—his relationship, or whatever is relied upon as equipping him with information—must be shown in advance *Banbury Peerage Case*, 2 Selw N P 764, see also *Taylor* § 640, W & E v 213 214 In India the existence of special means of knowledge in the declarant is pre requisite for admitting such declarations In *Sangram Singh v. Ranyan Bahu*, 12 C 219=12 I A 183, a deceased mukhtar's statement was admitted to prove the relationship amongst members of his client's family In disallowing the evidence Sir R R Collier said "It has been objected that the mukhtar has no special means of knowledge, and therefore he does not come within the description of persons mentioned in this section It no where appears that he had any other knowledge than as mukhtar acting for these ladies. If is not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns Therefore in their Lordship's opinion he does not come within the description of a person having special means of knowledge" See also *Bahadur v. Bhupendar Bahadur*, 17 A 456 P C So it must be shown that the declarant has sufficient acquaintance with the family to know what that reputation is *Wagmore* § 1490 Evidence of statements made by a deceased family priest as to the relationship of the members of the family may be given under clause 5 of section 32, which is wide enough to include the family priest *Lal v. Radha Bibee* 4 C L R 173 So also the pedigree produced in a settlement Court is admissible in evidence under s. 32, cl 5 of the Evidence Act upon proof that the person making the statement contained in the pedigree was dead and had a special means of knowledge *Kashi Singh v. Balraj Singh* 1 Ind Cas 199 The statement in a pedigree, made by a deceased member of a branch of a family, regarding the descendants of another branch thereof, if any dispute arose as to the latter is relevant and admissible in evidence *Syamanand v. Rama Kanta*, 32 C 6 So also a statement relating to any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl (5) of section 32 *Chandra Nath v. Ailmadhab*, 26 C 236=3 C W N 88 A pedigree filed at the time of a regular settlement and accepted by the Settlement Court is not admissible in evidence, unless it is proved how the pedigree was prepared whether it was based upon the statement of a person since deceased and whether such person had special means of knowledge *Mohammad v. Bryraj*, 8 Ind Cas 723 On the death of one H a Mahomedan lady, the question arose whether S and W were the legitimate children of Z a predeceased son of H and so were H's Certain documents bearing dates from 1860 to 1890 were produced from the Basika office, in which H then living has described S and W as her daughters their mothers as the *mutta* wives of her son Held that these documents were admissible in evidence as containing statements by one who had the best means of knowledge made at times when the present controversy was not in contemplation *Bahar Ali Khan v. Anyuman Ara Begam* 25 A 236=7 C W 1 See also in *Kedar Nath v. Mathumal* 10 C 555 (P C) Mathumal on the death of Munna the second wife of his maternal grandfather Dushan Lal, brought suit as the next of her husband to set aside an alienation made by him in favour of Kidarnath Kularnath denied the relationship of Mathumal Dushan Lal Mathumal produced a will made by the widow five years before her death in which she stated, "I have no issue or any near relative related to me as a daughter a son and Khairats Lal as my husband's brother These are my relatives on the husband's side" In the evidence Lord Shaw observed "In this situation their Lordships are

opinion that in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge, and, if her version of the facts be sound there can in their Lordship's view, be no doubt that the judgment appealed from is correct" Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evidence under section 21 (1) read with section 32 (5) of the Evidence Act, if made by a person having special means of knowledge whether personal or hearsay *Ram Athany Muni Goppa*, 33 Ind Cas 969 Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act, and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate which the Courts formed as to the credibility of the witnesses in the former case, nor, in the latter case to question the manner in which the Courts had applied the provisions of section 32 *Safiqunnissa v Shaban* 26 A 581=9 C W N 105 P C So where the witness is speaking from hearsay he must show that his knowledge is derived from the person whose statement is admissible under this section *Vide Jagatpal Singh v Jageshar Singh*, 25 A 43=7 C W N 209,

Statements are admissible to prove the facts contained in the statement on any issue In England declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue *Steph Dig Et Ali* 31 So evidence of this kind is only admissible in England when questions of pedigree are directly in issue not where they arise incidentally in the course of an action Thus in an action for goods sold and delivered where the defendant pleaded infancy it was sought to prove the plea by a statement contained in an affidavit made by the defendant's deceased father in a chancery suit to which the plaintiff was not a party, but it was held that there being no question of pedigree in the action the evidence was not admissible *Haines v Guthrie*, 13 Q B D 818 see also *Figg v Wedderburne*, 11 L J Q B 46 This rule thus interpreted, says that declarations, otherwise satisfactory, can never the less be used in those cases only where the issue involves as material a question of pedigree, i.e. genealogy—chiefly therefore inheritance cases *Wigmore* § 1503 This view seems to have its origin in the observation of Lord Ellenborough, *C J in R v Erith* 8 East 539, where he observed "This was a case in which the question was, whether the declaration of the father of a bastard child as to the place of his the bastard's birth, was competent of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree The controversy was not as in a case of pedigree from what parents the child has derived its birth, but in what place an undisputed birth, derived from known and acknowledged parents has happened The point thus stated turns on a single fact, involving no question but of locality and therefore not falling within the principle of or governed by the rules applicable to cases of pedigree, and is to be proved therefore, as other facts generally are proved according to the ordinary course of common law, that is by evidence to which the objection of hearsay does not apply" In deciding this case Lord Ellenborough appears to have gone directly against the previous practice *vide R v Greenwich*, Burr Sett Cas I, 343, *R v Nutley* Burr Sett Cas II 701, *R v Holy Trinity Cald Just Perce* (Settl Cas 141 cited in *Wigmore* § 1502 (note 1) In *Harbert v Tuckal*, T Raym 84 where the question was as regards the capacity of a devisor to make a will, his father's entry of age in almanac was admitted Historically these declarations were first customarily (though not exclusively) used in England in inheritance cases where the pedigree or genealogy of a claimant was directly a part of the issue but on principle, the kind of issue involved in the litigation ought to have no bearing on the admission of these class of declarations A deceased father's entry in a family Bible is equally trustworthy or untrustworthy whether the issue subsequently arising happens to be framed upon a claim to an inheritance, a plea of infancy to a promissory note or an application to appoint a guardian *Wigmore* § 1503 In the majority of American jurisdiction

5. 32. — this limitation is ignored. So the declarations are now admitted whatever the general nature of the issue, and whether or not the issue is one of general pedigree, or descent, *Wigmore* § 1503. In *Inhabitants of North Brookfield v. Inhabitants of Warren*, 16 Gray (Mass) 171, the rule is thus laid down "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and when the incidents of birth, marriage and death, and the times when those events happened, are directly put in issue. But, upon principle, we can see no reason for such limitation. If this evidence is admissible to prove such facts at all it is equally so in all cases, whenever they become legitimate subjects of judicial investigation." Similarly in the colonies the rule laid down in *Haines v. Guthrie* L.R. 13 Q. B. D. 818 was not followed. In *Mahomed Syedol Arifen v. Yeoh Ooi Garh*, (1916) 2 A. C. 575 = 21 C. W. N. 202 a plea of infancy was set up in a suit for mortgage. But evidence of entry of date of defendant's birth was by his deceased father in a book containing family records of births, deaths and marriages was held admissible, under Straits Settlements Evidence Ordinance, 1893. So also under section 32(5) of the Indian Evidence Act evidence is admissible. In *Dhanunlal v. Ram Chander*, 1 C. W. N. 270 = 21 C. 265, a plaintiff in a former suit, verified by a deceased member of a family and as such having special knowledge, was held admissible under section 32(5) of the Evidence Act, to prove the order in which certain persons were born and their ages. In delivering the judgment of the Court, *Petharam C. J.* said "It was contended on the part of the plaintiff on the authority of the English cases that as the question at issue in this case did not relate to the existence of any relationship by blood, marriage or adoption the section did not apply and the statements were excluded by the ordinary rules of evidence. We think that on this point the law in India under the Evidence Act is different from the law of England and that the effect of the section is to make a statement made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaintiff was admissible here to prove the order in which the sons of Sumbho were born, and their ages, and when admitted, to my mind, satisfactorily proved that the defendant was the son who was born on the 6th June 1868." *Sumbho v. Ram Chandra v. Jogeswar*, 20 C. 758, for the purpose of the defence of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to him by relations of the plaintiff who were since deceased relating to the date of the plaintiff's birth. The defendant objected to such evidence on the authority of *Haines v. Guthrie* L. R. 13 Q. B. D. 818. In delivering the judgment the Court observed "In the discussion which arose on the point of limitation it was strongly urged for the appellant that the statements of deceased persons made to the date of the plaintiff's birth were not admissible as evidence under section 32 of the Indian Evidence Act, and in support of that contention the case of *Haines v. Guthrie*, was referred to. It was further asserted that the law of England, in this respect is the same as the law of India, but in dealing with the point we must bear in mind that when the Evidence Act was passed in this country this question of hearsay evidence was not then so definitely settled as it is now. Some of the text-books supported the contention, that hearsay evidence was inadmissible to prove the date of birth, and looking at illustrations (k. h. 21) of section 32 we think that the view was adopted by the Legislature, and that the statement is admissible in evidence." The case of *Dipin Jishi v. Sreedam Jhundr*, 13 C. 42 has been practically overruled by *Dhanunlal v. Chandra* supra.

Kind of facts that may be the subject of the Statement. On the principle that those facts for the trustworthiness of which there is circumstantial guarantee should only be admitted. "Family transactions" says Lord Justice in *Berkeley Peerage Case*, 4 Camp. 416, "are naturally talked of in the relations of the parties. Therefore what is thus dropped in conversation on such subjects may be presumed to be true." The principle therefore applies to topics with which the declarations may be concerned to the extent that they are of importance in the family life. This certainly in India is the case.

date of birth, marriage, and death, and the fact and degree of relationship—as has always been conceded. But there has been more or less fluctuation and uncertainty about the exact limits to be applied, and upon certain classes or facts some doubt still unnecessarily exists. *Wigmore* § 1500. In *Grimuade v Stephens* Kent Assizes, 1697, Bull N P 294, as to what are questions of pedigree, it has been said "Hearsay is good evidence to prove who is my grand father, when he married, and what children he had, etc., of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relations, beyond the ser, dead, and the common reputation and belief of it in the family gives credit to such evidence." On the authority of *R v Erith*, 8 East 539, the place of birth or death—something more than the fact of birth or death—has by some Courts been thought to be inadmissible. But the question was finally settled in England in *Shelds v Boucher*, 1 Dig & Sm 53, where *Knight Bruce* said "If the place of birth in *Rex v Erith* had been a genealogical fact as it was not,—had been material, namely, for any genealogical purpose, which it was not, *Lord Ellenborough* and the Court of King's Bench might possibly have dealt with the evidence differently." See also *Lord Brougham* L C in *Mannton v Att Gen* 2 Russ & M. 156, where he observed "but declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died, or whether they are actually dead, every thing in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by evidence *de hors* those declarations, have been previously connected with the family respecting which their declarations are tendered." Moreover since the proof of a particular relationship often depends on the proof of some specific fact, such as birth, marriage or death, or the date or place of such event or some incident connected therewith, or the place of residence of some particular person of family, or other matters of family history, these facts are also regarded as matters of pedigree within the meaning of the rule when they thus tend to prove a relationship which is in question. *Wills, Et* 212, *Monkton v Att Gen* 2 Russ & Myl. 147, 156, *Betty v Neil* 7 Ir C L 17. A statement as to the age of a member of a family, made by his sister is no doubt admissible after her death under section 32, clause (5), illustration (e). The principle of the decision in my opinion is that time of one's birth relates to the commencement of one's relationship by blood and a statement therefore, of one's age made by a deceased person having special means of knowledge relates the existence of relationship within the meaning of section 32, cl 5. *Oriental Government Security L A Co v Narasimha Chari*, 25 M 183, 209, 210, see also *Ram Chandra v Jogeswar Naran*, 20 C 758, *Bipinbehari v Sridam*, 13 C 42.

**Contemporaneity of the Statement.** It is not necessary to show that the declarations were contemporaneous with the events to which they relate, for as *Lord Brougham* has well observed, such a restriction "would defeat the purpose for which hearsay in pedigree is let in by preventing it from going back beyond the lifetime of the person whose declaration is to be adduced in evidence, and to use a homely illustration—it would render inadmissible the statement of a deceased person as to the maiden name of his own grandmother." *Monkton v Att Gen* 2 Russ & Myl. 157, 158, *Tay Et* § 639.

**Hearsay of the family as to particular facts is not excluded.** "In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead. Here, however the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree it being impossible to prove by living witnesses the relationship of past generations, the declarations of deceased members of the family are admitted, but here as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing the hearsay of the family as to these

**S. 32.** particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true. *Per Lord Mansfield in Berkeley Peerage Case, 4 Camp 401.*

**Cases under clause (5)** Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood relations." Statements made by deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family are admissible in evidence under clause (5). *Krishna Lal v Raj Kaur*, 104 Ind Cas 299=1 Luck C 97=A. I R 1927 Oudh 278. A statement as to the existence of a relationship is admissible even though it was made in a previous suit in which the issue was the same as in the present suit. *Gokuldas v Baldeo Sukul*, 105 Ind Cas 26. Oral evidence was given by a person about the relationship between two parties and he based his information on a pedigree prepared by his father. The pedigree was not put in evidence, nor any foundation laid for letting in secondary evidence. *Held* it was inadmissible. *Sesham mal v Kuppannyangar*, 91 Ind Cas 462=A. I R 1926 Mad 475. The statement as to relationship made by an attorney in the discharge of his duty and within the scope of his authority is admissible under this clause. *Chandrasekar v Bisheswar* 5 P 777. Inam statements concerning a family made by a person who is neither a member of the family nor connected with it by marriage himself nor having any special means of knowledge are inadmissible. *Kanda lam Krishnamachari v Sathuluri*, 1925 M W N 117=22 L W 73=38 Ind Cas 646=A. I R 1925 Mad 823=48 M L J 467. Entries in *Khewat* based on pedigree and attested by all co-sharers are admissible under this clause. *Baynath v Raja Singh*, 12 O L J 571=2 O W N 872. Declaration of a person as to his parentage is admissible under s 32 ill (k). *Santu v Tara*, 80 Ind Cas 407=A. I R 1925 Oudh 537.

A statement by a person in a mortgage deed as regards his paternity before any dispute arose is admissible in evidence under this clause in as much as the person when he grew up would have had means of knowledge that his father was a particular person. *Santu v Tara* 10 O & A. L R 1226. Before a pedigree is admitted in evidence it must be shown that they were made by a person having special means of knowledge of the relationship. Where it is based on an old genealogical tree which no longer exists the person who was responsible for the old document must be indicated. *Jhobali v Sahlu* 1923 Pat 266=103 P 585. A recital as to the date of birth in a guardianship application by a person having special knowledge is admissible in evidence where other conditions are fulfilled. *Prohlad v Ramsaran* 38 C L J 213. A statement relating to his own relationships made by a person in a will or mortgage executed by him is admissible in evidence under s 32 (5) of the Evidence Act, and cannot be objected because it related to his own relationship. Such a construction would make illustration (k) to the section wrong. *Mullany Venkata v M Vento*, 13 M L T 515=19 Ind Cas 740=25 M L J 373. A statement made by a deceased sapinda as to the circumstances under which he received a sum of money in connection with the adoption is admissible under this clause as it relates to the existence of relationship by adoption. *Danakoti v Balsundara* 36 M 19=18 Ind Cas 939. A pedigree filed in a Settlement Court for the preparation of *Khewat* cannot be put in evidence as a family pedigree under s 32 (6). It can be admitted only under s 32 (5) for which purpose it must be proved that the document represents a statement as to the existence of a certain relationship by blood or marriage made by a person who had special means of knowledge in respect of the matters thus stated and made before the question now in dispute was raised. *Mathura v Bhulan*, 15 O C 364, see also *Sarj bah v Tilok Chand*, 36 Ind Cas 66. A statement in a will made by the father describing his adopted son, aged so and so as the sole beneficiary is admissible to prove the age of the 'boy' under s 32 cl 5 and 6 of the Evidence Act. *Krishnamachariar v Veeravalli*, (1913) M. W. N 355=13 M L T 333=21 L J 517=19 Ind Cas 472. The question for decision was whether the respondent was the legitimate daughter of one K and R. The respondent contended that R was not the legally married wife of K, and in proof of it produced a

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compromise and a decree between R and another person by which R obtained only a small amount as maintenance. He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not the married wife of K. It was held that the statement of R was admissible in evidence under section 32, clauses (3) and (5). *Parbat v Maharaj Singh*, 10 Ind Cas 188. A statement made by a person before a public officer as to his son's age is admissible in evidence under s 32, to prove his son's age. *Bappa Raja v Kondu Raja*, 9 Ind Cas 324=9 M L T 220. The statement of the deceased maternal grandfather of the testator is admissible in evidence to prove the latter's age. *Deberam v Somanchi*, (1911) 2 M W N 383. A pedigree produced in a Settlement Court is admissible in evidence under section 32 clause 5 upon proof that the person making the statement contained in the pedigree was dead and had a special means of knowledge. *Kashi Singh v Balraj Singh*, 10 Ind Cas 199. Hearsay evidence is not admissible under section 32 clause (5) of the Evidence Act, to prove the case of fosterage, in as much as, even if it be assumed that connection by fosterage can amount to relationship in any sense of the term the relationship is not by blood, marriage or adoption. *Prince Mirza v Nouab Qudria*, 24 Ind Cas 643. The term 'adoption' in clause (5) of section 32 of the Evidence Act is not to be interpreted in a restricted sense. The relationship between a *mohant* and his *chela* is a relationship by adoption within the meaning of that clause. A statement in a will that A has one *chela* B and has no other *chela*, is one relating to existence of that relationship within the meaning of clause (5) of section 32. *Achyutananda v Jagannath*, 21 C L J 96=27 Ind Cas 739=20 C W N 122. Statements contained in the plaint in a previous suit as to the existence of relationship is a statement within the meaning of section 32 of the Evidence Act and having been made by a person having special knowledge of such relationship and before the litigation in the subsequent case arose, it is admissible under clause 5. *Maulad Khan v Abdul Sallor*, 15 A L J 349=39 A 426. Where the question is whether A born on a certain date is of age an entry in a book containing the record of births, deaths and marriages in the family kept by his father who is dead, that he was born on a particular date, is admissible under this clause. *Mohamed Syedol v Yeo Ooi Gark*, 21 C W N 257=(1917) M W N 162=19 Bom L R, 157=39 Ind Cas 401 (P C). A statement by a Muzumdar that the estate should be handed over to X, as the sole wife of a Zamindar is admissible under s 32, as made by a person having special means of knowledge. *Krishna Thera v Ramasami* (1917) M, W N 201=33 M L J 277=40 M 871.

In *Achyutananda Das v Jagannath Das*, 20 C W N 123=21 C L J 96=27 Ind Cas 739 one *Raghabananda Das* was the *Mohunt* of a *muth* known as the *Khumkukul Muth*. He was succeeded by his *Chela Sriram Das*. After the death of *Sriram Das*, *Jagannath Das* the plaintiff claimed to be his lawful successor as his *gurubhai*. The defendant resisted the claim on the allegation that he had been adopted by *Sriram Das* as his *chela*. The plaintiff proved by satisfactory oral evidence that *Raghabananda Das* had two *chelas*, the senior *Jagannath* and the junior *Sriram*. Against this view the evidence brought forward by the defendant is the recital in the will of *Raghabananda* that he had no one else as his *chela* except *Sriram Das*. The question is whether the statement is admissible under section 32 clause (5). In delivering the judgment Mr Justice Mookerjee observed. On behalf of the plaintiff it has been argued that the section should be strictly construed and that the statement in question should be excluded, first because it relates not to the existence, but to the non-existence of a relationship, and, secondly, because the relationship between a *Mohunt* and his *chela* is not a relationship by adoption. On behalf of the defendant, it has been argued that the section should be liberally construed, and that it is only by a liberal construction that the view taken in the cases of *Ram Chandra v Jogeshwar*, 20 C 758. 23 I A 37=23 C 670 (P C) and *Dhannumull v Ramchandra*, 24 C 265=1 C W N 270, can be defended. In answer it has been contended by the plaintiff that the view taken in these cases, viz that a statement as to date of birth or marriage of a person is admissible as a statement relating to the existence of relationship though in accord with illustrations (f) and (m) of section 32 is opposed to the view taken in *Bepin Behary v Sudam*,

**S. 32.** 13 C 42; *Satish Chandra v. Mohendra Lal*, 17 C 849 and *Ram Krishna v. Mamandra Mohun*, 20 C 1, 1, 302. It is not necessary for our present purpose to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of relationship is so indissolubly associated with the existence of itself of the relationship, that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship. *Oriental etc. Co. Ltd v. Narashinha*, 25 M 183 and *Palambar Kuru v. Raman* 24 Ind Cas 519. But whatever view may be adopted upon that question, it does not directly affect the point raised before us for consideration, i.e. first, is the relationship between a *Mohunt* and his *chela* a relationship by adoption, and, secondly, is a statement that A has one *chela* B and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative. In the first place, there is no reason why the term 'adoption' should be interpreted in a restricted sense, that the expression that A has adopted B as his *chela* is found in judicial decisions of the highest authority. In the second place, the expression 'relates to the existence' is obviously very comprehensive and need not be construed in the narrow sense suggested by the plaintiff. This view is in accord with the decision of the Judicial Committee in *Mohunt Bhagwan v. Mohunt Raghunandan*, 22 I A 91=22 C 813 P. C. In that case the contest for the office of *Mohunt* lay between one *Raghunandan*, who claimed to be the *Gurubhai* of deceased *Mohunt Hoygrib* (both of them *chelas* of *Chaturbhuj*) and *Bhagwan* who claimed to be the *chela* of *Hoygrib*. The plaintiff contended that the defendant was not the *chela* of *Hoygrib*, while the defendant asserted that the plaintiff was not the *chela* of *Chaturbhuj* and, consequently not the *gurubhai* of *Hoygrib*. A petition by *Chaturbhuj* was adduced in evidence, containing the statement that he had no other *chela* or heir besides *Hoygrib*, and this was sought to be used to disprove the allegation of *Raghunandan* that he also was *chela* of *Chaturbhuj*. The statement was treated as admissible in evidence but was held not to be conclusive. "So also statements, made by a deceased person are admissible in evidence under s. 32, clause (5) of the Evidence Act not only to prove 'relationship by blood, marriage or adoption,' but also date of birth on the same principle. A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is also admissible in evidence." *Palambar Kuru v. Raman Verma* 24 Ind Cas 519. see also *Shro Lal v. Gaur Narain*, 7 Ind Cas 218.

Where on the death of one H, a Mahomedan Lady, the question arose whether S and W were the legitimate children of Z, a predeceased son of H, and so were H's heirs certain documents having dates from 1860 to 1890 which were produced from the *Wasika* office and in which H, then living had described S and W as her heirs and their mothers as the *multra* wives of her son were held admissible in evidence as containing statements by one who had the best means of knowledge made at times when the present dispute was not in contemplation and further, a petition presented to the *Wasika* office by S and W conjointly with F a son of Z, since deceased whose legitimacy was not questioned, describing H's husband, who had recently died, as their grandfather, and proving that the *Wasika* allowed to him be allotted to them; was also held admissible as a statement made by F against his own interest, and as going to prove that their title as legitimate heirs as good as F's. *Baker Ali v. Anjuman*, 7 C W N 465 (P.C.) 25 A 236=5 Bom L R 410=30 I A 94. The legal presumption as to paternity raised by s. 112 of the Evidence Act is applicable only to the off spring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can course rely upon statements of deceased persons under s. 32, clause (5), upon opinion expressed by conduct under s. 50 of the Evidence Act, and also upon such presumption of fact as may be warranted by the evidence. *Gopalswami v. Arima Jellam*-27 M 32. Hearsay evidence though to be received with caution is not inadmissible in questions of pedigree, and by the Mahomedan law is held to be good respecting death descent and marriage. In India, in cases of such

description the declarations of illegitimate members of the family and also of persons who, though not related by blood or marriage to the family, are intimately acquainted with its members and state, is admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of the deceased members of the family *Ghurreeb Hossain v Usumonnisa*, 1 Hay 528 Where the question is as to the age of a person, the entry of his date of birth in the school register based on the statements of his deceased father is admissible under s 32(5) and also under section 35 *Munna Lal v Kameshary*, A I R 1929 Oudh 113 A settlement of pedigree is admissible in evidence either under s 32 cl (5) if it be shown that it amounts to the statements of deceased persons, who were members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the point, which is sought to be established by the said pedigree *Sanfaraz v Rajana*, A I R 1929 Oudh 129

A register of baptism, while evidence of that fact and of the date of it, furnishes even if it states the date of a person's birth, no proof of the age of that person further than that, at the date of such ceremony, the person referred to was already born Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under s 32 (5) of the Evidence Act, but, in the case of an entry in the register in question, there is nothing to show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge *Ab Collier v Mrs L Baran* 2 N L R 31 In an application for letters of administration, the rights of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great great-grand father and the great-great-grand mother of the deceased was that of full brother and sister To prove this a *Kurismana* or genealogical table, made by the ancestors of the deceased "by the pen of a *gomosta* and alleged to have been filed by her in 1804 in a suit to establish the same fact, and a certified copy of an *euanama*, or deed of exchange, dated the 17th January, 1782 and corroborating the *Kurismana* as to the relationship were produced by the applicants The *Kurismana* was held admissible in evidence *Sharadi v Secretary of State for India*, 31 C 1059 P C

Cases under clause (6) Entries made by a parent or relation in Bibles, prayer books, miscals, almanacs, or indeed in any other books or in any document or paper, stating the fact and date of the birth marriage or death of a child, or other relation, are also received as the written declarations of the deceased persons who respectively made them *Tay Et* § 650 These statements may be made by the declarant's own writing, or by assenting to or adopting the writing of another This is also equally true whether the statement offered be the individual's assertion or the family repute *Wigmore* § 1495 In *Goodnight v Moss*, Cowp 594, Lord Mansfield C J said "An entry in a father's family Bible an inscription on a tombstone, or pedigree hung up in a family mansion (as the Duke of Buckingham's was) are all good evidence Similarly in *Toules v Young*, 13 Ves 140, *Ervine L C* said "Inscriptions upon tombstones are admitted, as it must be supposed the relations of the family would not permit an inscription without foundation to remain So engravings upon rings are admitted upon the presumption that a person would not wear a ring without an error upon it' That the document containing the assertion is a formal one—a deed or will—does not make the assertion inadmissible *Murray v Milner* L R 12 Ch D 845 *Doe v Pembroke* 11 East 504 *Smith v Tebbit* L R 1 P & D 351 "Such statements" says Lord Blackburn in *Sturla v Freccia*, L R 5 App Cas 641, "by deceased members of the family may be proved not only by showing that they actually made the statements but by showing that they acted upon them or assented to them or did anything that amounts to showing that they recognized them "A pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or mural or monumental inscription if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent acknowledgment of the relationship stated in it, by members of the family, is



**S. 32.** some evidence of that relationship, from whatever sources his information have been derived, because he was likely from his situation, to enquire into the truth of such matters, and from his means of knowledge, to ascertain it the reason why a pedigree, when made or recognised by a member of a family is admissible may be, that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be related or of information received by him from some deceased member of what latter knew, or heard from other members who lived before his time. And it may well be contended, that, if, the facts rebut that presumption, and so that no part of the pedigree was derived from proper sources of information then the whole of it ought to be rejected, and so also if there be some but uncertain and undefined part, derived from improper sources. But when a framer speaks of individuals, whom he describes as living, we think the reasonable presumption is that he knew them and spoke of his own personal knowledge and not from reference to registers, wills, monumental inscriptions, and family records or history, and consequently, to that extent the statements in a pedigree are derived from a proper source, and are good evidence of the relationship of these persons." *Per Lord Denman in Davies v Loundes*, 7 Scott N 211-213=6 M & Gr 525. When a statement is made in a will of a deceased person in his own interest or in view of a litigation, it should not receive much weight. But when a certain person is described in the testator's will as adopted son, that statement is a strong evidence of the former's relationship to the testator. *Chandressuar v Bishesuar*, 5 P 777. Entries made in family books regarding the relationship of parties are admissible under this clause. *Amrit Saria v Prabh Dial*, 89 Ind Cas 939.

**Will or deed.** Written declarations contained in wills or deeds are admissible to prove relationship. *Murray v Milner* 12 Ch D 845, *Smith v Tibbit*, R 1 P & D 354. Such declarations are admitted on the principle that they are the natural effusions of a party who must know the truth, and who speaks up on an occasion when the mind stands in an even position, without any temptation to exceed or fall short of it. *Per Lord Eldon, in Whitelocke v Baker*, 13 V 514, *Higham v Ridgway*, 10 East 109. *Berkeley Peerage Case*, 4 Camp 418. Evidence of the relationship stated in the wills or deeds in order to become admissible must be between deceased persons. *Ram naram v Monee*, 9 C 613, 614. A written agreement is admissible as evidence of pedigree even when it has been set aside by a competent Court on other grounds. *Tamma v Daramma*, 10 M 367. Also section 17, clause (b) of the Registration Act (III of 1877) does not render a passage in a will inadmissible in evidence if the words of it do not purport to operate to extinguish an interest in the present or in future but states only facts. Such a statement would, if proved be admissible also under section 3, clause (6) of the Indian Evidence Act (I of 1872). *Chamanbee v Mullan chetty*, 20 B 562. But the incidental recital of a child's age in a will does not prove the exact age of the child. *Ailmoni v Zaharunissa*, 8 W R 371. But when the recital is not incidental it is admissible in evidence. *Krishna machharwar*, *Feerabali* 33 M 166=19 Ind Cas 452, see also *Oriental Government v Anand sinha*, 25 M 183 (207), *Ram Chander v Jogeswar* 20 C 758, *Subramanyam Doraisinga* 16 Ind Cas 943=24 M L J 49.

The recital in a family conveyance by a trustee is evidence of parentage. *Slaney v Wade* 7 Sim 611. So also an old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title. *Doe v Pembroke* 11 East, 60. The probate of a will is not a primary evidence for this purpose. *Doe v Ormonde*, 1 M & R 466. *Dike v Polhill* 1 Ld Raym 741. The will itself, the signature of the testator must be proved unless the age of the document or other circumstances dispense with such proof. It is said, however, that the "family book" or "original roll" of Ecclesiastical Court, containing an enrolment of the will, are admissible in evidence to prove relationship. *Bull N P 310*, *R v N P 46*. So recitals of descent and description of parties in deeds or other family instruments, will be received, provided the deeds come from the proper custody, and are proved or may from age be presumed, to have been executed by some member of the family to which the statements refer. *Marmyon Perley*.

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Pr Min 111, *Hastings Peerage*, Pr Min 200, *Barthwick Peerage*, Pr Min 62, *Hengate v Gascoigne*, 2 Coop 417, *De Roos Peerage*, 2 Coop 541, *Stokes v Davies*, 4 Mason 268 cited in *Tay Li* § 651. But the execution of the deed by a relation is an indispensable requisite *Slaney v Wade*, 1 Myl & Cr 338 *Fort v Clarke*, 1 Russ 604, *Tay Li* § 651. Though a person cannot claim a title under an unprobated will he can rely upon a statement contained therein indicating the relationship of the parties *Litnam v Rambarat*, 7 P at 783=9 Pat L 1 484=A I R 1928 Pat. 459. A statement, in a will left by a deceased person, to the effect that he and his brothers were living, earning and holding property separately, is not admissible in evidence under any clause of section 32, nor under any other section of that Act *Gokuldas v Chandibar*, 4 S L R 22=10 Ind Cas 967.

**Family pedigree** A pedigree which has long been hung up in a family mansion is good evidence to prove relationship *Goodright v Moss*, 2 Cowp 594. The words "family pedigree" in clause 6 should not be construed according to the standard adopted by the Courts of England in regard to the pedigrees of English families. Peoples of England widely differ in their habits of thought modes of expression and indeed in their entire system of family life *Jang v Arjun*, A I R 1928 Oudh 125. Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living members, rests on the absence of anything showing directly or inferentially, that the pedigree was prepared with any motive other than the natural motive for preparing and preserving a record of family traditions relating to family pedigree. Such pedigree is admissible in evidence *Ibid* In *Kalla Prosad v Mathura Prasad*, 30 A 510=35 I A 510=1 Ind Cas 175 the plaintiff gave in evidence three pedigrees. The last one was ruled out of evidence as having been made *post litem moto*. The second was admitted as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of his descent made *ante litem moto*. The first pedigree was also admitted in evidence under the same conditions as the second. As regards all three pedigrees *Lord Atkinson* observed at p 522 of 30 A "They are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of a family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them". But in *Jang Bahadur v Arjun Singh ubi supra*, the Court observed "Nor do we think that the first portion of the observation of their Lordships is intended to lay down an exhaustive definition of 'family pedigree' as used in cl 6 s 32, Indian Evidence Act 1872. Those two words simply indicate the highest and the best type of family pedigree. The decision does not show that a pedigree not conforming to that standard cannot be a family pedigree. See also *Nam Deo v Ganoba* 86 Ind Cas 847=8 N L J 29. Where the relationship in a pedigree table is corroborated in material parts by the oral evidence and the table *prima facie* satisfies all the conditions prescribed by ss 32 (6) and 90 of the Evidence Act, a presumption should be made for its genuineness *Jagdeo v Velhoba* 105 Ind Cas 81. The mention of a certain common ancestor of the parties in the pedigree table recorded at the time of settlement indicates that the land in dispute was occupied by him *Sandhu v Dani*, 96 Ind Cas 349. Where in a pedigree table the common ancestor's name appears and the sons are found to be in joint possession of the property holding equal shares the presumption is that the common ancestor held the property *Fateh Nur v Jwan*, A I R 1923 Lah 964. A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family even for its use and the use of the family. Such a record can be admitted even though not signed by the person making it. *Anand v Nand Lal*, 22 A L J 657=16 A 665=A I R 1924 All 575, see also *Mohansing v Dulpal Sing*, 46 B 753=67 Ind Cas 235=24 Bom L R 289.

**S. 32.** The words "family pedigree" in clause (6) of section 32, do not necessarily include such a pedigree as is in the possession of a member of the family concerned nor do they indicate that the actual possession of the record need be with the family concerned. In order that a "family pedigree" be admissible in evidence under this clause it is essential that all the writers of the pedigree should have special means of knowledge. *Lahaun v Motiram*, 63 Ind Cas 968.

It is valid to presume after the death of a person that a pedigree filed by his general agent in a suit to which the deceased was a party was filed under his instructions and such pedigree if other conditions be satisfied would be admissible in evidence in subsequent litigation. *Balbhadr v Sripal* 21 O C 231=48 Ind Cas 309. Where the plaintiffs filed the family pedigree extracted from a settlement Record and it was signed by some persons named in the pedigree it was held that the document might be treated not as a family pedigree admissible under section 32 clause (6) but as a statement made by deceased persons likely to be acquainted with the facts as to the existence of certain relationship. *Bhupath v Khetat* 21 Ind Cas 271. A pedigree was filed before the Settlement Court in the year 1871 after being signed by the *patuaries* and by two *Lambardars* of the village both of whom appeared in the pedigree itself and as to whom there was no reason to doubt that they were now dead, and was signed by the Settlement Officer having been attested or verified before him. Held that in view of the circumstances, under which it was prepared, the pedigree should be accepted as a public document within the meaning of the definition in the Evidence Act. *Musammam Sarju De v Ram Harakh*, 18 Ind Cas 250. Entries in *Panda's Register* or note book are admissible in evidence upon a question of family pedigree, but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication. *Collector of Farrukabad v Gulraj* 16 Ind Cas 625. Although a presumption under section 90 of the Evidence Act may be made with respect to a pedigree filed at the time of the Regular Settlement of the Province and found on the settlement file on the ground that it was more than 30 years old and that it was produced from proper custody yet before such pedigree can be admitted in evidence it must be shown that it is admissible under clause 5 or clause 6 of section 32 of the Evidence Act. *Mathura Prashad v Bhulan Singh*, 14 Ind Cas 339. Where a pedigree put forward in the settlement proceedings was produced in evidence, and it was found that it had been by a person who was neither a member of the family nor an official bound to record such pedigree that there was not sufficient evidence that it had been signed by any member of the family, that its contents were adopted by the members of the family who were privy to its preparation and that upon that basis the entries in the *Themat* made at the time of the settlement were recorded, it was held that the pedigree was relevant and admissible under section 32 (5) of the Evidence Act, though the entries in it were not of great value. *Ram Din v Kayestha Patshala*, 25 Ind Cas 823.

In a suit for possession based upon the rights of inheritance of the plaintiff as collateral heirs of the last male owner through a common ancestor a pedigree of the family was produced in evidence to show that the plaintiffs were such collateral heirs. The statements in the pedigree were held to be inadmissible in evidence on the ground that the persons by whom it was drawn up were not called as witnesses and no proof was given that they were within any of the descriptions in section 32 of the Indian Evidence Act. *Sorjon v Sardar Singh*, 23 A 72=2 Bom L R 492=5 C W N 49=27 I A 183 P C.

**Horoscope**—evidentiary value of. A horoscope may be tendered under clause 5 or clause 6 of section 32 or under ss 17, 18 of the Evidence Act. Under clause (6) of section 32, it cannot be admitted as it is not a statement relating to the existence of any relationship by blood marriage or adoption, between persons deceased. Where it only purports on the face of it to be a statement of relationship between a deceased person and a living person, this clause does not embrace such a case. Moreover to come within this clause it must be shown that the writer is dead or cannot be found or became incapable of giving evidence. *Ram Narayan v Monee Bibee* 9 C 613. In *Satish Chandra v Mohendra Lal*, 1 C 849, the question again arose whether a horoscope was evidence under this clause. In answering the question in the negative *Petharam G J* observed

Then the next question is with reference to the horoscope. This horoscope has been admitted as coming within section 32 of the Evidence Act and within clause 6 of that section. That clause makes entries made by persons, evidence on questions of relationship by blood marriage, or adoption, when the deceased person had some special means of knowledge. As to that it is enough to say that it is not shown that the person who had made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship by blood, or marriage, or adoption. But it is submitted that no special knowledge is required under clause (6) and if the horoscope has been tendered under clause (5), the case of *Ramnarain v Unce* which it purports to follow, does not seem in point. As regards the meaning of the words "on questions of relationship" the interpretation is also not sound. *Id. supra*, see also *A. & H. Evidence Act p. 356 F. Note*. A horoscope is receivable in evidence under section 32, clause (5) of the Evidence Act and not under clause (2) or (6) of that section, but the party making it must have had special means of knowledge. *Ramnarain v Murugappa*, 33 Ind Cas 969 = 1916 M W A 208, see also *Chuah Hori v Khair* 31 Ind Cas 637 = 19 C W N 787 P C. *Jaitan bhai v Chabildas* 13 B 7. In *Bidya dhar v Pran Gopal* 5 C W A 237, the Court admitted a horoscope, not *qua* horoscope, but as a statement under clause 5 made either as family astrologer or a statement adopted by the father. In *Kumar Krishna chariar v Viceratelli*, 19 Ind Cas 452 = 35 M 161. *White C J* said: "An objection was taken to the evidence of this witness with reference to the horoscope on the ground that the witness was not the writer and that he had no personal knowledge of its correctness. The man who made the horoscope is not called. The learned Judge seems to think that this horoscope as a piece of evidence is worthless, and I think so too." Where a full horoscope prepared from a short horoscope was produced in evidence and the person who prepared it was examined as a witness it was held that so far as the date of birth and the parentage were concerned, the horoscope represented what had been stated to the witness who prepared it before the present dispute had arisen and could be used both as corroborative or rebutting evidence and for the purpose of refreshing memory. *Harbahadur v Chand Ray*, 15 Ind Cas 400 = 21 O C 268. So a horoscope can be used to help in proving the date of birth stated in it only under section 159 or 160 of the Evidence Act, if the person who read it soon after it was written, is examined as a witness. *Shankergu v Chinnuaji*, 71 Ind Cas 140. A horoscope may be put in as an admission. *Raja Goundan v Raja Goundan* 17 M 134.

In *Amardyal Singh v Iluv Perishad Sahu* 5 Pat L J 605 = 11 P L T, 511 = 58 Ind Cas 72, a horoscope of *Parbhu Dayal*, purporting to be made by one *Ram Andan Nam* who was dead, was tendered in evidence and proved by his son to be in his father's handwriting. The question was whether the horoscope could be admitted in evidence to prove the age of *Parbhu Dayal*. In admitting the horoscope *Miller C J* observed: "There is no dispute as to the relationship between any of the parties and but for the illustration (f) appended to the section, I should have taken the view that the horoscope is not admissible for the purpose for which it was tendered. I am constrained to hold that the document is admissible however by reason of the illustration. The question was also considered by *Coxe* and *Breachcroft JJ* in *Monindra Mohan Roy v Ramkrishna*, where earlier authorities were reviewed and it was decided that statements as to age made by deceased persons in the circumstances contemplated in the section were admissible. The horoscope however is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point had such a course been necessary. A statement about the date of the son's birth by a father at the time of preparing a horoscope is admissible in evidence under s. 32 cl. (5) as it was the date of commencement of a relationship. *Annamalai v Annamalai*, 10 L W 68 = 50 Ind. Cas 410.

**Principle of authentication** The principle of authentication as applicable to proof of the execution or genuineness of a writing, is in general applicable to a writing offered under the present exception. *Slaney v Wade*, 1 M & Cr 335, *Fruy Perrage* 10 C & F 151. No special considerations here.

**S. 32.** need attention, except as regards the necessity of proving the handwriting of entries in family Bibles or the like. The fundamental idea of authentication is to connect the writing with the person alleged to be its author. Now under the present exception the testimonial statement may be the assertion either of an individual member or of the family. Hence, it is not necessary, where a family Bible or family tree is offered as embodying the family repute to prove the entry to be that of an individual member, for its adoption by the family makes it a family assertion. *Wigmore* § 1496, see also *Perth Peerage Case*, 2 H L C 876. *Hubbard v Lees*, L R 1 Exch 258. The reason for the exception in the case of family tree is thus laid down by *Bigelow C J* in *North Brookfield v Warren*, 16 Gray 174: "They are in their nature public, openly exhibited, and well known to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the fact which they record." But such public exposure of the writing is not needed when it contains the signature of a specific member of the family and his signature is authenticated. So a signed chart of a family was admitted. *Monkton v Att Gen*, 2 Russ & M 163. In admitting the signed chart *Lord Brougham* said: "It is urged that the principle of all those cases would exclude such a pedigree as this, which was not hung up or in any way made public. But why is it that publicity is relied upon in those cases? Why is it that family Bible the public wearing of ring, the public exposure of an inscription upon a tombstone and the public hanging up of the family pedigree in the manor are all relied upon in respect of their publicity? It is because in all those cases the publicity supplies a defect, there existing but not here existing,—the want of connection between the pedigree, the tombstone, the ring, or the Bible with particular individuals members of the family. The presumption is it would not be suffered to remain if the whole of the family did not more or less adopt it and thereby give it authenticity." So also in the case of family Bible there is no necessity of proving the handwriting of the entries. "Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament for then the entries as evidence derive their weight not more from the fact that they were made by any particular person than that being in that place a family registry they are to be taken as assented to by those in whose custody the book has been kept." *Aling J* in *Jones v Jones*, 45 Md 160, *Wigmore* § 1496, *Berkeley Peerage Case*, 4 Camp 421 per *Lords Ellenborough and Redesdale*, *Hubbard v Lees*, 20 L J Ex 169, *Goodright v Moss* 2 Cowp 591, *Stanley v Wade*, 7 Sim 590, *Shrivesbury Peerage*, 7 H L 1.

**Value of statements under clauses (5) and (6)** Statements of the kind referred to in section 32, clause (5) of the Evidence Act may be evidence, but they must be received with great caution, since they are always open to the objection that the parties making them are not subject to any cross examination, the caution is all the more needed especially when the parties making them could not have had any certain knowledge of the matters regarding which they made the statement. *Sangram Singh v Rajam Bai*, D O R. Part V 60. "Courts of Justice lend a very unwilling ear to statements that a dead man had said," said *Mr Justice Corton* of the United States Supreme Court. *Lea v Peck County Copper Co* 21 How (U S) 493, 504. It has been well said that testimony as to declarations of a deceased person should undoubtedly be disregarded upon the least conflict with the probabilities of the case. *Matter of Berth's*, (Surrogate Court) 43 Mis C (N Y) 437. Testimony to declarations of deceased persons concerning matters of pedigree is notoriously unsafe fact for the same reasons that testimony to declarations of deceased persons on other subjects is weighed with great caution. *Moore's Facts on the Height and Length of Evidence* §§ 1150, 1156, *Matter of Williams*, 128 Cal 553. *Wood v Tallman*, 65 N J Eq 310. Similarly in *Smith v Cooper*, 16 Beav 101. *Sir J Romilly* M R. said: "It is a trite but just remark, that if one link in a pedigree be assumed any two persons may be proved to be related, and it is the usual observation in these cases, that the difficulty consists in properly weighing and considering the evidence relating to some one link, which connects the line of the claimant with that of the intestate. It is a rule of evidence in ped."

cases, that declarations *post litem motam* are not receivable in evidence. All this is evidence of declarations made before any question arose as to the succession to this property, but there is no trace that they were remembered or acted upon until after the contest had arisen. And though no complaint can justly be urged against persons for not giving the evidence before the occasion requires it, yet it must always be borne in mind in judging of the evidence of this description, how extremely prone persons are to believe what they wish. And where persons are once persuaded of the truth of such a fact, as that a particular person was the uncle of their father, it is every day's experience that their imagination is apt to supply the evidence of that which they believe to be true. It is a matter of frequent observation, that persons dwelling for a long time on facts, which they believe must have occurred, and trying to remember whether they did so or not, come at last to persuade themselves that they actually recollect the occurrence of circumstances which, at first, they only begin by believing must have happened. What was originally the result of imagination becomes in time the result of recollection, and the judging of which, and drawing just inferences from which, is rendered much more difficult by the circumstance, that, in many cases, persons do really by attentive and careful recollection, recall the memory of facts which had faded away, and were not, when first questioned, present to the mind of the witness. Thus it is that a clue given or a note made at the time frequently recalls facts which had passed from the memory of the witness. I look, therefore, with great care and considerable jealousy on the evidence of witnesses of this description even when I believe them to be sincere and to be unable to derive any advantage from their testimony. Once impress the witness with the belief that *Charles Cruch*, the father of the intestate was the brother of their grandfather, and the further steps follow rapidly enough. In the course of a few years, by constant talk and discussion of the matter, and by endeavouring to remember past conversations, without imputing anything like wilful and corrupt perjury to witnesses of this description. I believe that they may conscientiously bring themselves to believe that they remembered conversations and declarations which they had wholly forgotten in 1830, and that they may in truth *bona fide* believe, that they have heard and remember conversations and observations which in truth never existed but are the mere offspring of their imagination. It is also necessary to remember that in these cases from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person." *Not Et* 190

### CLAUSE VII

Scope of the clause. The "transaction" spoken of in section 13, clause (a) is one by which any right or custom was created, etc. It applies to private as well as public rights. Customs also may be private as well as public, as for instance the custom of a particular family as to a particular order of succession (*Rajah Rii Kisuen Singh v Ramjoo* 19 W. R. C. R. 8) but generally speaking customs are in their nature public or general. Reputation as to matters of general interests is not confined to oral declarations. It may be evidenced by recitals in deeds or "other documents" in the language of this clause. So it is clear the words "statements, written or verbal" at the beginning of this section do not govern this clause. Parol evidence of reputation as to matters of general interest or rights may be given under clause (4) and not under this clause. In England such records of private boundaries title or possession are not admissible in evidence. The law is thus laid down by *Kenyon L. C. J.* in *Morewood v Wood*, 14 East 329, where he said "Evidence of reputation upon general points is receivable because all mankind being interested it is natural to suppose that they may be conversant with the subjects and that they should discourse together about them having all the same means of information. But how can this apply to private titles? How is it possible for strangers to know anything of what concerns only these private titles?" In India under clause 7 of section 32 private rights as well as customs can be proved by deed, will or other documents if they relate to any such transact

**S. 32.** as is mentioned in section 13, clause (1) On principle there is nothing to object to the reception of such evidence Under this clause private boundaries, titles or possession can be proved "If such evidence may be offered to show customs and boundaries of a private manor, boundaries of a particular duties (*Stell v Prickett*, 2 Stark 466, per *Abbott C J*) the principle may well cover any other property rights in which a number are interested in general inquiry and discussion, whether the right is in substantive law called a public or a private one" *Wigmore* § 1587 So in *Weeks v Sparke*, 1 M & S 691, the distinction between private and public rights have been repudiated and a new test of admissibility was laid down In that case *Bayley J* said "I take it that where the term 'public right' is used, it does not mean public' in the literal sense but is synonymous with 'general'—that is what concerns a multitude of persons In the same case *Dampier J* also added (Reputation evidence) has been extended to other rights which strictly cannot be called public, such as manors, parishes, and a modus, which comes the nearest to the case. That strictly speaking is a private right, but has been considered as public as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district" But in England this tendency of extending the admission of Reputation evidence to private rights was checked by *Baron Parke* in *Dunraven v Llewellyn*, 13 Q. B. 809 (1850) and an arbitrary distinction in this respect between public and private property rights was laid down In that case he said "Reputation is not admissible in the case of such separate rights, each being private unless the proposition can be supported that because there are many such rights the rights have a public character We think this position cannot be maintained It is impossible to say in such a case where the dividing point is, what is the number of rights which is to cause their nature to be changed and to give them a public character? The number of these private rights does not make them to be of a public nature" *R v Bedfordshire*, 4 E & B 535, *Doe v Thomas*, 14 East 323

But in America the result is otherwise The earliest English practice had clearly been to admit reputation as to private titles, and it is therefore natural to find, on question of private boundary, that reputation was regularly admitted without question in the early American cases *Thayer Cas* Et 471 note *Wigmore* § 1587 But even in America this application of the principle is confined to reputation of boundaries That the title cannot be so evidenced is conceded *Ibid*

Old maps and old surveys so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after the use of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey *R v Milton*, 1 C & K 62 *Hammont v Brad Street*, 10 Ex 390 *Pipe v Fulcher* 28 L J Q. B. 12, *Daniel v Hickin*, 7 Ex 429 *Bullen v Michel*, 4 Dow 297, *Smith v Earl Brounlow*, L. R. 2 E. 252, *Foulke v Berrington* (1914) 2 Ch 309, *Freeman v Reed*, 4 B & S 11 *Badder v Bridges*, 34 W R (Eng) 514 So also under this clause mention of private title, such as old deeds and leases may in a given case just as effectually be the vehicle of reputation *White v Lisle*, 4 Madd 223, *Coomes v Coether* 1 M & M 399, *Plarion v Dire* 10 B & C 19, *Brett v Lester* 1 M & M 418, *Curxon v Iomar* 5 Esp 60 *Doe v Whitcomb* 4 H L 425, *Carnarion v Tellebois*, 13 M & W 313, *Beaufort v Smith* 4 Ex 47 *Wigmore* § 1592

In *R v Milton*, 1 C & K. 58 upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the question was not within the parish, a map was produced which had been made some thirty years before by a surveyor from information derived from some parishioner who had pointed out to him the boundaries, *Felme J* held that proof could be given of the old man's death, the map would be admissible as evidence of reputation, though it came from the chest of the parish is *L. v. North Fr* 190

Clause (7) of section 32 does not declare all reputation to be relevant, only that which consists of statements contained in a deed, will or other document relating to any transactions by which any right or custom was created or

modified, recognised, asserted, or denied, or which was inconsistent with its existence. The clause therefore, does not provide for the admissibility of parol evidence of reputation in the case to which it applies. Of the documents which are admissible under this clause, judgment and decrees are not in the least important. *Friedl Et* 6th Ed p 144, *Bansi Singh v Mir Amir* 41 11 C W N 703. But where the question was whether a tenant held lands under the *Nahdi* or *Bhaoli* system of rent, and the Court founded its decision upon a statement in a *hebanama* executed by a tenant's deceased grandfather, held that the *hebanama* was inadmissible in evidence under s 32 (7) read with section 13 (a) of the Evidence Act. *Bansi v Mir Amir*, 11 C W N 703.

**Customs** To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction in which or in the course of which the right or custom was asserted or denied. The transaction will be relevant under section 13 (a) of the Evidence Act, if it be only by which the right or custom was asserted or denied. *Bansi Singh v Mir Amir Ali*, 11 C W N 703. In a suit to establish the existence of a family custom, a deed containing a recital of the custom as alleged in the plaint and a covenant to do nothing contrary to it, was tendered in evidence by the plaintiffs. The deed had been executed before suit by the present plaintiffs and by another plaintiff who had died after the institution of the suit. Held that the deed was admissible in evidence on the plaintiff's behalf, though they could themselves be called as witnesses but though the deed was admissible, the custom as against the defendants must be proved *aliunde*. *Hurnonath v Nittanand* 10 B L R 263.

**Ancient possession** In England the rule has always been that private rights could not be proved by reputation, except by what was called evidence of ancient possession. Therefore ancient documents (provided they are proved to be genuine and come from the proper custody) were always receivable to prove even private rights. *Nort Et* 191. So ancient documents which purport to be part of the transactions to which they relate as distinct from a mere narrative of them and which are produced from a proper custody, not only prove themselves, but are received as evidence that those transactions actually occurred. This is so whether the rights in question be public or private provided the controversy refers to a time so remote as it is unreasonable to expect a higher species of evidence. *Powell Et* 285. In *Roe v Rawlings* 7 East 279, *Lord Ellenborough* thus laid down the reason of the rule. 'Ancient deeds proved to have been found amongst deeds and evidences of law may be given in evidence, although the execution of them cannot be proved and the reason given is that it is hard to prove ancient things and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty. This paper therefore having been found amongst the muniments of the family accredited and preserved we think that it was evidence to be left to the jury of the amount of ancient rent at the time it bears date.' So ancient tithes are received to prove the amount of vicarial tithes. *Pearson v Beek* 8 Ex 452. see also *Bishop of Meath v Marquis of Winchester*, 3 Bing N C 183, *Doe v Pulman*, 3 Q B 622. In *Walcolmsen v O'Dea*, 10 H L Cas 593, it was laid down that the true ground for admitting a lease is that it shows an act or acts of ownership. Thus the production from proper custody of an ancient lease granted by A is evidence of an act of ownership over the *locus in quo* by A at that date, and is presumptive evidence that he was then owner in fee simple of such land. *Clarkson v Woodhouse* 3 Doug 189, see also *Blandy-Jelins v Earl of Dunraven* (1899) 2 Ch. 121, *Powell Et* 287. So to prove a personal prescriptive right of fishery, as appurtenant to a manor old licences on the Court rolls, granted by the lords of the manor, are admissible. *Rogers v Allen*, 1 Camp 309. Old rent rolls or Court rolls are received to prove rights to which they refer. *Heath v Dane*, (1907) 2 Ch 678. Entries in old parish books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time. *Smith v Andreics*, (1891) 2 Ch 678, *Powell* p 287. So it is clear that the existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had possession of the land at the time of making it. It is occasionally said that, the



**S. 32.** documents themselves are acts of possession, but that is incorrect. These documents are merely evidence of possession. The rule is thus explained by Lord Cairns, L C in *Bristow v Cormican*, L R 3 App Cas 641, 603, 688 "Old leases have always been considered to be admissible as being evidence of facts of ownership. I understand this to rest on the principle that when at a distant period as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself responsible as lessor of the title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances, are of themselves admissible as evidence of title. They are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief in title. The payment of rent under such lease is a further and additional fact also admissible as evidence on the same principle." In the same case Lord Blackburn said "In as much as after long time all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent to be given as evidence from which the jury may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessees do not pay rent unless they are in possession, so that ancient payment of rent adds weight to the ancient indenture."

In *Malcolmson v O Dea*, 10 H L Cas 593, the Court laid down the reason for the rule thus "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of the property by personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted even when they amount to mere assertion, as in the case of a right affecting the public generally, but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting upon the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail. It may be a question whether the absence of proof of enjoyment consistent with such documents goes to the admissibility or only to the weight of the evidence probably the latter."

In *Blandey Jenkins v Durnaven*, (1899) 2 Ch 121, an action to restrain alleged acts of trespass on unenclosed land in Wales, there was a question as to the admissibility of a document dated in 1659. In holding it admissible Lord Macnaghten said "I cannot bring myself to doubt the admissibility of this document. What it is worth is another thing. It is an ancient document and I cannot tell whether an ancient document is admissible in evidence against any body till you look at it. You must look at it to see what it purports to contain. When you look at this document you find it contains a great deal. It bears upon the face of it that Jenkins must have been in possession, or else he would not have brought an action of trespass. He speaks of trespass. The word is used in the document itself. It is not an act of ownership. I agree, but it is a document which shows that the person in possession is vindicating that possession against some body by making him take off his cattle. To my mind it is evidence of an act of ownership. I do not say it is an act of ownership." This doctrine is now well settled in English Law is applicable in proof of title by ancient possession in prior generations, where no evidence has survived except the documents themselves which embodied acts of claim of ownership. *Clarkson v Woodhouse* 5 T R 412, *Rogers v Allen* 1 Camp 309, *Doe v Askew* 10 Eas 520, *Coombs v Coethier*, M & M 398 *Doe v Putman*, 3 Q B 622 *Wignall v*

**Other cases** A deed of mortgage containing an assertion of title as owner by the mortgagor is relevant under s 13 of the Evidence Act as evidence of the title asserted. Where the mortgagor is dead the recitals in the deed as to how he got the title are also evidence under s 32 cl (7) as statements made by a deceased person in document relating to a transaction mentioned in section 13. *Nallasina Mudalar v Ravan Bibi*, (1921) M W N 560=14 L W 327, see also *Visalashy v Dorasinga*, 29 Ind Cas 974. Under section 32 of the Evidence Act a statement of boundaries in documents of title is legal evidence in a suit between third parties, if the third parties are dead or outside the jurisdiction of the Court. *Lalu Singh v Sahadeo Singh*, 36 Ind Cas 610. The case against this contention is *Ningaua v Bhurnappa*, 23 B 63 but this decision seems to have been dissented from in all the High Courts in India save that of Bombay. *Vide Saripalli v Fota*, 25 Ind Cas 747=(1914) M W N 779 (*Madras*), *Abdullah v Kunia* 12 Ind Cas 149=14 C L J 467=16 C W N 252 (*Calcutta*), *Imrit v Sridhar Panday*, 13 Ind Cas 120=15 C L J 7=17 C W N 108 (*Cal*). *Natuay v Alhu*, 18 Ind. Cas 752=11 A L J 139 (*Allahabad*). In all these cases it has been held that under section 32 of the Evidence Act a statement of boundaries in documents of title is legal evidence. The only case which expressed a contrary view was that of *Abdul Ali v Syed Rejan Ali*, 21 Ind Cas 618=19 C W N 468. But that case dealt only with documents prepared in the course of litigation and not with transactions affecting title. In a suit for recovery of possession of certain lands as *niskar brahmatter* the plaintiffs relied upon a recital of *brahmatter* title in the will of the father and a recital in a judgment in a claim case, which was not *inter parties*, to prove their title. Held that the recital in the will was not admissible in evidence under section 32 (7) of the Evidence Act read with section 13 (a) and that the recital in the judgment not *inter parties* was not evidence. *Satindra v Krishna*, 36 Ind Cas 882; *Basu Nath v Jagat Kishore*, 35 Ind Cas 298=23 C L J 583=20 C W N 643.

## CLAUSE VIII

**Scope of the section** The meaning of this clause is that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their minds at the time of making it that statement may be repeated by the witnesses and is evidence. *R v Ram Dutt*, 23 W R Cr 35 (38). These statements are admissible on the general principle that they appear to be natural and sincere. Illustration (n) exemplifies this clause. This illustration is based on the case of *Du Bost v Bresford* 2 Camp 512. This was an action for destroying a picture, the impression produced upon the mind by the picture was allowed to be proved on the defence, by witnesses who swore to the exclamations and declarations of other spectators not being themselves put into the witness box. In that case the plaintiff, a painter had painted the picture of the defendant's brother in law and his wife. The former was extremely plain and the latter very handsome. Some misunderstanding having arisen the defendant refused to receive the picture whereupon the plaintiff exhibited it in public with the title "Beauty and the Beast". The defendant cut the picture to pieces, and therefore the action was brought to recover damages. The defence was, that the picture was a libel, calculated to bring the defendant into public ridicule and that he was therefore justified in destroying it. To prove this, witnesses were called who swore to the impression produced by the picture on their own minds, viz that it was intended to be a representative of the defendant's brother in law and his wife, and to the statements of recognition by other spectators. The evidence was received by Lord Ellenborough, who held "that the declarations of the spectators while they looked at the picture in the exhibit room were evidence to show that the figures portrayed were meant [rather were understood] to represent the defendant's sister and brother in law." "What the witness said as to his own feelings was in the nature of original evidence. What he reported the bystanders to have said was in the nature of hearsay. Now the latter is receivable as relevant." *Nort Et* 192 193. But Prof Wigmore thinks such utterances should be admitted as evidence of knowledge or belief and as not being obnoxious to Hearsay rule. "Conduct and word utterances" says

**S 33** the learned writer "may betray knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the minor existence of that knowledge or belief."

The important thing is that, so far as the evidential fact consists in an utterance of words, it is receivable for the present purpose as circumstantial evidence, and that so long as it is offered for that purpose only not as an assertion to be credited like testimony, it is not obnoxious to the Hearsay rule. For example, A's mention of X's insolvency is receivable as circumstantial evidence of A's knowledge, but not as testimonial evidence of X's insolvency. *Wigmore* § 266. It is submitted that when such utterances are offered to prove a testimonial fact it may well be considered as an exception to the Hearsay rule and this clause has its proper place under this section although the illustration (n) is misplaced. So also to prove that a libel referred to the plaintiff, evidence that he was publicly jeered at in consequence of the libel is admissible. *Cool v Ward* M & P 99, *Phy Ev* 339. In *Chase v Houell*, 151 Mass 422 (Am) notice of the rottenness of a tree's root was in issue and to show knowledge by the city remarks of citizens were offered. In admitting the evidence *Knoullon J* said "The acts of persons in looking at the root were an important part of the evidence. From this it might be inferred that they noticed the decayed condition of the roots. The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them. So also on a charge of conspiracy to procure crowds to assemble in order to excite terror in H M's subjects,—evidence by police of complaints of alarms and requests of military assistance made by several of the inhabitants is admissible without calling the declarants. *R v Vincent*, 9 C & P 275, *Phy Ev* 67. But the statement of a police officer based on the information collected from persons of different places and afterwards put in second hand before the Court cannot be received as evidence under the clause. *Queen v Ram Dutt*, 23 W R 30 Cr.

**Illustration (n)** Illustration (n) gives an instance of the sort of cases for which this clause is intended to provide. The object often is to ascertain not so much the feelings or expressions of individuals as the general feeling or impression of a crowd or other public body. This is to be gathered from the impressions used by individuals forming the crowd, and evidence of such expressions is admissible, though it is impossible to call the individuals themselves as witnesses. *Cun Ev* p 170. "With regard to illustration (n) to section 32, I may observe that the case do not belong to section 32 at all. The evidence would be equally admissible, whether the bystanders could be called or not as witnesses. When the bystanders, on seeing a caricature, called out 'there is X,' and evidence is given of their words, what is relied on is not their statements, but the fact of recognition, the fact, that is, that the caricature at once recalls the person X to the minds of those who see it. *Mark Ev* p 34.

**Condition of admissibility under clause (8)** "It will be observed, in the sub clauses as in illustration, reference is made to a number or crowd of persons. If these persons were known to the witness and could be called, his statement could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material. In the English cases it does not seem to have been proved that the persons who made the observations could not be called." *Cun Ev* 11th Ed p 87.

### 33 Evidence given by a witness in a judicial proceeding

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or ex-

pense which, under the circumstances of the case, the Court considers unreasonable **S. 33.**

Provided—

that the proceeding was between the same parties or their representatives in interest,

that the adverse party in the first proceeding had the right and opportunity to cross-examine,

that the questions in issue were substantially the same in the first as in the second proceeding

**Explanation**—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section

**Principle** The securities which have been devised by municipal law for ensuring the veracity and completeness of the evidence given in Courts of Justice, vary, as might be expected, in different countries, and with systems of law to which they are attached *Best Ev* § 54 In Anglo Saxon Jurisprudence all depositions of witnesses must satisfy the following tests, namely (1) they must be taken under oath or solemn affirmation, and (2) when deposing the witness must be brought face to face to the party against whom he is deposing in open Court, so that he may be cross-examined by the latter This security is termed by Betham as *confrontation* *Betham's Rationale of Judicial Evidence, Book III, Ch. XII* This was established long ago "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly which has always been found the most effectual method of discovering truth" *Duke of Dorset v Girdler*, Finch's Pre Ch 531 (1720) The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers There is however a secondary advantage to be obtained by the personal appearance of the witness the Judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness's deportment while testifying, and a certain subjective moral effect is produced upon the witness This secondary advantage, however, does not arise from the confrontation of the opponent and the witness, it is not the consequence of those two being brought face to face It is the witness's presence before the tribunal that secures this secondary advantage—which might equally be obtained whether the opponent was or was not allowed to cross examine In other words this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross examination *Wigmore* § 1395 Nevertheless the secondary advantage incidentally obtained for the tribunal by the witness's presence before it—the demeanour evidence—is an advantage to be insisted upon where it can be had No one has doubted that it is highly desirable if it is only available But it is merely desirable Where it cannot be obtained it need not be required It is no essential part of the notion of confrontation if stands on no better footing than other evidence to which especial value is attached and just as the original of a document (§ 66) or a preferred witness (§ 69) may be dispensed with in cases of unavailability, so a demeanour-evidence may be dispensed with in necessity Such necessity is established by the unavailability of demeanour witness by reason of death illness, and the like *Wigmore* § 1396 So when the unavailability of a witness is proved his evidence is admitted because "on a former trial he was under oath and subject to cross-examination by the other party The main object of producing the witness upon the stand had been attained *Per Bowen J in U S v Reynolds*, 1 Utah 322, *Per Earle J in People v Fish*, 125 N Y 160=2 N E 319

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In stating that this rule mainly depends on the right of cross-examination, care must be taken to guard against the error of imagining that, whenever a party has had the right of cross-examining a witness, he will be liable to have the statement of that witness adduced against him in any subsequent action. This will be so only in the event of his opponent being the same in both suits (*Morgan v Nichol*, 36 L J C P 86), because the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour, which had it been tendered against him would have been clearly inadmissible (*Dow v Derby*, 1 A & C 783, 786, *Faylor* § 469). The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining on the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may (on the conditions mentioned in section 33 arising) be given in the subsequent proceedings. *In re Ram Reddi*, 3 M 48 (52), *Bal Gangadhar v Shrinivas*, 39 B 441=19 C W N 729=42 I A 729 (P C).

**Scope of the section.** Declarations under oath are admissible (a) When the witness who made them is dead, (b) or is physically or mentally incapable of being present at the trial, (c) or is kept out of the way by the adverse party, (d) or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

**Provided the following conditions exist** (a) The person against whom the evidence is to be given must have had the right and opportunity to cross-examine the witness when his examination was taken. (b) The question in issue must be the same as in the proceeding in which the testimony was taken. (c) The proceeding, if civil, must be between the same parties or their representatives in interest, if criminal, must relate to the same crime and be against the same person. *Mc Kehys Ev* § 164. The chief reason for the exclusion of hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where testimony is given under oath, in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admissible, after the decease of the witness in any subsequent suit between the same parties. *Bull N P* 239, 243, *Mayor of Doncaster v Day* 3 Taunt, 262, *Glass v Beach*, 5 Vt 172, *Greenl Ev* § 163. It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. *Bull N P* 239, 243, *1 Stark Evid* 264, *R v Erisuell*, 3 T R 707, 721. But testimony thus offered is open to all the objections which might be taken if the witness were personally present. *Wright v Tatham*, 1 Ad & El 3, 21, *Crary v Sprague* 12 Wen 41, *Todd v El of Winchelsea*, 3 C & P 387. "Section 33 of the Evidence Act gives the Court new powers, which require to be exercised with great caution. There is no doubt that it is still necessary (just as much as ever it was) to produce every witness at the trial unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on its production." *Per Macpherson J in Queen v Mowjan* 20 W R 69 Cr, *R v Piyari*, 4 C L R 511, *R v Mathu* 2 A 648. In England the law on the subject is thus stated. "Agreed in this case where a person has been examined in chancery, that in a case at law between the same parties his deposition may be used in evidence, if it can be proved that the witness is dead, or by reason of sickness, etc., is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the Court. *Fry v Wood* (1737) 1 Atk 445. "In this case the deposition is the best that can possibly be had and that answers what the law requires." *Gilbert Evidence* 61. The deposition, if published could not be read at law unless it was proved to the satisfaction of the Court that the witness could not be examined at the trial. *Per Lord Eldon in Andrews v Palmer*, 1 Ves & R 2.

This section embodies the law as to depositions taken in a former proceeding being admissible upon a subsequent occasion. It specifies what evidence is receivable. This is whatever is delivered by a witness either in (a) judicial proceeding or (b) before any person authorized by law to take the evidence. Oral evidence therefore is as receivable as when it has been reduced to a formal deposition. *Aort Ev 194*

The deposition of a witness is not admissible under section 33 of the Evidence Act unless one or other of the requirements of the section is satisfied. The mere fact that the witness did not appear as a witness when cited on behalf of the defendant on one occasion but was not examined, will not be a ground of admitting the prior deposition. *Brajaballav v Ahoy*, 30 C W N 254=93 Ind Cas 115=A I R 1926 Cal 705, *Ghulam Haider v Emperor*, A I R 1929 Lah 542=30 P L R 192. It is impossible to lay down any hard and fast rule for the application of this section. Each case must depend upon its own facts and the matter is essentially one for the exercise of discretion on the part of the Court applying it. *Jati Mali v Emperor*, A I R 1929 Lah 765, *Mahomed v Mussamat Fattan* 12 P L R 1919. The power given by s 33 of the Evidence Act requires to be exercised with great care and caution and the Court must insist on a strict proof before holding that the requisite conditions have been satisfied. *Nga Nyo v Emperor*, 1 Rang 512=2 Bur L J 205, *per Oung J*. It is far preferable and safer precaution that the Court should record its reasons for holding that the necessary conditions of this section have been complied with, prior to admitting such deposition into evidence. The section presupposes a consideration of the grounds prior to the admission of the evidence and if the reasons too are recorded prior to the admission the order would constitute a more convincing proof of the considered adequacy of the grounds than a passage in the judgment subsequently written which may easily assume the appearance of a subsequent statement of excuses for a previous ill-considered action. *Nga Nyo v Emperor*, 1 Rang 512=2 Bur L J 205. Deposition in a civil suit is admissible in a criminal case between the parties where the witness is dead. *Debi Singh v Emperor* 52 Ind Cas 385=20 Cr L J 625. The application of s 33 of the Evidence Act, in criminal cases ought to be confined within the narrowest limits. Where a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of a witness is not material, there is no need to introduce it under s 33. It can only be in very extreme cases that it is right to make use of the evidence of an absent witness under s 33 in a criminal trial where the evidence, if true, would be extremely material. *Emperor v Lakshman*, 17 Bom L R 590.

In the absence of proof of circumstances specified in this section of the Evidence Act, the importing in bulk in a civil suit of depositions of witnesses recorded in a criminal trial was a serious irregularity. *Bal Gangadhar Tilak v Shin Shrinubha Pandit* 19 C W N 729=13 A L J 570=39 B 441=29 Ind Cas 639 P C. Admitting evidence given in a former judicial proceeding under section 33 Evidence Act, without explaining reason for so doing, is an irregularity. *Empress v Fateh Ali*, A W N 1881, 38, *Queen Empress v Ram Sarup* A W N 1898 22, *Queen v Mewan*, 20 W R Cr 69, *Queen v Lakhun* 21 W R Cr 56. The copy of a deposition is inadmissible in evidence, under section 33 unless the deponent is dead or cannot be found or is incapable of giving evidence, or his presence cannot be obtained without an unreasonable amount of delay or expense, and, even then, only when the proceedings are between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross-examine and the questions in issue were substantially the same in the first as in the second proceedings. *Chakauri Singh v Suraj Kuar* 2 A L J 91. If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act, for example ss 32 and 33. *Bela Ram v Mohabir Singh* 9 A L J 351. To make a previous deposition relevant, three elements have to be established, namely first, that the proceeding was between the same parties or their representatives in interest, secondly, that the adverse party in the first proceeding had the opportunity and right to cross-examine, and, thirdly, that the questions in issue

**S. 33.** were substantially the same in the first as in the second proceeding *Ray Kumari Nritya Kahi*, 7 Ind Cas 892=12 C L J 434 Any statement which was not relevant evidence in the previous proceeding should not be admitted in the second proceeding *Pellat v Fenars*, 2 B & P 542 *Small v Naram* (1849) 13 Q B 840

Previous deposition can not be used in a subsequent suit merely to contradicting a person in such proceeding *Bharamma v Ramanna*, 78 Ind Cr 16

**Affidavit** An affidavit of a person who died subsequently and who had not been subjected to cross examination is not admissible under ss. 33 and 33 of the Evidence Act *Doraiswami v Balasundaram*, 38 M L T (H C) 270=10 Ind Cas 243=A I R 1927 Mad 507=52 M L J 477, see also *Mir Abdus Musst Bibi Sona*, 8 Ind Crs 897

**Admission of improper evidence by consent** A and B were jointly tried Prior to this, another criminal proceeding was going on between B and the present complainant The Magistrate admitted depositions of three witnesses in the previous proceedings, in the present trial, although A was not a party to those proceedings at the request of the accused's counsel or at least with his consent It was held that the evidence thus put in by consent was not really admissible as the conditions under which alone evidence of absent witnesses is admissible under s. 33 of the Evidence Act had not been fulfilled *Abdul Gaffar v Govind Prasad* A I R 1928 Rang 284, *Ghulam v Emperor*, A I R 1944 Lah 542, *Umar Hayi v Emperor*, A I R 1923 Mad 32=46 M 117, *Patil Samu v Singaram*, 41 M 731=34 M L J 526=46 Ind Cas 849, *Kalra v Uma*, 46 M 117 But in a civil case such deposition is allowed by consent So in a civil case a deposition given by witnesses in a prior suit may be admitted in evidence in a subsequent suit by consent of parties even though such witnesses are alive *Lakshmi devarma v Krishniah* 39 M L T 198=104 Ind Cas 519 A Irregularity in the admission of such evidence is cured by consent of the parties *Radha Kishen v Kidar Nath*, 22 A L J 761=L R 5A 536=46A 815=40 Ind Cas 874=A I R 1924 All 845 The provisions of this section are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil suit where no question of public policy is involved *Jamab Bibi v Hylary Rally* 43M 609=38 M L J 582=28 M L T 23=56 Ind Crs 937=194 M W N 360, see also *Lakshman v Amrit Gopal* 24 B 591=2 Bom L R 94

**Previous deposition, how proved** What the deceased witness testified may be proved by any person who will swear from his own memory, or from notes taken by any person who will swear to their accuracy *Mayor of Don Caser v Day 3 Taunt* 262 *Chess v Chess*, 17 Serg & R 409 It can be proved by the Judge's own notes *Glassford on Evid* 602, *R v Gard*, 8 C & P 21 "One mode of proof of such depositions is the production of the Judge's notes or the oath of some one who was present and heard the evidence delivered by *Morgan*, 6 Cox 107, *R v Bird* 5 Cox 11, *Struett v Boringdon*, 5 Esp 4, *In Lord Palmerston's Case*, the evidence was rejected, because the witness could give the effect only, and not the words But it may be doubted whether such manner of particularity is requisite, for the very words could seldom be remembered after the lapse of time Where a note has been made by a reporter or a shorthand writer he could of course use the note to refresh his memory, and from such a source a shorthand writer might be able to swear to the very words See *OO no's Case*, A & T 275 *Nort Et* 194 It was formerly held, that the person called to prove what a deceased witness testified on a former trial must be required to repeat his precise words and that testimony merely to the effect that they were inadmissible *R v Jolliffe*, 4 T R 290 But this strictness is now insisted upon It seems therefore, to be generally considered sufficient if the witness is able to state the substance of what was sworn on the former trial *Cornell v Green* 10 Serg & R 14, 16 *Miles v O'Hara*, 4 Binn 104, *Cox v Lenox* 5 Randolph 31 *R v Rowley* 1 Mood Cr C 111, *Chess v Chess* 17 Serg & R 409, *Jackson v Bulley* 2 Johns 17 But he must state in substance the substance of what was said on the particular subject which he is called to prove It is not enough to state only what was said on that subject by the deceased, on his examination in chief without also giving the substance of what he said upon it in his cross examination it is inadmissible *Holf v Wyeth*, 11 Serg & R 140 Where the

depositions are written it may be proved either by office copy, or examined or certified copy *Phup Ly Ath Ed p 409* The words descriptive of the witness put at the head of a deposition, form not part of it and are no evidence to prove the facts stated *Magbulan v Ahmad*, 26 A 108 (P C)=31 I A 98=8 C W, N 241=6 Bom L R 238, *Lalshman v Lalim*, 39 C L J 90=80 Ind Cas 357, see also *Muhammad v Abdul* 50 Ind Cas 431 Before admitting a certified copy of a previous deposition, the identity of the person who gave his evidence must be proved *Bayaballa v Al shay*, 30 C W N 254

**Oral evidence** The deposition may have been oral as in the common case of a *via voce* witness in a civil suit If that oral deposition can be proved to the satisfaction of the Judge, it is as admissible as a written deposition But it is of course open to much observation in as much as the memory is treacherous, while a written record of what is said abides *Latera scripta manet* Some forcible remarks on the superiority of written over oral testimony will be found in the case of *Bumaree Lal v Maharajah Hetnairan*, 7 M I A 136 *Nort Li* 194

**Judicial Proceeding** The evidence taken in the ejectment proceedings before the revenue authorities cannot be legally relied upon in a suit in Civil Court to recover possession by persons ejected in consequence of the proceedings in the Revenue Court *Saru Khan v Jan Mahmud* 106 Ind Cas 313=A I R 1928 Lah 43 Where certain proceedings were conducted before a Magistrate who had no jurisdiction to conduct it, the evidence of witnesses examined in such a proceeding is inadmissible on a retrial before a competent Court *Bula Singh v Goun*, 27 P L R 447=7 Lah 396=97 Ind Cas 752=27 Cr L J 1168=A I R 1926 Lah 592 The evidence taken in the summary cases is no doubt admissible upon the conditions and for the purposes described in the Evidence Act, e g under section 33 previous evidence is relevant under certain circumstances where for instance, the person gave the evidence in the previous proceedings and cannot be found *Nga Sen v Nga Pu* 22 Ind Cas 676=U B R (1913) I, 181

**Before any person authorised by law** It is not necessary that the evidence should have been given in a judicial proceeding Any deposition taken by a Magistrate in his ministerial capacity could be receivable, if not excluded on any one of the grounds mentioned in the section So a deposition taken before a Coroner (*R v Rig 4 F & T* 1985, *State v Campbell* 1 Rich 124, *R v Butcher*, 64 J P 608 but see *R v Coule*, 71 J P 152) a British consul of *Zanzibar* (*Empress v Dossay*, 3 B 334) a Special Registrar (*Jeheto v Jayanessa*, 18 C W N 605, *Jekale v Paufanessa*, 20 Ind Cas 661) an arbitrator (*R v Amanulla*, 12 B L R App 15) or a Commissioner appointed under Civil Procedure Code to take down evidence (Civil Pro Code Order XXVI) is admissible in a subsequent case In earlier Cyloutta cases it was held that deposition taken by the Commissioner should be formally tendered in evidence (*Aistairu v Vundo*, 3 C W N 239, *Kusum v Satyram* 30 C 999, *Hemanta v Banu* 9 C W N 794) but in *Dhani Ram v Muli* 36 C 567 a contrary view was taken The evidence of witnesses examined in an enquiry held by a Sub Registrar under s 41(2) of the Registration Act as to the genuineness of a will is admissible in evidence in a subsequent suit between the same parties raising an issue as to the genuineness of the will if it is to be proved that the witnesses were dead at the time of the suit and that the adverse party at the enquiry before the Sub Registrar had an opportunity of cross examining the witnesses *Lanka Lakshmana v Lanka Vardhan*, 35 M L J 607=(1918) M W N 931

**Previous deposition should have been recorded in accordance with law** In a trial the deposition of a witness must be recorded in accordance with law In criminal cases such law is laid down by sections 263 264, Chapter XXV and ss 503 509 and 512 of the Criminal Procedure Code Order XVIII rules 4 17 of Civil Procedure Code lay down the rules which must be observed in taking down depositions in civil cases When any deposition is taken in accordance with law the Court shall presume that the document is genuine (Ide s 80 of the Evidence Act)



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In what proceeding it can be used. Either in an entirely new judicial proceeding, or in a subsequent stage of the same proceeding such previous deposition may be used if other conditions are satisfied. A trial before a Magistrate or Court is a continuation or subsequent stage of the proceedings in which a Magistrate first took up the inquiry which led to the trial. A deposition taken upon one charge in a criminal proceeding may be used in another criminal proceeding arising out of the same transaction, when the deponent is dead, etc. at the time of the second proceeding. Thus deposition taken on a charge of assault and robbery have been admitted on a charge of murder, when death resulted from the violence used to perpetrate the robbery. *R v Smith*, 1 R & R 330, *North*. *Ev* 195. In *Rangaswami v Sundarajulu*, 30 Ind Cas 52=31 M L J 412, it was contended in second appeal for the first time that the evidence taken in the suit, before a defendant was newly made a party, should not have been used against him and section 33 of the Evidence was relied upon. Held that the new defendant was not entitled to take that objection in second appeal and s 33 of the Evidence Act has no application to this case.

**When the witness is dead.** Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding or in a later stage of the same proceeding, when the witness is dead. *Steph Dig Li* Art 32, *Mayor of Doncaster v Day*, 3 Taunt 267. When a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn upon a former trial, it is admitted on the principle that it is the best of which the case admits. *Per Johnson J in State v Hill*, 2 Hill 5 (609). So death has always been the typical and acknowledged cause of unavailability, and is equally conceded to suffice for depositions and for former testimony. *Wigmore* § 1403, *Gilbert's Ev* 60, *Lord Morley's Case*, *Kelying* 55, *Permy* *Wood*, 1 Atk 444. *R v Castro* (Trichborne Case), charge of Chief Justice, 11 305. Such depositions cannot be admitted in the subsequent suit when the witnesses are living and their evidence is procurable. *Hursh v Turner* *Chanc*, 2 B L R App 4, *Chalaur v Suraj* 2 A L J 91, *Bhoobun Moyee v Ambica*, 23 W R 343. *Mahomed v Fatan*, 12 P L R 1919. The evidence of witness, one of them being dead and the other absconding, given before a Magistrate, was held admissible at the Sessions trial even though fresh charges have been added. *Empress v Roeha* 8 C L R 273.

**Absence.** The absence of the witness from the jurisdiction, out of the reach of the Court's process, ought also to be sufficient, and is so treated by the great majority of cases. *Fry v Wood* 1 Atk 415, *Roe v Jones*, 3 Low Can 38.

Mere absence, however, may not be sufficient and it is usually and that a residence or an absence for a prolonged or uncertain time is necessary. *Greenl Fr* § 163(g). It is not necessary to try and take the witness's deposition or secure his voluntary personal attendance. *Munn M Co v R* (3), *Minn* 34 315, *contra Shusser v Burlington* 47 Ia 302. The deposition by a person where he denied on oath that he had presented a certain petition in Court which purported to be from him is held to be inadmissible as evidence when such person might have been brought into Court but was not. *Bhoobun Moyee v Ambica*, 23 W R 343.

**Illness.** Illness, by causing inability to attend, has the same effect as death. *Lord Morley's Case*, *Kelying* 55. *Fry v Wood* 1 Atk 445. *R v Sir* 3 C & P 113, *Rogers v Roborg* 2 G & J 60, *contra Doe v Evans* 3 C & P 221. The phrase usually employed as a test is "so ill as to be unable to travel". The application of the principle should be left to the trial Court's discretion. *Thornton v Britton* 144 Pa 130. *Greenl Fr* § 163(g). The duration of the illness need only be in probability such that with regard to the importance of the testimony the trial cannot be postponed. *Wigmore* § 1406. The question of illness is a question for the determination of the presiding Judge. *Per* *Ev* 120 (1916) 1 K B 581. *R v Stephenson* L & C 165. "As to the degree of illness so ill as not to be able to travel sufficiently indicates the requirement of common sense and the ability to be considered with reference to the nature of path or danger to the witness. That the illness should be such as to make it impracticable to take the witness's deposition at his home has been said by the

Court to be the correct limitation (*Berney v Mitchell*, 34 N J L 341, *Smith v Moore*, 149 N C 185), but this is certainly incorrect, for a deposition obtained from a person during illness could not be any better than his former cross examined testimony or deposition, and would probably be much less trustworthy. *Mathews J in Miller v Russel*, 7 Mart N S La 268. *Wigmore* § 1406. See also *Fry v Wood*, 1 Atk 445, *R v Savage* 5 C & P 143, *R v Harris* 4 Cox C C 440, *R v Harney*, 4 Cox C C 441, *R v Ullner*, 4 Cox Cr 441, *R v Stephenson* 9 Cox Cr 156, *R v Bull* 12 Cox Cr 31, *R v Helton* 9 Cox Cr 296, *R v Farrel*, 12 Cox Cr 606, *R v Thompson* 13 Cox Cr 182, *R v Heeson*, 14 Cox Cr 42, *R v Wellings*, L R 3 Q B D 428, *R v Prunty*, 16 Cox Cr 344. So where a witness is 87 years of age and is 'in such a great state of nervous excitement that it would be attended with great risk to her life to bring her into Court to give evidence' or where it might bring in an attack of apoplexy there was no actual disease or illness, only a predisposition to it, his previous deposition was not admitted. *R v Thompson*, 13 Cox Cr 182, *R v Furell*, 12 Cox Cr 606. The degree of illness in every case is to be decided by the Court. *R v Noals*, (1917) 1 K B 581.

**Cannot be found** Inability to find the witness is an equally sufficient reason for non production, by the better opinion (*Oates Trial*, 10 How St Tr 1285 *Anon Godbolt* 236, *Gilbert Evidence*, 60 Buller N P 239, *Thompson v State* 106 Ala 67, *Utchell v State* 114 Id 1 *Shall elford v State*, 33 Ark 539 *Sneed v State*, 47 Ark 539), though there are contrary precedents (*Lord Morleys Case* Kelying 55, *R v Hagan*, 8 C & P 169, *R v Scaife*, 8 Q B 243 *Cray v Sprague* 12 Wend 45) the sufficiency of the search is usually and properly left to the trial Court's discretion. *Greenl Ev* § 163(g). If the witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance. Such a disappearance is shown by the party's inability to find him after diligent search. The only objection to recognizing this ground of unavailability is the possibility of collusion between party and witness but supposing the Court to be satisfied that there has been no collusion and that the search has been *bona fide*, this objection loses its force. *Wigmore* § 1405 "If a party cannot find a witness, then he is as if were dead to him." *Anon Godbolt*, 326. This principle has also been accepted by *Jeffreys L C J* in *Oates Trial*, 10 How St Tr 1227, on the assurance of Oates to the effect "My lord it has cost a great deal of money to search him out, but I cannot anywhere meet with him, and that makes my case so much worse that I cannot when I have done all that man can do to get my witnesses together."

The complainants in a criminal case were not examined and instead the deposition of one of the complainants in a prior case in which another accused had been charged with a similar offence were put in evidence. A police constable gave evidence that an attempt was made to produce the witness but she could not be found. *Held*, that the evidence in the former case should have been admitted as evidence in this case and a further attempt should be made to enforce the attendance of the witness. *Duarka v Emperor* 25 O C 142=1922 Oudh 241, see also *Emperor v Dost*, 2 Cr L J 518, *Queen v Lakhu* 24 W R Cr 18, *Khem Singh v Emperor* 89 Ind Cas 30=A I R 1925 Lah 319 *Emperor v Kangal* 41 C 601. But when it is proved that the witness could not be found his previous deposition is admissible. *Ajodhya v Emperor*, 56 Ind Cas 582=16 N L R 30.

**Insanity** Insanity equally renders the witness unavailable. *R v Linsweil* 3 T R 707, *Morler v State* 67 Ala 62, *Thompson v State*, 106 Ala 67. A witness who has become insane is no longer qualified his testimony in Court is no longer available and by universal concession his former testimony or deposition may be used. *Wigmore* § 1408, *R v Marshall* Car & M 147. "There is no real or practical difference between the death of the mind and the death of the body." *Morler v State*, 67 Ala 62, per *Somerville J*. Even temporary insanity makes a witness unavailable. *R v Marshall*, Car & M 147.

**Loss of memory etc** Loss of memory by disease or old age also renders the witness unavailable. *R v Wilson* 8 Cox Cr C 453, *Rothrock v Gallagher*, 91 Pa 112, *Cent R Co v Murray*, 97 Gr 326, *Ewing v Diehl*, 76 Pa 373,

**S 33.** *Drayton v Wells*, 1 Nott & M 217 Loss of memory by lapse of time will also have the same effect as loss of memory by disease or old age *Jack v Woods*, 26 Pa 378, *contra*, *Robinson v Gilman*, 34 N H 297, *Velott v Lewis*, 102 Pa 326, *Greenl Ev* 163 (g) But the Court must be satisfied of the fact of the loss The difficulty is that the witness must be called in order that this fact may appear, so that in practical application there would be no dispensation of his presence, more over he might in some cases be able to use the deposition or report the testimony as a record of past recollection *Wigmore* § 1409 *State v N O Water Works Co* 107 La 1, *Jack v Woods*, 26 Pa 378, *contra*, *Cool v Stout*, 47 Ill 531, *Stearns Lumber Co v Houlett*, 131 Vt 217

**Loss of faculties necessary for testimony** Like insanity also the loss of any one of the faculties necessary for testimony furnishes an equal reason, whether the loss occurs through disease or through senility This may be the case where the lost faculty is that of speech *R v Coolburn*, 7 Cox Cr 260 Blindness may also render a witness unavailable for certain kinds of testimony *Houston v Blythe*, 69 Tex 509, *Wigmore* § 1408 So where a witness has become blind his deposition in Chancery was used for those parts of his testimony which depended on his consultation of documents *Kinsman v Crooke*, 2 Ld Raym 1166, *Houston v Blythe*, 60 Tex 509 (512) Where evidence was given before a committing Magistrate but in the Sessions Court the witness proves to be speechless, this section does not apply to the case and the evidence cannot *in fact* be treated as evidence at the Sessions *Moti Ram v Emperor*, 10 Ind Ca 152=24 Cr L J 904

**Incapable of giving evidence** The capacity to give evidence mentioned in section 33 of the Evidence Act need not be a permanent one something short of permanent incapacity might satisfy the words of the section incapable of giving evidence *In the matter of the petition of Asgur Hossein*, 6 C 1=5 S C L R 124, but see *In the matter of Pyari Lal* where it was held that the word "incapable of giving evidence" in section 33, Evidence Act, denotes an incapability of a permanent kind The Court has no discretion under section 33 as to admitting a deposition, when the witness is found to be "incapable of giving evidence" But where the absence of the witness is due to temporary causes the Court has a discretion to admit the deposition of a witness if it is proved to be either actually impossible to produce him, or to be so difficult to do so or if it is unreasonable to insist on his production *In the matter of Pyari Lal*, *supra*

**Kept out of the way by the adverse party** If the witness has been by the opponent procured to absent himself this ought of itself to justify the use of his deposition or former testimony—where the offering party has or has not searched for him whether he is within jurisdiction or not, whether his place of abode is secret or open, for any tampering with a witness should once for all estop the tamperer from making any objection based on the result of his own chicanery *Wigmore* § 1405 (4) This rule is based on the broad principle of justice, which will not permit a party to take advantage of his own wrong In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them the Court held that his deposition might be read in evidence as against the man who had kept him out of the way but that it could not be received against the other two men *R v Scarfe* 2 Den 281=17 Q B 238=5 Cox 243 S C, see also *Lord Morley's Case*, 6 How St Tr 1r 770, *R v Harrison* 12 How St Tr 801 *Green v Gateward* B N P 243 *R v Guttridge* 9 C & P 473, *Faylor* § 414 Td proposition that if a witness be kept out of the way by the adversary, his former statements on oath will be admissible rests partly on the authority of several decisions both in civil and criminal Courts *Faylor* § 478, *Greenl Fr* § 111 (g) *U v Reynolds*, 1 Utah 322

**Proof of unavailability of witness** The proponent of the former testimony or the deposition is of course ordinarily the party to prove the necessity of resorting thereto in consequence of the witness's unavailability in person Where former testimony is offered no difficulty arises in applying the principle *Fi* *v* *Traction Co* 124 Ja 665 *Wigmore* § 1111 As evidence of the witness's death

absence or non-residence replies received during the search ought to be admissible, whether or not they are testimony themselves they serve as circumstances indicating due diligence of the party seeking the witness *Wigmore § 1114* Where the witness is available for testifying his deposition is not usable "The very meaning of the phrase *de bene esse* implied that it was conditional and that the witness must be re-examined if capable *Per Dr Lushington in Weguelin v Weguelin* 2 Curt Doel 263 So also when the deposition of a witness was allowed to be read when he was present in Court, this was also illegal *Campbell J in Dunn v Dunn*, 11 Mich 292 So also if a witness is within the reach of the process of the Court his previous deposition is inadmissible *Inon* 2 Salk 691, *Blagrate v Blagrate* 1 Deg & Sim 212, 259 Under this section, the evidence of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court without proof of the circumstances which make it admissible Such circumstances should be proved like any other fact by the evidence of witnesses and a mere report that a witness is dead or absent is not sufficient *Queen Empress v Aga Po* L B R (1872-1892) 134 *Khem Singh v Emperor*, 88 Ind Cas 30=7 Lah L J 105=26 Cr L J 1086 That it is absolutely necessary to examine a qualified medical practitioner before evidence of witness too ill to attend can be admitted under section 33 of the Evidence Act cannot be laid down as a proposition of law Facilities for obtaining qualified doctors in England are very different from those in India and an argument based on the analogous English law would not apply here *Uyan v King Emperor*, 31 C W N 908=103 Ind Cas 846=28 C L J 766=A I R 1927 Cid 679, *R v Noakes*, (1917) 1 K B 581 but see *R v Cohen*, 34 L J 623 A previous deposition can be admitted in evidence only under the provisions of s 33 of the Evidence Act, but before it can be placed on record of a criminal trial the Court must decide judicially that a proper effort had been made on behalf of the prosecution to secure the presence of the witness that in spite of that effort he had not been traced and could not be found out, or that he was incapable of giving evidence, or was kept out of the way by the adverse party or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case the Court considers unreasonable *Ghulam v Emperor*, A I R 1929 Lah 542 *Annari v Emperor*, 39 M 449=28 Ind Cas 518, *Umar Hajee v Emperor* A I R 1929 Mad 32=46 M 117, *Sayan Singh v Emperor* 6 Lah 437=A I R 1925 Lah 418 *Emperor v Kangal Mahi* 41 C 601=26 Ind Cas 161=15 Cr L J 713 *Falconer v Hanson* 1 Camp 171, *Wedeman v Walpole*, 1891 Times, June 15

Presence cannot be obtained without an amount of delay or expense etc It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with *Empress v Mulu*, 2 A 616 'The prisoner certainly had a right to expect that the witnesses should be brought to give their testimony *in voce* before the Sessions Court, and any expense or delay that might be necessary for that purpose must, in the absence of special facts be taken as reasonable rather than unreasonable *Per Phear J in Queen v Lukhun*, 31 W R 56 Cr Inconvenience to witness is no ground allowed under this section *Empress v T Burke*, 6 A 224 What delay or expense is reasonable or unreasonable depends upon the circumstances of each case Of the circumstances of the case, one of the chief which the Judge has and ought to weigh, is the nature and importance of the statements contained in the deposition It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for prosecution, or supply something in the case for prosecution, as to which little or no dispute exists or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial *Per White J in In the matter of Pyari Lall* 4 C L R 501 (509-510) But where the absence of the witness is due to temporary causes, his previous deposition cannot be admitted *Ibid* The mere fact that a witness changed his lodgings after giving *mochulel* for appearance in the Sessions Court and much delay would be involved in searching him are no grounds for admitting his deposition in the lower Court In such a case it must be shown that such a witness could not have been found if reasonable exertion had been made to find him *Queen v Luclhy*, 24 W R Cr 18 *Noshi v Empress*, 5 C 938=6 C L R 333, *Empress v Dabee Prasad*, 6 C 532, *Queen Empress v*

**S. 33.** *Jacob*, 19 C 113 Section 33 of the Evidence Act does not justify a Magistrate when proceeding under s. 491 of the Criminal Procedure Code, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused. *Queen v. Prosonno*, 22 W R 36 Cr. The Court has a discretion to admit the deposition of a witness, if it is proved to be either actually impossible to produce him, or to be so difficult to do so, or if it is unreasonable to insist on his production. In the matter of *Piyari Lall*, 4 C L R 534, see also *Andar Steam Navigation v. Bengal Coal Co.*, 35 C 751, *Nga Ba v. Emperor*, 104 Ind Cas 637 = A I R 1927 Rang 248, *R v. Hogg*, 6 C & P 176, *Beaufort v. Gray*, 1 L R 1 C P 699, *Empress v. Ramu Reddi*, 3 M 45. So where a witness is procurable his subsequent deposition is not admissible. *Bhoooban v. Amba*, 23 W R 313, *Emperor v. Nanlu*, 2 A L J 599. The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the time of the trial, i.e., in the traditional phrase, they are taken *de bene esse*, conditionally. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *in a voce* on the stand. This principle is constantly indicated. *Green v. Li*, § 163 (1). In certain States of the United States of America, such deposition is admitted where the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any personal advantage. *Atkinson J in Western & A R Co v. Bussen*, [95 Ga 584. But this rule is not sustainable on principle. The notion that any citizen's private interest should be allowed to override his duty to the community is a false one. The principle that the whole community and every member of it, should join in rendering all possible aid to the establishment of truth and justice is a fundamental one in civilized society. *Wigmore*, 1407.

**Proviso—Para (1)** At common law testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same trial in proof of the facts stated provided that the proceedings are between the same parties or their privies. *Phip v. Elth Ed*, p. 406. A party offering a deposition or an answer in evidence against a person not a party to the original suit, *Munsfield L C J* said 'That cannot be done for this reason because such person has it not in his power to cross examine.' *Goodright v. Moss Cowper* 593. So 'examinations upon oath, except in exceptional cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness.' *Per Lord Kenyon, L C J in R v. Eriswell*, 3 T R 707. The law on this subject is thus summarised by Chief Baron Gilbert.

When you give in evidence any matter sworn at a former trial, it must be between the same parties because otherwise you dispossess your adversary of his liberty to cross examine. *Gilbert Ev* 68. So a deposition can not be given in evidence against any person that was not a party to the suit, and the reason is because he had not liberty to cross-examine the witness and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party. *Buller J Trial at Nisi Prius*, 239. The words used in this paragraph are 'The proceedings must be one between the same parties or their privies in interest.' This refers to the former proceeding the language would have been more accurate if it had been "those whom they represent in interest." The effect is the same as that of *res judicata* and estoppel. *Nort Ev* 196. The words here used as representatives in interest. In fact they are privies. *Chambers v. Bishwanar*, 8 Pat L T 510 = 101 Ind Cas 289 = A I R 1927 Pat 61. In *Morgan v. Nicholl* 2 L R C P 117, *Willes J* said "By persons privies to former parties is really meant persons claiming under them." So where a trial was a trial between different parties having different rights and with whom the plaintiff had no privity and as he had no opportunity to examine or cross-examine the witness it would be contrary to the first principle of justice to bind or in any way affect his interests by the evidence given on that occasion. *Per Hannon C J in Lane v. Bramerd*, 30 Cox 579. The real reason of the parties being the same is thus laid down by *Gilchrist J in Bailey v. Woods*, 17 H N 372 (Am). The testimony be given under oath in a judicial proceeding, in which the same

litigant was a party and where he had right to cross examine and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting the testimony so given is admitted in any subsequent suit between the parties. *It seems to depend rather upon the right to cross examine them than upon the pre use & nominal identity of the parties.* See also *Summons v State*, 5 Oh St 343. Where there are two or more charges arising out of the same allegations made by an accused, the testimony of a deceased witness in a previous proceeding against the accused is admissible in evidence in a subsequent proceeding against the same accused, although the prosecutor in the second case is the widow of the prosecutor in the first. *Queen Empress v Bhabhutgar*, Rat Un Cr C 347=Cr Rg 38 of 1887. To satisfy the requirements of this section the two suits must be brought by or against the same parties or their representative in interest, at the time when the suits are proceeding and the evidence is given. *Sita Nath v Mohesh Chunder*, 12 C 627, *Queen v Ishri*, 8 A 672=A W N 1886, 277.

Where the parties of the present suit were not parties or representatives of the parties of the previous suit, in such a case, a deposition made in the former suit is not admissible in evidence in the present suit. *Mrinmoyee v Bhooban Moyee*, 15 B L R 1=23 W R 42, *Queen Empress v Ishri*, 8 A 672=A W N 1886 257, *Queen v Rana* 3 M 45, *Emperor v Vaman*, 5 Bom L R 599 (601). This section does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in a subsequent suit and the deposition is sought to be used against him not as evidence given between parties one of whom called him as a witness but as an admission as against himself. *Soogan Bibi v Achmut*, 14 B L R App 3=21 W R 414. The parties may be differently marshalled that is, the plaintiff in former suit may be defendant in the latter and *vice versa*. *Wright v Tatham*, 1 A & E 3.

In *Wright v Tatham supra* one T claimed against W as heir of J M while W claimed under a will of J M. T first filed a bill in Chancery against W and three others and evidence was taken on an issue framed at law in which W was plaintiff. Then T brought an ejectment suit against W in which *John Doe* was the nominal plaintiff. It was held, when the testimony of a deceased witness B at the former trial was offered in the second action, that (1) the nominal difference in the parties on T's side, and (2) the addition of three new parties on W's side, could not prevent the use of the testimony as between T and W. In admitting such deposition *Tindal C J*, said "Mr T the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of B, the same right of cross-examination and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had it if Mr W had been the sole plaintiff in that suit or as he would have had now if B had been alive and subpoenaed as a witness." *Wigmore* § 1388. It is further well settled that the former testimony is receivable if the then party opponent, though a different person had the same property interest that the present opponent has. *Ibid*.

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case and a judgment or other determination could in that case have been made between them alone though other parties were joined with both or either. *California Civ Pro Code* § 1910. Aside from the provisions of the Code, it is well settled that depositions taken in an action between two parties are admissible in actions between their successors in interest. *Greenleaf Li* §§ 164 553. It is not an unsafe rule. For while the successor in interest may not have an opportunity to cross-examine the witness yet the person in whose shoes he stands had, and this is sufficient for every practical purpose. *Briggs v Briggs*, 80 Cal 253 (Am). But such depositions taken in other actions are not to be received in evidence, unless the parties are the same or in privity, and unless the issues are substantially the same. Thus, where husband and wife were each injured on a ferry boat at the same time and by the same cause, the deposition of the husband taken in an action by the wife against the ferry company for an injury to herself, in which he was plaintiff only by reason of being her husband, was not received in an action by the wife as his administratrix, against the company for the injury to him. *Fearn v.*

**S 33.** *West Jersey Ferry Co*, 143 Pa 122 Where a plaintiff brought two actions against obligors on the same bond, a deposition taken at the instance of one defendant could not be used by the defendant in the other action. It could not be used by the plaintiff in the other action, and therefore for want of mutuality could not be used by the defendant therein, "as a man who cannot be prejudiced by deposition or proceeding in a suit shall never receive any advantage from it" *Gibb Ev 55*, *Brown v Johnson*, 13 Gratt 614, *Burr Jones* § 683

In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under section 33 regard must be had to the state of affairs when the evidence is sought to be admitted. When the defendant in a subsequent suit was the natural son of the plaintiff in previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person. *Held* that the deposition in the previous suit was not admissible. *Sri Raja Ravi v Raja of Pittapur*, 51 M 893=28 L R 122=A I R 1928 Mad 994=55 M L J 894 (F B). The words "representative in interest" mean that the parties in the second proceedings in which evidence is tendered must be the representatives in interest of the parties in the first proceeding, or in other words should be persons who derive their title through or claim under them, or shortly are their privies. Section 33 cannot be applied without any reference to the subject matter of the two suits. The interest involved in each case must be the same or similar. *Doe v Earl of Derby*, 1 Ad & El 783. *Arishna Rao v Raja of Pittapur*, 102 Ind Cas 713=A I R 1917 Mad 733. The wording of this proviso is perhaps a little defective. In the words "their representative in interest" the words should have been "those whom they represent in interest" or the word "is" should have been used instead of "was" so that the proceeding may be read as the second proceeding. *Ibid*. At common law depositions taken in a judicial proceeding are admissible in evidence in a subsequent judicial proceeding in proof of the facts stated therein provided the proceedings are between the same parties or their privies. *Halsbury Vol XIII*, p 546. The rule limiting the admission of such deposition is thus laid down by Lord Cottenham in *Humphreys v Pensam*, 1 My & Cr 507. "Deposition can only be read for or against those who are parties or privies to the suit in which the depositions were taken, and they cannot be read for a party unless they can be read against him." So evidence taken on the first trial is admissible in a second trial if although the two trials be not between the same parties the second trial is between persons who generally represent the former parties or are their privies in estate. *Taylor on Evidence*, 11th Ed § 46. The vague expression "representatives in interest" has not been defined in the Evidence Act but whatever scope may be given to those words they must at least include privies in estate. Partners and joint contractors are each other's privies for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate so as to render their statement admissible under the proviso s 33 of the Evidence Act. *Chandreswar v Bisheswar*, 5 P 777.

A forged receipt was filed in a civil case by the defendant. The accused was tried for having abetted the forgery. Before the trial K, the person whose signature was forged, died and could not be examined in this case. *Held* that the deposition of K in the civil suit was not admissible in evidence against the accused who appeared only as a witness in that case. *Kaiche Mal v Emperor*, 42 A 24=17 A L J 893=52 Ind Cas 394=20 Cr L J 634.

For the purposes of this section a purchaser of the equity of redemption is a representative in interest of the mortgagor. *Mashue v Mgh* 11m 11, 1st Cas 111=8 Bur L F 104. A Hindu widow in possession of the estate of her husband completely represents the estate and consequently a reversioner can be said to be the representative of the party (i.e. the widow) within the meaning of section 33 of the Evidence Act. *Raj Kumar v Nitya Kali* 12 C L J 44. In delivering the judgment in that case *Mookerjee J* said "Prima facie, therefore, it would be difficult to hold that the two proceedings are between the same parties or their representatives in interest. But it has been argued that *Monmohini*, a Hindu widow in possession of the estate of her husband, completely represents that estate, and consequently the position is the same as if she was a party to the

suit as a full owner, because a decree was against her in a contested litigation would bind the inheritance. *Katama v Rajah of Shrivangana*, 9 M I A 539, *Pertabnara v Tulokanath*, 11 C 186=11 I A 197. Reference may in this connection be also made to the observations in the case of *Mun Moyee v Bhubun Moyee*, 23 W R 42=15 B L R 15, in which *Couch C J* expressed the view that possibly upon the principle of the rule of the English law of evidence by which when there are several remainders limited by the deed, a judgment for or against one of them is evidence for or against the next in succession, may justify the use under section 53 of the Evidence Act, of a deposition in a suit brought against a widow before any adoption in a subsequent litigation against the adopted son. *Pyke v Crouch*, 1 Ld Raym 730, *Doe v Passingham*, 2 C & P 446. These are obviously weighty considerations, and though we do not fully decide the point our present inclination is not to hold the previous deposition inadmissible on the ground that the first element (i.e. that the proceeding was between the same parties or their representatives in interest, has not been established. A party is liable to have a deposition in a previous proceeding used against him in a subsequent proceeding, only if his opponent is substantially the same in both the proceedings. *Morgan v Nichol*, L R 2 C P 117.

**Proviso—Para (2)** The rule of common law is strict in this that no evidence shall be admitted, but what is or might have been under examination of both parties. *Buller v. At. Pius*, 240. The opportunity to attend and to cross-examine is all that is necessary, and if it is not availed of the principle has still been satisfied. *Moore v. Triplett* Va, 23 S E 69. So the general principle is that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again, he should be dispensed from doing so, if there is at hand his testimony already subjected to cross-examination and this general notion underlies all the cases of dispensation. *Greenleaf* 163 (f). The doctrine requiring a testing of testimonial statements by cross-examination has always been understood as requiring not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross-examine if desired. The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or he shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. *Wigmore* § 1371 *Starke* Fr 97. "The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining." *Per Ellenborough J C J in Cavenore v Vaughan* 1 M & S 6.

A deposition is considered a partial representation of facts, as to all person who have no opportunity of bearing out the whole truth by cross-examination. *Per Lawrence J in Berkeley Peerage Case*, 4 Camp 412, see also *Lord v Colvin*, 3 Dr 222 *Allen v. Allen*, (1894) P 248. Since the competency of the deposition taken in former suit depends upon the fact that the adverse party or those in privity with him, had the opportunity, to cross-examine the witness, if it appears that the deposition was taken without authority, or without the sanction of an oath, or without such chance of cross-examination it should not be received although if due notice was given, it is not necessary that any cross-examination should have been actually made. *Fitzgerald v Fitzgerald*, 3 Swab & T 397, see also *Lawrence v Maule* 4 Dr 472 *Macombie v. Inlon* 6 M & G 27. In a warrant case until the stage provided for in s 256 Cr Pro Code is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible under s 33. *Emperor v Mathews* A I R 1929 Cal 822. In that case *Cumming J* said "The prosecution now desires to put in as evidence under s. 33, Evidence Act the statement of *M. Vine* before the Police Magistrate. S 33, provides that in certain circumstances evidence given in one judicial proceeding is relevant in a subsequent judicial proceeding provided that the adverse party in the first proceeding had the right



**S 33.** and opportunity to cross-examine That the accused had the opportunity of cross-examining this witness, is I think quite clear. He was asked to do so but he refused to do so. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witness until after the charge is framed. No doubt s 256 (Cr Pro Code) does not prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that until the stage of the case provided for in s 256 is reached the accused has no right to cross-examine. That being so in the present case the accused had no right to cross-examine and so the evidence of *Mr Milne* is not admissible in evidence under s 33. But in *Mangal Sen v Emperor*, A I R 1929 Lahore 840 a witness was examined by prosecution but no cross-examination was put to him and after the charge it was discovered that he was too ill to attend the Court and was unable to answer the interrogatories. The result was not that he was never subjected to cross-examination. It was contended that the statement being incomplete his evidence could not be considered. It was held that such evidence was admissible but the weight to be attached to it depended upon the circumstances of each case. See also *Maharajah of Kallapur v Sundaram Iyer*, A I R 1925 Mad 497 = 48 M 1. This section does not apply where it is obvious that there was no occasion for cross-examination. *Emperor v Phagunma Bhanu*, 89 Ind Cas 1043 = 76 Cr L J 1475. *Emperor v Balur Saheb*, 18 Bom L R 284 = 34 Ind Cas 269 = 17 Cr L J 249, *Queen Empress v Burke*, 6 A 224 = A W N 1884.

A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties even where other conditions of the section are satisfied. *Roy Mangal v Mathura* 13 A L J 881.

The words "opportunity to cross-examine" include the method of cross-interrogatories, which, for many years were the chief mode of cross-examination in the Courts of Equity and the Admiralty Courts of England, and for which provision is made in the Common Law Procedure Acts. An opportunity to administer cross-interrogatories under a commission is sufficient to render the evidence elicited by the cross-interrogatories relevant under s 33 of the Evidence Act. The words do not imply that the actual presence of the cross-examined party or his agent before the tribunal taking evidence is necessary. To require a presence would be to put a strain on the words of s 33 and lead to inconvenience, and much difficulty would be found in getting evidence under this enabling section, where a party is in police custody. The fact that an accused person had full opportunity of cross-examining if not admitted, must be proved before evidence can be admitted under section 33. The deposition of a witness obtained by a commission issued by a committing Magistrate and forming part of the record of the enquiry is admissible under s 33 of the Evidence Act provided the requirements of that section are satisfied. *Queen Empress v Rama Chandra*, 19 B 749, see also *Queen Empress v Bastanta* 20 B 16 = Bom L R 761.

In an enquiry under Chapter XVIII of the Criminal Procedure Code a witness was examined by the prosecution but he was not cross-examined by the accused, in the Sessions trial the witness having died his deposition was put in under s 33, Evidence Act. Held—it is doubtful whether the evidence is admissible under section 33 of the Evidence Act, even if it is admissible as evidentiary value is very small indeed. Having regard to the practice at Sessions enquiries not to cross-examine the prosecution witnesses unless, at the conclusion of the enquiry when the charge is drawn up, the accused thinks it worth while to defend himself in the first Court it would hardly be said that the accused had the opportunity to cross-examine a witness examined by the prosecution, where the accused did not cross-examine any of the prosecution witnesses and was not asked by the enquiring Magistrate to exercise his right of cross-examination. *Abraham v King Emperor*, 17 C W N 250 = 14 Ind Cas 106 = 14 Cr L J 70, see also 2 Weir 755. Deposition of a witness can be taken in the absence of an accused who has absconded. When such a deposition is to be used in a subsequent case, it is necessary to establish that witness

deposition was taken, the accused had absconded, and after due pursuit could not be arrested. *Queen v. Fluaree*, 21 W R Cr 12, *Queen Empress v. Sahib Singh*, A W N 1896, 182. S. 33

**Failure of cross examination** There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or the state of issues and parties, yet the required opportunity may nevertheless practically have failed through circumstances connected with the conduct of the examination. These circumstances may be distinguished under six heads, (1) the death or illness of the witness intervening to prevent or curtail cross-examination, (2) the witness's refusal to answer on cross-examination or the party's prevention of his answer, (3) the witness's answering the direct examination "non responsively", i.e. without dealing with the subject of the question, (4) the framing of the direct examination so as to prevent adequate cross-examination, (5) the lack of interpretation of testimony of an alien etc., (6) sundry circumstances preventing adequate cross-examination. *Wigmore* § 1390

**Witness's death or illness**—In case of death of a witness before cross-examination his testimony is inadmissible, if any delay is caused by the laches of the party offering it. *Kemble v. Lyons* 184 In 804. The same result would follow if his illness was temporary and the offering party could have produced him before the end of the trial. *Clements v. Benjamin*, 12 Johns N Y 299. But where death or illness prevents cross-examinations under such circumstances that no responsibility of any sort can be attributed to either the witness or the party according to *Prof. Wigmore* it seems harsh measure to strike out all that has been obtained on the direct examination. But he admits that on principle such examination should be rejected. *Wigmore* § 1390. According to this section such deposition is clearly not admissible. In England the case law on the subject is not uniform. *Vide Jones v. Fort*, 1 M & M 196. *R v. Hagan* 1 Jebb Cr C 127. *R v. Mitchell* 17 Cox Cr 503. Where, however, the failure to obtain cross-examination is due to the default of the cross-examiner such lack of cross-examination does vitiate the former deposition. *R v. Hyde* 3 Cox Cr 90. *Parnell Commission's Proceedings*, 7th day, Times Rep pt 2 p 66 (1888), *Wigmore* § 1390. This is according to the principle that he had an opportunity though waived the same. *Ibid*

Where a witness died after the examination in chief and part of the cross-examination was finished. *Held* that her deposition could not be admitted in evidence under this section because the evidence was not concluded. For it might be argued that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence in chief. *Narsing Das v. Gokul Prasad* 25 A L J 775. Such evidence should not be ordinarily acted upon. *Rex v. Vadala* 7 M L T 41=5 Ind Crs 512. But where the statement of a witness was recorded by the committing Magistrate and the accused did not exercise the right to cross-examine him and the witness died subsequently before the case was tried by the Sessions Judge, *held* that the statement was admissible in evidence under section 33 of the Indian Evidence Act. *Azimuddh v. Emperor* 31 C W N 410=101 Ind Crs 661=28 Cr L J 485=A I R 1927 Cal 398.

**Through the witness's refusal to answer or the fault of the party offering him**—Where a witness after his examination in chief declined to answer the questions put in cross-examination, his examination in chief is not admissible in evidence. *Smith v. Griffith*, 3 Hill N Y 333. But such a result does not follow when he evaded one or two questions. *Gibson v. Goldthwaite* 7 Ala 281, 294. The law on the subject is thus laid down by Chief Justice Shaw in *Savage v. Blanchard* 20 Pick 167, 172. "So far as objection goes upon the assumption that a deposition must be rejected because some of the questions of the adverse party are not answered, as a general rule it is untenable. (But) cases may be supposed where if a witness is manifestly favourable to the party taking the deposition and declines answering pertinent and material questions to facts apparently within his knowledge it would be a good ground for excluding the deposition altogether. It would show that the witness had violated his duty and his oath in not telling the whole truth, and the deposition could in effect be taken *ex parte*." *Wigmore* § 1391.

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*Non responsive answers* This objection is obviously applicable to written interrogatories only. *Murray v. H. et al.* 1 Colo. 2, 6, *Wigmore* § 1392

*Through lack of interpretation for a witness alien, deaf and dumb, &c.* Where the cross-examination could not be conducted for want of a competent interpreter because evidence is given in foreign language, the party against whom the evidence is given is denied the right of cross-examination. The modern English practice is thus lucidly stated by *Lord Reading C. J.* in *R. v. Lee Kun*, (1916) 1 K. B. 337, 339. "When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence and is undefended, the evidence given at the trial must be translated. If he does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated, he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. We have come to the conclusion that the safer, and therefore the wiser, course when the foreigner accused is defended by counsel is that the evidence should be interpreted to him except when he or counsel on his behalf expresses a wish to dispense with the translation and the Judge thinks fit to permit the omission. The right to interpretation being conceded this right is satisfied if somehow an understanding is attained, either by his own or his counsel's knowledge of the language or by the help of an interpreter third person and the precise method of attaining it is immaterial. Moreover the opponent is also entitled to cross-examine the interpreter so as to test the correctness of the translation, and to call other witnesses to verify the interpretation." *Wigmore* § 1393

Whether the deposition of a witness who cannot be cross-examined on account of some organic defect, such as defects of speech hearing or the like should be admitted in evidence it is for the trial Judge to decide. *Quinn v. Halbert* 55 Vt. 228. The same principle also applies when the accused is deaf or dumb or blind. *Felts v. Murphy*, 201 U. S. 123. *Wigmore* § 1393

*Sundry insufficiencies of cross examination* Where a party is absent from the Court at the time of the cross-examination, but his counsel is present, he can hardly be said to have no opportunity of cross-examining a witness. Still in some cases it has been held to be so. *Crouse v. Peters* 63 Mo. 429, 433. But such objection is not at all tenable where the deposition of a witness taken in his absence is read over to him and liberty is given to him to cross-examine the witness. *R. v. Smith* R. & R. 339. *R. v. Forbes* Holt, 699. In *R. v. Hoke* 1 Cox Cr. 226. *Earle J.* said: "The reading of it in the prisoner's presence is equivalent to the taking of it in his presence. The object is to afford to the party charged an opportunity for cross-examination. Such an opportunity has been held to be afforded by a reading over of the deposition where there is one prisoner only; the object is not less secured because there are many prisoners. But mere reading over to the accused a deposition already taken is not enough; but liberty must be given to him to cross-examine." *R. v. Day* 6 Cox Cr. 55. *Wigmore* § 1394. This principle also applies where the Judge limits the time of cross-examination, and thereby deprives the party of his right to cross-examine. *Ibid.* Under section 256, Cr. Pro. Code the Magistrate is bound to produce the witnesses whom the accused desires to cross-examine. Where a witness leaves the country after the charge and he can not be produced without undue delay and expense his deposition before the charge can be admitted in evidence under this section. *Nga Da On v. Emperor* 104 Ind. Cas. 637=28 Cr. L. J. 861=6 Bur. L. J. 114=A. I. R. 1927 Rang. 94

**Section 33 whether controlled by s. 350** The general provisions of section 33 of the Indian Evidence Act are not in any way affected by section 350 of the Code of Criminal Procedure. *Lal v. Crown* 101 Ind. Cas. 483=29 P. L. R. 199=28 Cr. L. J. 451=A. I. R. 1927 Lah. 332=8 Lah. 370

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**Proviso, Para (3)** Although the section, by using the word "questions in the plural seems to imply that it is essential that all the questions shall be the same in both the proceedings to render the evidence admissible, that is not the intention of the law. The principle involved in enquiring identity of the matter in issue is to secure that in the former proceedings the parties were not without an opportunity of examining and cross-examining on the *very point* on which their evidence is adduced in the subsequent proceeding. Though separate proceedings may involve issues, of which some only are common to both the evidence of those common issues given in the former proceedings may, on the conditions mentioned in s 33 arising be given in the subsequent proceedings. *Ram Reddi v Seshu Reddi*, 3 M 48=2 Weir 756=2 Weir 455. Unless the issues were then the same as they are when the former deposition is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies, and falsehoods. *Wignore* § 1386. It is absolutely necessary that the former statement was sufficiently tested by cross-examination upon the point now in issue. It is sufficient if the issues were the same or substantially the same for the purpose. *Empress v Rochia*, 7 C 42=8 C L R 273. *Wignore* § 1387. The general rule in this shape is nowhere disputed. *Taylor* § 464, *Chakauri Singh v Su aj Kuar*, 2 A L J 91 (96), *Foolkishori v Nobin* 23 C 441. *Phap Ei 4th Ed* p 407. But there is naturally much variance shown in the strictness of its application in specific cases. *Vide R v Smith*, R & R 339, *Doe v Foster* 1 A & E 791, *R v Ledbetter* 3 C & K 108. *R v Dilmore*, 6 Cox Cr 52. *R v Beeston* 6 Cox Cr 425. *R v Lee*, 4 F & F 63. *R v Castro*, *Trichborne Case*. *Brown v White*, 24 W R 456, *Edmunds Case*, (1909) 2 Cr App 257. *Wignore* § 1387.

In *R v Beeston* 6 Cox Cr 425, deposition of a witness on a charge of felonious wounding with intent to do bodily harm, was admitted on a trial for murder, the act being the same. In admitting the deposition *Jarvis C J* said: "The presiding Judge must determine in each case whether the prisoner has had full opportunity of cross examination, and if the charges were entirely different, he would not decide that there had been that opportunity but where it is the same case and only some technical difference in the charge, the accused generally has had full opportunity of cross-examining." In the same case *Alderson B* said: "The question really is whether the deposition was taken under such circumstances that the accused had full opportunity of cross examination." "The situation" says *Prof Wignore* "is one that calls for common sense and liberality in the application of the rule and not a narrow and pedantic illiberality. On the whole the judicial rulings show a liberal inclination to receive testimony already adequately tested, but there is yet room for much improvement." *Wignore* § 1587. In deciding whether the questions in issue are substantially the same it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both. *Field Ei 6th Ed* 149, *Wardroffe Ei 8th Ed* 356. *R v Rochia Mohata* 7 C 42=8 C L R 273. *Doe v Foster* 1 A & E 791.

Depositions of deceased persons are not admissible under s 33 of the Evidence Act unless the subject matter of the dispute in the two suits is the same and also the subsequent suit is between the same parties or their representatives in interest. *Raghubhushana v Vidya Varidhi* 34 Ind Cas 575. In a suit under s 9 Act I of 1877, for possession of a certain house evidence given at a former case for criminal trespass, in respect of the same house by a person since dead is admissible in evidence under s 33—*Foolkissory v Nobin Chunder*, 23 C 441.

**Explanation** This explanation is inserted for the purpose of excluding, the objection which arises when the depositions are taken in criminal case, that it cannot be used on a subsequent proceeding for want of mutuality or reciprocity because the Queen is the prosecutor in all criminal proceedings. *Nort Ei* 198. The effect of the explanation would appear to be that a deposition taken in criminal proceedings may be used in a civil suit, and conversely provided that the conditions of the section are observed. *Field Ei 6th Ed* 148, see also *Marby Ei* p 33. A prosecution was instituted by S against A at the instance

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and on behalf of F for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. S gave evidence at the trial in support of these charges. F subsequently brought a civil suit against N for the possession of the same house under section 9 of the Specific Relief Act. S died before the institution of the civil suit. At the trial of the civil suit the deposition of S in the Criminal Court was tendered by F as evidence on the issue of possession. *Held*, that S being dead and the proceedings being between the same parties and the issues being substantially the same, the deposition of S was admissible. *Foolkissoy v Nobin Chandra*, 23 C 441.

## STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

### 34 Entries in books of account, regularly kept in the

course of business, are relevant whenever they refer to a matter into which the Court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability.

#### Illustrations

A sues B for Rs. 1,000, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

**Principle**—The reasons justifying the admission of this class of statement are that they are by cross examination have not been as clearly defined by the Judges as in other Hearsay exceptions, but they seem fairly clear. *more* § 1522. It has already been stated that in order to admit evidence which is an exception to the Hearsay rule, two principles must be satisfied, namely (1) the necessity principle and (2) the principle of circumstantial guarantee of truth or truthfulness. Vide notes on section 32 *supra*. On the face of it, in this class of evidence the second principle is well satisfied. In such a case the situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy empower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings experience of human nature indicates three distinct degrees of related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statement fairly trustworthy. (1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to misstatement. (2) Since the entries record a course of business transactions, an error or misstatement is almost certain to be detected and the result disputed by those dealing with the entrant. A misstatement cannot safely be made if at all except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty or otherwise would deter all but the most daring and unscrupulous from attempting it) the ordinary man may be assumed to decline to undertake it. In the long run this operates with fair effect to secure accuracy. (3) If, in addition to the entrant makes the record under a duty to an employer or other superior, there is additional risk and disgrace from the superior in case of inaccuracies, a motive on the whole the most powerful and most palpable of the class. *Hyman* § 1522. The third reason is thus stated by *Indal C J* in *Indal C J* *Hyman* § 1522. The third reason is thus stated by *Indal C J* in *Indal C J* *Hyman* § 1522. "The clerk had no interest to make a false entry if he had any interest it was rather to make a true entry. Again the clerk would be likely to bring disgrace with his employer. The entry was made was open to all the clerks in the office and the entry if false would be exposed to speedy discovery." See also *Hyman* § 1522. *Heramba* 8 Ind Cas 81 = 13 C 1, J 139.

In order to understand the Necessity principle, so far as a party's entry in a shop book is concerned we must go back to the time when this kind of entry was

was first admitted. At that time a party was disqualified as a witness for him self, and since in certain class of transactions he was thus totally without evidence obtainable from others, certain past statements of his must be admitted by very necessity. Thus the principle of necessity and the principle of circumstantial guarantee were both recognized, and the case stood on the ordinary footing of an exception to the Hearsay rule, without reference to specific exceptions. When parties were made competent, on their own behalf, a main reason—the necessity disappeared, but the form of the rule was established before this change was made and its limitations can therefore be understood only by keeping in mind that the original attitude of the Courts in establishing it was precisely analogous to their attitude towards other Hearsay exceptions—*119 more § 1536*. As regards other regular entries made in the ordinary course of business this necessity principle is absolutely wanting (*vide next topic*).

‘It is recognized that to use a system of regular accounts to sustain a particular fraud is so difficult and dangerous a procedure that the Courts may guide their decisions by using entries in such a system, truth and accuracy and contemporaneous record being almost indispensable for a due carrying on of such accounts. *Mukundram v Dayaram*, 10 N L R 41=23 Ind Cas 893. ‘It must be confessed that to forge elaborate accounts extending over six years or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty.’ *Jaswant Singh v Sheo Narain*, 16 A 157=21 I A 6. The principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered, for the purpose of a particular case. *Mukundram v Dayaram*, *supra*.

**English rule—History of the exception.** In England an exception to the Hearsay rule exists for regular entries made in the course of business, but there are two distinct branches to this exception—one concerned with such entries in general, and the other with entries by a party in his own shop books. *Greenleaf Et § 115*. In cases of regular entries made in the course of business, it is indispensable for the use of these statements that the entrant be unavailable as a witness. Death is usually spoken of as the condition on which they may be used, and death is certainly sufficient. Absence from jurisdiction should equally suffice. *Elliot v Dyche*, 78 Ala 157. On the same principle, insanity (*Union Bank v Knapp* 3 Pick 109) and illness hindering the presence of the witness should equally suffice, and in general ‘the ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial. *North Bank v Abbott*, 13 Pick 471. That which gives trustworthiness to such statements, and affords a reason for receiving them as an exception to the rule, is the habit and system of making the entries as part of the ordinary and regular course of business, removing the ordinary motives for untruth and adding certain safe guards for correctness. *Per Tindal C J in Poole v Ducas*, 1 Bing N C 649.

In order to understand the present condition of the law as regards parties shop books it is necessary to notice briefly the historical relation of the two forms of exception, thus and the preceding one. First, there was in England, as early as the 1600s, a custom to receive the shop books of diverse men of trades and handicraftsmen in evidence of the particulars and certainty of the wares delivered—and thus whether the books were kept by the party himself or by a clerk and whether the entrant were living or dead. But there was more or less abuse of this evidence in leaving the books uncrossed and any way discharged and still sung for the claim, more over, the whole proceeding was also disparaged as involving the making of evidence for one's self for ‘the rule is that a man cannot make evidence for himself. In 1609 Stat Jac I C 12, after reciting these considerations, forbade this use of shop books ‘in any action for any money due for wares hereafter to be delivered or for work hereafter to be done except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed (3) between merchant and merchant merchant and tradesman, or between tradesman and tradesman,’ for matters within the trade. That Statute was continued in 3 Car

**S. 34** I C 1 § 22 and 16 Car I, C 4 The higher Courts, applying the principle that a man cannot make evidence for himself, ultimately made the exclusion complete by refusing to recognize these books at all, after the expiration of the year. In the lower Courts, where the jurisdiction was limited to small claims the use of these books continued (*Wile Thayer, Cases on Evidence* pp 471, 506, 516 for a full collection of the historical material), and a recent Rule of Court has re-introduced the use (to an extent somewhat indefinite) in the upper Courts (Rule of Court 1893 Ord 33, R 3, Ord 30, R 7 as amended by Rules of July, 1902). But before the end of the century of the above Statute the entries of a deceased clerk (even a clerk of a party) began to be admissible on considerations of necessity, as an exception to the Hearsay rule. It was distinctly understood that their use, though affording some concession to parties was a different thing from the use of books kept by a living party himself. *Price v Lord Torrington*, (2 Ld R 873) is the case most frequently taken as the landmark of the rule, but the usage is earlier than that case (*Wile, Putman v Mott* 1 Ld R 732, *Sir Biby Lake's Case*, Theory of Ev 93). The attitude of the Court may be gathered from the following passage in *Lefebvre v Worden*, 2 Ventr 1: "So far as the Courts of justice have gone (and that was going a good way) and perhaps broke in upon the original strict rule of evidence) that where there was such evidence (entries) by a servant known in transacting the business, as in a goldsmith's shop by a cashier or book keeper, such entry, supported on the oath of that servant that he used to make entries from time to time and that he made them truly, has been read. Further, where that servant, agent, or book keeper has been dead if there is proof that he was the servant or agent usually employed in such business was intrusted to make such entries by his master, (and) that it was the course of trade,—on proof that he was dead and that it was his hand writing, such entry has been read (which was *Sir Biby Lake's Case*). And that was going a great way, for there it might be objected that such entry was the same as if made by the master himself yet by reason of the difficulty, of making proof in cases for this kind the Court has gone so far. The admission thus covered only the books of a clerk of a party. But already there were instances fore shadowing a wide principle (*Smart v Williams*, Comb 247, *Woodnoth v Lord Cobham*, Bunbury 180, *Sutton v Gregory*, Comb 150), and finally in *Doe v Turford* 3 B & Ad 890, the matter was placed on a firm footing, and the general scope of the exception was understood as covering all entries made "by a person, since deceased, in the ordinary course of his business"—whether a person wholly unconnected with the parties or the clerk of a party, or a party himself. *Greenl Ev* § 120b

**English Law** When a person in the regular course of his duty or office performs some business transaction and makes forthwith a return or record of it which he has no interest to falsify such return or record is after his death evidence against all persons, of the performance of the transaction, and is known as a declaration in the course of duty. *Price v Torrington* 1 Sm L C 101 *Polson v Gray*, 12 Ch D 411, *Sturla v Freccia* 5 App C 623, 640. The guarantee of its credibility, is the accuracy which is generally produced by business routine. *Wills Ev 2nd Ed* p 178. So in England when A sues B for the price of goods sold an entry in A's shop books, debiting B with the goods, is not evidence for A to prove the debt. *Smith v Anderson* 7 C B 21. *Phy Er* 19. But where A sues B for the price of goods sold an entry in A's shop book debiting C and not B with the goods is evidence against A to disprove the debt. *Wills v Scott*, 6 C & P 241. Entries made in a ledger or diary in the ordinary course of business are not admissible in evidence if the writer be still alive, and even though he has abandoned or is kept away by the other side, though if he be called as a witness he may refresh his memory by referring to them. So the evidence contemplated by this section is not admissible according to the English common law. *Cum Ev 11th Ed* 99 *Field Ev 6th Ed* p 154

**Origin of the section** The present section, which is in conformity with the law of France and America, is a reproduction of the Roman law, and is based on the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, was deemed presumptive evidence (see *Field Ev* 154).

*probatio*) of the justice of his claim, and in such cases, the suppletory oath of the party (*iuramentum Suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favour' *Taylor* § 712 By the law of France, too the books of merchants and trade-men regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity constitutes a semi proof and with his suppletory oath are received as full proof to establish his demand *Greenl Et* § 119 cited in *Taylor* § 712 The same doctrine is familiar in the law of Scotland by which books of merchants and others, kept with a certain reasonable degree of regularity, satisfactory to the Court, may be received in evidence the party being allowed to give his own oath in supplement of such imperfect proof It seems however, that a course of dealing or other "pregnant circumstances" must in general be first shown by evidence *aliunde* before the proof can be regarded as amounting to the degree of *semi plena probatio* to be rendered complete by the oath of the party *Tay on Evidence* pp 273—277, *Greenl Et* § 119 A party may, under this section, corroborate other evidence of a debt being due to him by entries, whether by himself or another in his own books provided the books have been regularly kept in the course of business *Cun Et* 10th Ed 175

**Old law under Act II of 1855** Section 43 of the repealed Act II of 1855 lays down "Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated therein" So, even by that Act a man was not allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties But where there was other independent evidence of the truth of the transaction to which the accounts referred they were admissible as corroborative evidence provided the books were first shown to the satisfaction of the Court to have been regularly kept in the course of business *Nori Et* 198 see also *Dwarla Doss v Jankar Doss* 6 M I A. 88 But such books could not be used as independent evidence *Rai Sri Krishen v Rai Hurri Krishen* 5 M I A 432, *Dwarla Doss v Darka Doss* 2 Agr 308, *Ramkrishna v Hurrydo* Marsh 219, *Jagun Koor v Raghonundun* 10 W R C R 148, *Allyat v Jugut Chunder* 5 W R C R 242 *Gopal Mundal v Nabho Krishen* 5 W R Act X Rule 83 Account books are legal evidence to corroborate oral testimony *Rajnaram v Olvia* 5 W R Act X Rule 30 *Ram v Hurry* Marsh 219—1 Hay 569 *Doomu v Stevens*, 2 Ind Jur N S 5 *Zainab v Hadjee* 2 Ind Jur N S 54 *Ganga v Inderjit*, 23 W R 390 P C But the language of Act II of 1855 differs very materially from that of Evidence Act (I of 1872) The only limitation in section 34 is that statements contained in documents of this kind shall not alone be sufficient to charge any one with liability This change of expression has made substantial alteration in the law *Per Marfaty J in Belael Khan v Rash Beharee* 22 W R 549, but see *Surnomoy v Johur Mahomed* 10 C L R 546, *Aktouli v Tarak*, 16 C L J 328=17 C W N 744 A *hath chutta* book is a document kept especially as a security for the vendor, and in the absence of fraud it must be considered binding upon him *Gopee v Abdool* 1 Ind Jur N S 353

**Scope of the section** This section states that books of accounts regularly kept in the ordinary course of business are relevant whenever they refer to a matter into which the Court has to inquire but such statements shall not alone be sufficient evidence to charge a person with liability Now section 34 does not make books of accounts inadmissible unless corroborated It states distinctly that such books are admissible but not sufficient by themselves to charge any person with liabilities Even though they are uncorroborated they are still evidence It is not correct to say that such books are inadmissible They are admissible. It is not therefore correct to say that such books of accounts are inadmissible unless corroborated if required to charge a person with liability It would be more correct to say that though admissible they do not establish the facts required to be proved, i.e., that a person owned a certain sum of money unless corroborated *Per Cumming J in Gopeswar Sen v Bhooy Chand*, 32 C W N 580=53 C 1167=108 Ind Cas 883=A I R 1926 Cal 851, *Belael Khan v Rash Beharee* 22 W R 549 *Dukha Mundal v Grant*, 16 C L J 24, but see



**S 34** *Aktowli v Tarak Nath Ghose*, 17 C W N 774=16 C L J 328, *Emperor v Narbada*, A I R 1930 All 38, *Duarla v Sant*, 18 A 118, *Fairuddin v Agni Kumar*, 71 Ind Cas 300, *Surnamoyi v Johur Mahomed*, 10 C L R 515, *Nurod v Maharaja*, 82 Ind Cas 794, *Deonarayan v Duarka*, 9 Pat L T 619. 'The expression 'corroborative evidence,' 'independent evidence,' and 'substantive evidence' that are found in many of the reported decisions bearing upon section 34 of Act I of 1872 are somewhat out of place in view of the wording of that section and have but been handed down to us from the words 'corroborative and 'independent' that appeared in section 43 of the old Act and these words as well as the word 'substantive' that were used in the decisions thereunder. The present section deals amongst others, with the relevancy of evidence and in some instances with its probative value. The only material difference is between an entry relevant under section 34 and one relevant under section 32 cl (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under section 32 clause (2) from the disability that it imposes on entries relevant under section 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other are not to be considered as alone sufficient to charge any person with liability. The other view, however, namely that the latter part of the section 34 applies only to such entries which are relevant only under section 34 and not under section 32 clause (2) is backed by the high authority of *Sir Laurence Jenkins C J*, in the case of *Ram Pyarabai v Balaji Sridhar*, 28 B 294 and has been accepted as correct in *Daji Abaji Khari v Gobin Narayan*, 10 Bom L R 811, *Dukha Mandal v W N Grant*, 16 C L J 24 and *Aktowli v Tarak Nath Ghose*, 17 C W N 774=16 C L J 328, and it is perhaps too late to contest it. If this other view is adopted it should be held that it was intended by the legislature that where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraph of section 32 being present there is no statutory obligation to look for anything else to found the liability. Per *Mukherji J* in *Gopeswar Sin v By v Chand*, *supra* see also *Jainab Bisu v Sita Kumari Devi* 46 C L J 233=114 Ind Cas 733=A I R 1927 Cil 855. It is essential in every case where reliance is placed upon books of account to establish that they have been regularly kept in the course of business but it is not sufficient to prove the correctness of the books the entries themselves have to be proved, unless the necessity for such proof is removed by the admission of the opposite party. *Bibi Imambakh v Haji Motasuddi* 15 C L J 621=13 Ind Cas 678. Under the Indian Evidence Act entries in books of account regularly kept in the course of business are admissible in evidence not only for refreshing the memory of the witness but also as corroborative evidence of the story which he tells. Books of account which profess to record facts relating only to the particular transaction in question, are less reliable than a book wherein the same is recorded in common with other transactions in the ordinary course of business. *Bhrozoy Hong v Ramanathan*, 29 C 334 P C=6 C W N 401=4 Bom L J 378=8 Sar 273. It is not necessary in a suit on accounts to show how the accounts came to be written and that they were kept in regular course of business. If a *gomastah* and a member of a firm were examined and deposed that the accounts were regularly kept the accounts may be held to have been proved in the absence of evidence to the contrary. *Beecha Lal v Jas Pershad* 10 P R 10. A party who calls for an account book is bound by all the entries contained therein. *Shub Pershad v Promotho* 10 W R 193, *Imamurari v Jai Ashok* 9 A 713 P C.

**Account books.** The remarks of their Lordships of the Privy Council in *Jumant v Shro Narain* 16 A 157 (161)=21 I A 6 are instructive as to the variety in account books. Some may be of no evidential value but merely a man's private record prepared by him as may be in accordance with his practice and convenience. Other accounts may be so kept, and may be called for.

external circumstances, as to carry conviction that they are true" "And," their Lordships continue "the Evidence Act, section 34, therefore, enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability. The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act

"The word 'books' in its ordinary sense signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing a part. The binding is of a kind which is not intended to be movable in the sense of being undone or put together again. A collection of papers in a portfolio or clip, or strung together on a piece of twine which is intended to be untied at will would not in the ordinary English, be called a book. But so narrow a signification would not do in India where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the untying of a knot. Of this class are the *bahis* of practically every *Marwari* banker in India. The definition of 'book' given in the English Copyright Act 1845 section 3 is that the term means and includes 'every volume, part or division of a volume pamphlet sheet of letter press, sheet of music map, chart, or plan separately published' This is a special definition for the convenience of using a single word to answer the purpose of a particular Act, and would obviously misrepresent what the Legislature had in mind when enacting section 34 of the Indian Evidence Act. It may be pointed out that even the *Marwari bahis*, though capable of being unbound without damage, are not made in that form for that purpose, but when properly kept are pagged and intended not to be taken apart at any time for any purpose. I think the term 'book' in section 34 aforesaid may properly be taken to signify ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purpose of section 34, and I have no hesitation in holding that unbound sheets of paper, in whatever quantity though filled up with one continuous account are not a book of account within the purview of section 34.

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interpolation of a link of forgery without discovery is almost impracticable. The man who wishes to defraud his neighbour generally avoids keeping regular accounts, or, having kept them, suppresses them. The labour of weaving falsehood with truth in regularly kept account is too great and continuous to be popular, because of the mathematical connection running through them. But these safe guards of truth are entirely absent in the most regularly kept of private diaries and subsequent interpolations, to meet an unexpected demand and facilitate fraud are generally possible without difficulty and danger of discovery. It is clear that the Legislature, which guides itself by human experience had such considerations before it when it enacted, by section 34 an exception to section 21, in favour of books of account. I am therefore, of opinion that the Legislature did not intend to include in that category any record in which there is no process of reckoning. Therefore a book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of section 34. The papers produced by D W No 12 in this case are entirely devoid of totals and balances. Therefore the entries in them never ripened into accounts, and such entries—which could obviously be fraudulently added to or penned through at any time without hindrance or discovery are not admissible under section 34. Per *Stanton A J C in Mukund Ram v Dnyaram*, 23 Ind Cas 893 (894, 895) = 10 A L R 44

**Entries of books of account regularly kept in the course of business**  
Section 43 of Act II of 1855 was as follows — "Books proved to have been kept in the course of business shall be admissible as corroborative and not as independent proof of the facts therein stated." In this section the word 'regularly kept' are substituted for the words "proved to have been regularly kept" and in illustration to the section the word used is "how and not 'proves'". It is apparent, therefore, that the law embodied in section 34 of Act I of 1872 is not quite the same that was contained in section 43 of Act II of 1855, and this seems to be conceded on all hand. The plain words of section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business—in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose—namely, to charge any person with liability they shall not alone be sufficient evidence for the purpose. Section 32 clause (1) makes relevant a statement consisting of an entry made by a person who is not a witness before this Court in books—not necessarily books of account but kept in the ordinary course of business. A book of account may be one of such books and where an entry appears in a book of account it comes both under section 32 clause (2) and section 34. The illustration to section 34 makes it plain that if the book of account is regularly kept in the course of business the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. Per *Holker J in Gopeshwar Sen v Bijoy Chand* 32 C W N 530 (184). Under the old Act II of 1855 books to be admissible had to be "proved to have been regularly kept in the course of business." In the later Act of 1872 the words "proved to have been" have been dropped. This amounts to material alteration in the law. The law is now that a book of account is admissible as evidence if it is regularly kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business. *Emperor v Yarbada*, A I R 1930 All 19.

A book of account may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transaction takes place. *Chandreswar Prosad v Bishneswar Pratap*, 5 P 771. According to section 34 "regularly" or "systematically" means that the accounts are kept according to a set of rules or a system whether the accountant has followed the rule or system closely or not. Nor is there anything in the section that says the system must be an elaborate or reliable one. Both these matters—the degree of regularity of the system and the closeness with which it has been followed—are

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the weight of the evidence of admissibility, not its admissibility. The toughest memoranda of accounts kept generally according to the most elementary system, though often departing from it are admissible in evidence, but would of course have no weight. *Kesheo Rao v Ganesh*, 95 Ind Cas 128=A I R 1926 Nag 407. It would be giving too limited meaning to section 34 if it be held that books of account regularly kept in the course of business mean books entered from day to day or from hour to hour as transactions take place. The time of making the entries may affect their value, but would not, by the mere fact of the entries not being made from day to day or from hour to hour make them entirely irrelevant. *The Deputy Commissioner v Ram Parshad*, 4 C W N 147=27 C 118 P C=26 I A 24, *Munchersau Bexony v The New Dhurumsay*, 4 B 576, was not approved. "Finally, when we have got books of account, properly so called we must see that they have been regularly kept. This does not mean as is frequently supposed that they must be maintained in a particular form favoured by bankers usually called the *mahajan* system. Their evidential value will of course depend upon their formality and the checks against fraud secured by method of keeping them, but that is not to be confused with admissibility. A single account book, however simple, if regularly kept will be admissible. As regards admissibility section 34 makes no difference between the cash books and ledgers of a large bank and the day book of a house keeper. The difference lies in the weight to be given to the entries therein. But where the fact of regular maintenance and general accuracy of a account book is not admitted, it must be formally proved. *Mukundam v Dayaram* 10 N L R 44=23 Ind Cas 893.

Though an unstamped acknowledgment of debt in the plaintiff's book, by the defendant, is not admissible against the defendant under the Stamp Act yet the book itself is admissible as corroborative evidence of the plaintiff's claim. *Dchi Dutta v Man Singh* 43 P R 1874, *Kalu v Basanta Mal*, 33 P R 1873.

Accounts prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence. *Raya Gopala Naidu v Subbammal* 31 M 291=109 Ind Cas 153=28 L W 151=A I R 1928 Mad 180=51 M L J 703.

Where there were only the account books and the general statement of the plaintiff that there were dealings between him and defendant held that the dealings were not proved under s 34 Evidence Act, in the absence of evidence of specific sums having been paid. *Buta v Trilol*, 100 Ind Cas 862=A I R 1927 Lah 903. *Narayan v Lithoba*, 100 Ind Cas 863=A I R 1927 Nag 177. The mere production of account books without more does not prove anything. Mere proof of the existence of certain entries in books of account kept in the ordinary course business is not sufficient to charge a person with liability. The law requires proof not only of account books generally but of each item. *Mathilda v Fritz*, 23 L W 272=96 Ind Cas 429=A I R 1926 Mad 955, see also *Abdul v Sharje* 1922 Lah 378. Mere entries in books of account are not by themselves sufficient to charge any person with liability. The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate. *Beni v Bisai* 89 Ind Cas 371=A I R 1925 Nag 445. Plaintiff's own statement on oath in support of entries, can be sufficient to support the entries in plaintiff's account books to fix the defendant with liability. *Firm of Jodha v Ditta* 84 Ind Cas 909=6 Lah L J 504=A I R 1925 Lah 242. This section does not limit in any way at all the nature of the material upon which Court may rely to support the statements in a book of account. Such material may take the shape of contemporary vouchers receipts or other documentary evidence or of sworn oral testimony. *Kallu Mal v Bhawan*, L R 6 A 375=83 Ind Cas 333=A I R 1925 All 742, see also *Yesuadayan v Subba* 53 Ind Cas 704, *Abdul v Pura* 82 P R 1914=277 P L R 1914, *Ramaswami v Ramanathan*, (1914) M W N 240=22 Ind Cas 627. Where a claim based on entries in account books is entirely denied plaintiff must prove the various items of his account by

**S 34.** independent evidence, as the entries cannot in themselves charge any person with liability. *Ganesh v The Firm of Mangal Ram Atma Ram*, 76 Ind Cas 137. In a suit for recovery of water cess, *bahi* entries showing that in previous years the defendant has been paying cess at the rate demanded, are admissible in evidence. *Prabhu Dyal v Ram Chander*, A I R 1923 Lah 593.

Where original accounts were kept in a rough book or on slips of paper and were after an interval of time entered in the regular books, the books can be rejected on the ground that the entries were not made in them regularly from day to day. *Mangal Prasad v Mandir Das*, 11 Ind Cas 9. Where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to defendants and wrong in principle to accept as sufficient proof the entries, uncorroborated by any evidence other than a somewhat vague statement by one of the plaintiffs to the effect practically that the books speak for themselves. *Ganga Ram v Kaka Ram*, 3 P W R 1914=22 Ind Cas 403. An entry in the *paimash* alone is not sufficient evidence to establish a right to property which is denied. *Ashar v Tasudevan*, 7 M 297. A single account book, not otherwise suspicious, is admissible in evidence particularly when it is supported by *prima facie* reliable evidence. *Jita v Nehi*, 4 Ind Cas 495=51 P W R 1909. Entries to be admitted as evidence by way of corroboration of other testimony must be made in the regular course of business. It is not sufficient to prove that the entries were taken from books which were regularly and correctly kept. *Queen Empress v Sayad Sarfuddin Rat Un Cr C 344=Cr Rg 37 of 1887*. Though entries in account books are proved not to have been regularly kept in the course of business, yet if they are proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose they are relevant admissions against the firm. *Reg v Hanmant*, 1 B 6, 10. If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong they are 'books of account' regularly kept in the course of business' within the meaning of s. 34. Evidence Act. *Crown v Ramchand* 6 S L R 195=14 Cr L J 262=19 Ind Cas 304.

**Absence of entries effect of.** Although this section makes an entry in a book of account relevant, such a book is not by itself, relevant to disprove an alleged transaction by the absence of any entry concerning it. *Queen Empress v Grees Chunder*, 10 C 1024. In *Kamalapati Banerjee v Bejoy Lal Banerjee*, 2 Ind Cas 291, the Court observed 'But even if the account books were produced and it was established that the entries were not to be found there the question is at least doubtful whether this would be any evidence against the defendant'. *The Queen v Grees Chunder supra* and in the matter of *Jugan Lal*, 7 C L R 20 seem to indicate that though the entries in books of account are relevant to the extent provided by section 34 of the Evidence Act, such a book is not by itself relevant to raise an inference from the absence of any entry. The same view is apparently supported by the observation of Lord Duns in *Ram Persad v Lakhpai Koer*, 30 C 231 (247)=7 C W N 162. The contrary view however was taken in *Sagarmull v Munraj* 4 C W N 200 in which it appears that it has been held that the cases just mentioned did not rule that the fact of absence of an entry is no evidence at all under any section of the Act, and that evidence that there is no entry in the account books, though not a *prima facie* under section 34 may be admissible under sections 9 and 11. In *Indra Chandra v Serdhar Panday Mr Justice Moolerjee J* said "In support of the contention that it is not evidence, reliance may possibly be placed upon the cases of *Queen Empress v Grees Chunder supra* and in the matter of *Jugan Lal* 7 C L R 20. These cases however if they decide that the absence of a recital in a document is not admissible in evidence at all under any section of the Evidence Act cannot be accepted as giving a correct exposition of the law on a matter of fact in neither of these cases was the question raised in this form. What was argued was that section 34 did not make the document admissible for the purposes stated. It was pointed out, however, in the case of *Sagarmull v Munraj supra* that under ss. 9 and 11 of the Evidence Act the absence of recital in a document may be used in evidence as against the person who is not a party to that document, and the observation of Lord Duns in

the case of *Ram Pershad Singh v Lakhpatikoer*, 30 C 231, must be taken to be restricted in the same manner " 15 C L J 7=13 Ind Cas 120=17 C W N 108, see also *Imambandi v Matasuddi* 15 C L J 621=13 Ind Cas 678, *Ali Nasar Khan v Manil Chand*, 25 A 90=22 A W N 207, *Pragdas v Daulat Ram*, 11 B 257, *Debendra v Arun*, 1925 Cal 65, *Tanakumar v Arun* 37 C, L J 319=74 Ind Cas 383, *Kasam v Haji* 67 Ind Cas 327 *Ganga Ram v Lachmaram* 19 C W N 611=28 Ind Cas 705, *Imam bandi v Haji Mutsaddi* 29 C L J 409=45 C 878

**Jama wasil baki papers** Where certain entries are admissible under section 32, the position is that there is no statutory obligation to look for any thing else in order to found the liability. It does not follow that such entries should necessarily, in any event be regarded as conclusive of the truth of the statements therein made. When such entries in the landlord's papers are sought to be used against the tenant their evidentiary value has got to be carefully appraised, the entries themselves being scrutinised and the circumstances in which they were made being considered with extreme care. *Gopeswar Sen v Bejoy Chand Mahatah*, 32 C W N 580=35 C 1167 *Jama bandis* which formed part of the record of the proceedings of a settlement under the Bengal Regulation are admissible under this section being in the nature of books of account as corroborative evidence but not as in themselves substantive evidence. *Dionarayan v Duarka* 9 Pat. L T 679=109 Ind Cas 136=A I R 1928 Pat 429. Although *Zemindari* papers cannot be admitted under s 34 of the Evidence Act as corroborative evidence without independent evidence of the fact of collection at certain rates they can be used as independent evidence if they are relevant under s 32 clause (2) of that Act. *Charitar Bai v Kailash Behari*, 4 Pat L W 213=(1918) Pat 145=3 Pat L J 306=44 Ind Cas 422. In an application under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent the landlord filed certain collection papers for showing variation of rent from time to time. The collection papers were produced by an officer of the landlord who deposed that they were in his custody. There was no evidence as to who wrote these papers nor as to who collected the rent, there was neither any evidence to show when and by whom these entries in collection papers were made. Held that the collection papers were inadmissible in evidence. *Altouli v Taral Nath* 16 C L J 328. *Jama uasil baki* papers have no weight except as corroborative evidence. *Surnomoyi v Johur Mahomed*, 10 C L R 345. *Belaet Khan v Rashbehary* 22 W R 549. *Gopal Mandal v Nabolasto* 5 W R (Act X) 83, *Kherromonee v Begoy* 7 W R 333, *Umed Ali v Habibullah*, 47 C 266. *Jeshuradayan v Subba Naicker*, 52 Ind Cas 704, *Dwarla Das v Sant Baksh* 18 A 92, *Mahomed Mahmud v Safar Ali* 11 C 407 (409), *Fayyuddin v Agniukumar*, 71 Ind Cas 300, *Jonab v Sita Kumari* 46 C L J 253=104 Ind Cas 733=A I R 1927 Cal 955, *Umed Ali v Habibullah* 47 C 266=31 C L J 68. The fact that collection papers may be admissible under s 34 of the Evidence Act does not prevent their also being admissible under s 32 of the Act if the condition prescribed by section 32 are established. *Bhaba Sundari v Tara Nasya*, 6 Ind Cas 369.

**Account books, entries, how to be proved.** Where certain account books were produced in the original Court by the plaintiff and all that was proved was that they were in the handwriting of his father and the books were not even examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited, it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves. *Hingunmyn v Heramba Chandra* 8 Ind Cas 81=13 C L J 139. In that case the Court in delivering the judgment said "It is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner v Ram Pershad*, 27 C 118=26 I A 251=4 C W N 417, they need not be written up from moment to moment or from day to day. But it is obvious that if they have been written up casually once a week or a fortnight, though they may be



§ 34 admitted in evidence, obviously they do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour as transactions take place (*Muncher Shaw v New Dhurumsay*, 4 B 576). The proper procedure to follow therefore, is, as laid down by their Lordships of the Judicial Committee in *Duarka Dass v Janki Das*, 6 M I A 88 (98) to call the clerk who has kept the accounts or some person competent to speak to their genuineness and prove that the books have been regularly kept and that they are generally accurate. But this is not all that is necessary, section 34 makes the entries relevant if they are entries in a book of account regularly kept in the course of business. It is therefore not sufficient merely to prove the correctness of the book the entries themselves have to be proved unless indeed the necessity for such proof is removed by the admission of the opposite party. In the case before us the account books were produced in the original Court and all that was proved on the side of the plaintiff was that the books were in the handwriting of his father *Kali Prasanno Chuckerbutty*. The books were not even examined in detail in the original Court. The particular entries upon which the plaintiff relies were not even selected and exhibited. In this Court some of the entries have not been taken at all. Obviously the proceedings in the original Court were conducted with considerable laxity. The particular entries upon which the plaintiff relies are to have been pointed out and proved, evidence should also have been given in detail as to the character of the books themselves. We have our eyes examined the books closely and we are of opinion that they require much fuller scrutiny than has been applied by the Courts below, before the plaintiff can be permitted to use any entries there in support of his claim. It must be remembered that the books purport to be private account books of the father of the plaintiff and they ought, consequently, to be carefully tested before they are used by the defendant. In fact when they are used in favour of the plaintiff it must not be overlooked that the plaintiff is allowed to use in his own favour evidence which he or his predecessor in interest has created the Court must, therefore, be assured that the books are thoroughly reliable. There was evidence to show that the *khata* books containing the memoranda of the receipts and expenses of a *debtor* estate as well as that on the *my* estate of the *shahut* were dictated by him soon after the *furd*, embodying the expenses, and *maskabari*, and *maskabari* accounts were prepared. It was found that the latter accounts were kept regularly in the ordinary course of business. The *maskabari* and *maskabari* regularly prepared upon the examination of the said memoranda and they should be regarded as the original accounts and are admissible in evidence. § 34 even though the *khata* books may not be forthcoming. *Raja Pary v Narendra Nath*, 9 C W N 421-32 C 582. Where a Small Cause Court gave a decree for the plaintiff on the evidence of his account books and of his keeper, who deposed that the entries in the account books were made from the *khata* supplied to him by the plaintiff on the days on which such memoranda were supplied it was held that the plaintiff not having produced the *khata* by himself going into the witness box or by accounting for his failure in going into the witness box was not entitled to succeed. *Hira Bhai v G. B. Rani*, C3 P R 1897.

Where there are entries in plaintiff's *bahi* account book, which are in the report of the commissioner is correct and regular according to the custom in the part of the country to which the parties belong and there is no other evidence to the contrary, the plaintiff's statement on solemn affirmation that the account is correct, it was held that certain disputed items interspersed in the account should not be rejected simply because they were not admitted by defendants and no special evidence was adduced in regard to them as there is no reason why such items should have been interspersed in an otherwise true account. *Hindus v. Hindus*, 50 P R 1910-147 P L R 1910-117 P W R 1910. It is not necessary to accept entries in account books as relevant under the Indian Evidence Act that it should be proved how the account was written and that they were regularly kept in the course of business. It is necessary that there should be other evidence in support of the entries to be established. The testimony of one of the plaintiffs who was examined as witness for the defence was considered.

corroborative evidence of the accounts to charge the defendants with liability *Bichha Lal v Jas Pershad*, P L R 1900, 5. It is unnecessary to prove, by independent evidence, the correctness of every single item of an account extending over seven years, in the absence of any denial of the correctness of any of those items *Moortee Ram v Laljee Sahoo*, W R 1864, 174. Plaintiff sued for the amount due to him on several *hundis* drawn by the defendant. The main question was whether the *hundis* were genuine or false. The first Court found that the *hundis* were forged and dismissed the suit. The High Court on appeal gave a decree to the plaintiff, deciding that the *hundis* were genuine and the defendant's answer was false. Certain account books filed by the plaintiff and the evidence connected with them formed the main ground for the decision of the High Court in favour of the plaintiff. The Judicial Committee likewise observed that not only was there no discrepancy between the several account books but each book contained that amount of difference which was appropriate to its character. The committee also used the better test of genuineness than the correspondence of the books themselves and that was their correspondence with other evidence and agreeing with the High Court on the entire evidence, confirmed the decision of that Court *Jaswant Singh v Sheonarayan*, 16 A 157 = 21 I A 6 P C.

Plaintiffs sued to recover money due as balance of a running account and relied chiefly on their account books. The lower Court found that the books were regularly kept, and assumed in point of law that by reason of having been regularly kept, the books would by themselves constitute *prima facie* evidence against the defendants of the matters therein entered. The various items entered in the books not having been specifically proved by the plaintiff, the High Court held that the entries alone would not constitute, under this section, sufficient evidence to charge the defendant with liability. On the evidence however, one of the plaintiffs having given evidence with reference to the account books stating the amounts advanced to and repaid by the defendant and no question having been put to him suggesting that he was not speaking from his own personal knowledge, such evidence along with the evidence of a witness for the plaintiff and the entries in the plaintiff's account books, was sufficient to uphold the decree given to the plaintiff by the lower Court *Duarka Das v Sant Baksh*, 18 A 92 = A W N 1895 233.

"There is frequently confusion in the subordinate Courts as to how an account book should be proved and used under section 34 aforesaid. It is common practice to call a witness and examine him, as to the particular item sought to be proved by getting him as it were, to read them out to the Court, sometimes when he has no personal knowledge concerning them and they are not in his hand writing, meanwhile, it is taken for granted without formal proof that because the book is the *khata* or *rokar* of some firm, it is regularly kept. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted), according to the circumstances of each case. Where an entry is properly admitted it is mere waste of time to have its contents repeated out of the mouth of a witness who merely reads it and cannot supplement it with his personal knowledge. Use of an entry to refresh memory is one thing its proof as substantive evidence under section 34 is another but this distinction is constantly lost to sight by Judges and practitioners. A clerk called as a witness may depose—I remember paying out Rs 100 as a loan to the defendant some time last year. Having now refreshed my memory from an entry made at the time in my master's cash book I can state that the date was the 15th June 1910. That is not a case of evidence under section 34 of the Evidence Act. But suppose the account book had been produced and the entry tendered in evidence. Then the deposition of the clerk might have been in these terms—I know the defendant. I remember that he came to my master's shop and borrowed some money last year. I cannot remember the amount lent or the date of repayment though I saw the money paid. I also saw another clerk make an entry of the loan in my master's cash book. This book (Exhibit A) shows to me a list in which the entry was made. It is regularly kept. Transactions are entered as they occur and the total is totalled and balanced every day and entered into a ledger book. This book (Exhibit B) is the ledger for the year and the entry of the loan should be in it." Upon this the Court would

- S. 35.** admitting the entries tendered by the plaintiff and using them to corroborate witness, and prove the amount and date of the loan. It would be waste of time and to miss the point of section 34 to get the witness to give oral evidence of contents of the entries by reading them out. Once they are qualified for admission under s. 34, the Court itself can read them and use their contents for its determination." *Mulunda v. Dayaram*, 23 Ind Cas 893=10 N L R 44

But such statements shall not alone be sufficient evidence. Section 34 of the Evidence Act declares that entries in account books regularly kept in the course of business should not alone be sufficient evidence to charge any person with liability. *Ghastal v. Ranchor*, A W N 1881, 60. Section 34 of the Evidence Act only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even if those books are shown to be kept in the regular course of business. He must have to show further by some independent evidence that the entries represent real and honest transactions and that moneys were paid in accordance with the entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in books of account, if true. *Yesuradiyan v. Subba Nacker*, 57 Ind Cas 704, see also *Rama Suami v. Ramanathan*, 22 Ind Cas 677, *Ganga Kala* 22 Ind Cas 403=47 P L R 1914, *Beni v. Bisan*, 89 Ind Cas 100, *Kalu v. Bhauam*, 88 Ind Cas 383=A I R 1925 All 742, *Abdul v. Shuja* 71 Ind Cas 259, *Jodha v. Dutta* 84 Ind Cas 909, *Gopeshwar v. B. S. Shuja* 71 Ind Cas 259, *Rampayaya v. Balaji* 28 B 294, *Dhuka v. Grant*, 16 C I 32 C W N 580, *Ganga v. Indrajit*, 23 W R 390 P C, *Ganashi v. Fum* 76 Ind Cas 124, *Umed Ali v. Habibulla*, 31 C L J 68. But such entries are evidence only if the person making them *Ningama v. Bhawmappa*, 23 B 63, *Mathilda v. Gopal* 96 Ind Cas 429=A I R 1926 Mad 950, *Jodha Mal v. Dutta*, 84 Ind Cas 909=A I R 1925 Lah 242.

Where some entries proved bogus—whole books are discredited. Accounts books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident. *Seth Maganmal v. Darbanulal* 24 N L R 40=30 Bom L R 200, 107 Ind Cas 113=47 C L J 222=A I R 1928 P C 39.

**35.** An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

**General Principle.** An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officers in pursuance of official duty. The principle of Necessity, which in one form or another is found in all the Hearsay exceptions is satisfied not in the declaration of the law or other like circumstances, as in section 32 *supra*, of the declaration but in the practically unendurable inconvenience of summoning public officers from their posts on the innumerable occasions when their official doings or records are to be proved in litigation. So in this and ensuing exceptions the mere application of the principle of necessity is found relaxed. Something is required to reduce it to an absolute impossibility is regarded as sufficient. The necessity reduces it to a high degree of expediency. In none of these exceptions is it required that the witness be shown to be unavailable by reason of death, absence or the like circumstance. In the present exception it is only required that it is highly expedient, if not practically necessary, to accept the statement of an official in certain classes of case instead of summing him up to attend and testify *in person* before a Court or by deposition before a

sioner The public officers are few in whose daily work something is not done which must later be proved in Court, and the trials are rare in which testimony is not needed from official sources. Where there is no exception for official statements hosts of officials would be found devoting the greater part of their time to attending as witnesses in Court or delivering their depositions before an officer. The work of administration of Government and the needs of the public having business with officials would alike suffer in consequence. Although, then, there is strictly no necessity for employing hearsay, in the sense that the personal attendance of the officer is corporally impossible to obtain there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule. *Wigmore* § 1631, *Greenl. Ev.* § 162 (m).

The second essential for an exception to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found to take the place of oath, confrontation and cross examination so far as may be. Two reasons are stated by the Courts as justifying the present exception in this respect. The first reason is related in its thought to the presumption that public officers do their duty. In this case the guarantee of trustworthiness justifying the exception is usually said to be the official oath or duty. *Greenl. Ev.* § 162 (m). In *R. v. Aickles* 1 Leach Cr. L. 3rd ed. 436 the Court observed: "The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity, and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require." Similarly *Erle J. in Doe v. France*, 15 Q. B. 758 said: "It depends upon the public duty of the person who keeps the register to make such entries in it after satisfying himself of their truth." In *Irish Society v. Bishop of Derry*, 12 Cl. & F. 468 *Parke B.* said: "The bishops in making the return discharged a public duty and faith is given that they would perform their duty correctly, the return is therefore admissible on the same principle on which other public documents are received." The fundamental circumstance is that an official duty exists to make an accurate statement and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfilment. Possibly the duty may not be one for whose violation a penalty is expressly expressed. Possibly the officer may not be one from whom in advance an express oath of office is required. No stress seems to be laid judicially on either of these considerations nor need they be emphasized. It is the influence of the official duty, broadly considered which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. *Wigmore* § 1632.

An additional reason and requirement is said to be the publicity of the document which ensures the probability of the correction of the possible errors by the public who have access to it and the subjective incentive on the part of the official to state correctly that which the public's inspection would detect as false if he recorded falsely. *Greenl. Ev.* § 162 (m). The principle, upon which (a previous decision) goes is that it should be a public enquiry, public document and made by a public officer. I understand by a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. I think the very object of it must be that it should be made for the purpose of being kept public so that the persons concerned in it may have access to it afterwards. *Sturla v. Freeria*, L. R. 5 App. Cas. 623. "This reasoning is plausible," says *Prof. Wigmore*, "and does no doubt add to many official documents a special nature of trustworthiness. But it should not be regarded as justifying a definite limitation of the scope of the exception for its strict application would exclude many classes of official document which are in fact admitted and ought in reason to be admitted." Apart from a few jurisdictions in which by Statute the right is expressly given to every citizen to demand inspection of official documents, there are everywhere numerous official documents of which inspection cannot be demanded except in casual cases of person having a specific interest in the subject matter—for example, the account books of public officers. It can hardly be supposed that this bare possibility of inspection can have any



"It has already been seen says *Prof Wigmore* 'that an essential qualification of a witness is that in general his knowledge or belief should be based on personal observation, and that testimony based on any thing sort of this is receivable only in a few classes of cases in which the source of knowledge is for practical purposes equivalent to personal observation. It has also been noted, that the same principle is applied to persons whose hearsay statements are receivable under the exceptions to the Hearsay rule, and the application of the principle has been noticed from time to time in the foregoing exceptions. How far is the principle to be maintained in the present exception? Must the officer whose statement is admitted have personal knowledge of the thing recorded certified or returned? In general, there can be no doubt that the principle applies here as elsewhere, but the principle itself need not be and is not judicially employed to the extent of unpractical strictness, and it has its qualifications and exceptions, based on good sense and practical convenience. *Wigmore* § 1635. So it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant. At the same time there are reconciling considerations. In the first place, there is in the vast majority of instances no controversy at the time and no motive to deceive the official, his record is, on the whole, of sufficient trustworthiness to be at least worth receiving in evidence. In the next place, the secular registers must in any case be founded on the testimony of some one else, and a discrimination between entries founded on the reports of physicians, midwives, undertakers, and ministers and entries founded on the reports of parents and other family members would be out of the question. Finally in strictness, the Registrars do not have personal knowledge of even the most fundamental facts, of which their entries are accepted without cavil: for example, how can a minister always say with personal knowledge that the persons married by him were M and N, or how can a Registrar usually have personal knowledge that the child registered was actually born to S, or was a boy or a girl? If we are to insist with pedantic strictness upon the entrant's personal knowledge it will be found that the registers will cease to be of much practical service for any purpose. On the whole then it is sound policy to receive all registers as evidence of the facts required by law to be recorded. *Wigmore* § 1646. In India this policy has been adopted both by the Legislature and by the highest tribunal. *Idie* Act VI of 1886 (Registration of Births, Deaths and Marriages) ss. 19 A, 20 and 21. *Lekhraj Kuar v Mahpal Singh* 5 C 744 (751) P C, *Sri John Woodroffe* in his Evidence Act accepting the test laid by *Mr Philipson* states: 'The principle upon which entries in a register are received depends on the public duty of the person who keeps the book register or record to make such entries after satisfying himself of their truth. It is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries. *Philp Ev* 5th Ed 320, *Doe v Andrews*, 15 Q B 756, *per Earle J*, *Sturla v Freccia*, 5 App Cas 628-644 *per Lord Blackburn*, *Lyall v Kennedy* 56 L T 647. *Woodroffe Ev* 366. But if we are to accept that test many entries which have been held admissible under this section would be inadmissible. The test laid down by *Prof Wigmore* should be followed. The Court is to see whether there was any motive on the part of the individual to deceive the official who is entrusted to make the entry.

**Scope of the section.** To render a document admissible under section 35 three conditions must be satisfied. First of all the entry that is relied upon must be one in any public or other official book, register or record; secondly it must be an entry stating a fact in issue or a relevant fact; and thirdly it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty, specially enjoined by the law. *Saman Dasadh v Juggul Ashore*, 23 C 366 (368). So this section relates to that class of cases where a public officer has to enter in a register or other book some actual fact, which is known to him, as for instance the fact of a death or a marriage. *Saraswati Das v Dhanpat Singh* 9 C 431 = 12 C L R 12. In applying this rule certain simple and generally accepted limitations prevail. There must be an official duty to make the record report or entry in question. This duty may be expressly provided for by Statute or Ordinance, or it may be implied from the nature and functions of the

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office *Greene v. El* § 162(n) Such writings (those which the law requires to be kept for the public benefit) are admissible in evidence on account of their public nature though their authenticity be not confirmed by the usual tests of truth namely the swearing and the cross examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature it would often be difficult to prove them by means of sworn witnesses. *Per Wayne J in Games v. Pelf*, 12 How 472, 570, *Wigmore* § 1631. So "official registers or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments are generally admissible in evidence notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth—the obligation of an oath and the power of cross examination of the persons on whose authority their truth and authenticity may depend. This has been said to be because they are required by law to be kept because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty." *Per Fowler J in Ferguson v. Clifford*, 37 N. H. 85, 95 *Wigmore* § 1632. Under this section all public or official books, etc., fall, under it also will come consular and notarial certificates log books and any book which railway and other companies are required by law to keep. *Nort. Ev* 200. There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records though somewhat similar in kind to those of which the Court may take judicial notice do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are however deemed to have sufficient guarantee of reliability to render them admissible if offered in evidence. *Mekely's Ev* § 206. The exceptional privilege given to public records given by this section cannot be extended to entries which a public officer is not expected to do and is not permitted to make. *Ali Nasir v. Manikchand* 25 A. 90 (F. B.)=1902 A. W. A. 207. *Madhabrao v. Deonal*, 21 B. 695. Where a document is clearly an official document it is admissible in evidence under section 35 of the Evidence Act. It may be possible that in the case of such a document if it could be shown that any particular part was in excess of the official duty by reason of which it came into existence that part might not be admissible. *Bhavya Durgaj v. Dns. M. N.* 22 C. W. N. 439=23 M. L. T. 382=20 Bom. L. R. 712=28 C. L. J. 1=41 Ind. C. S. 1 (P. C.)

**English Law** Another exception to the hearsay rule consists of statements contained in public or official documents which are admissible as evidence of the truth of the facts recorded even against strangers. *Philp Fr* 291. Statements and recitals in public matters contained in any public Statute, Proclamation (*R v. Sutton* 4 M. & S. 532 *R v. de Berenger*, 3 M. & L. 67), Speech from Throne Address to the Crown from either House of Parliament (*R v. Franklin*, 17 How. St. Tr. 636—638) State paper (*Thelluson v. Cording* 4 L. J. 266) diplomatic correspondence (*R v. Franklin*, 17 How. St. Tr. 633, or *Philp Fr* 291) *United Ins. Co. v. 7 Johns* 38, *Talbot v. Seaman* 1 Cranch 137, 38), or Parliamentary Journal (upon all matters properly before either House). *Randall*, 1 Cowp. 17, *Root v. King* 17 Cowen 613, but not upon extraneous matters. *Oates Case*, 10 How. St. Tr. 1165—1167) are in general prima facie evidence of the facts recited (*R v. Greene* 6 A. & E. 514). *Franklin*, *sup*. 11th Gen. v. Bradlaugh 14 Q. B. D. 667) *Philp Fr* 291. Official registers are admissible in proof of the facts recorded when (1) the entry is required by law to be kept for public information or reference and (2) the entry has been made promptly, and by the proper officer. *Hill v. Hill* 11 L. J. 111. In England a church record of baptism, kept by a clergyman of the Church of England is admissible even before his death, accompanied by the evidence of the identity of the child to prove the date of its baptism but not the date of its birth because the clergyman has no authority to make enquiry about the birth.

birth or any entry concerning it in the register *Draycot v Talbot* 3 Bro P C (2nd Ed) 564 *May v May*, 2 Str 1073, *Wiken v Lau*, 3 Stark R 63 *Doe v Barnes*, 1 M & Rob 389, *Stark L* 4th Ed 299 note (7), *Re Wittle*, L R 9 Eq 373, *R v Weaver*, L R 2 C C R 85, *R v Taylor* 96 L T Jo 443 In the church of England, from the time of the Reformation, registers of baptisms, weddings and burials were kept by the orders of the Crown as head of the church, and, in the words applied by Lord Chief Baron Gilbert to the original order of Henry VIII on this subject, 'When a book was appointed by public authority it must be a public evidence' *Gilb Ev* 3rd Ed 77, *Lord Cole*, in Noy, 146, *Hubbock on Succession*, 470-474 The Ordinances of the English Commonwealth in 1644 and 1653 provided for the registration of births deaths and marriages *Scobell's Ordinances* 76 236, *Dudley's Case* 2 Sid 71 But these Ordinances were annulled upon the restoration of Charles II And registers kept under ecclesiastical authority continued to be admitted in evidence by the Courts, although not required to be kept, nor declared to be evidence by any Statute This is probably the meaning of Lord Holt's dictum that such registers are evidence from 'the nature of the thing' and of the additional words attributed to him by one reporter of least authority—'though no law for it' *Stainer v Burgess* of *Droitwich*, 1 Salk 281=12 Mod 86=Skm 623=Holt 290 About the time of the decision of that case Acts of Parliament began to be passed which were repealed or altered from time to time, for the registration of births or baptisms, marriages and burials, generally limited to the Established Church and (unless for a few years towards the end of the 18th century), the law of England does not seem to have provided for registering births or deaths of any person, or baptisms, marriages or burials, in any form except that of the Established Church, from 1706 until 1836 when the general Registration Act (6 & 7 Will IV C 86) was passed (*Hubbock on Succession* 457—477, 493 where the Statutes are cited) Now registers of baptism are evidence of the date and place of baptism (*Hubbock*, 493), but not of the date or place of birth (*R v Chapman*, 4 C & P 29 *Wiken v Lau*, 3 Stark 63, *Burshardt v Angerstein* 6 C & P 690) So also registers of marriage are evidence of the fact and date of marriage *Doe v Barnes*, 1 M & Rob 386, *R v Haues*, 1 Den C C 270 From registers of death the fact of death and the place of death are proved *Re Vaters Trust*, W N 1887 p 128, *Pouell* 3rd Ed 302 The English Judges, adhering to the principle of admitting in evidence as public documents, those registers only which the law required to be kept, have considered all others as mere private memoranda and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or other witnesses *Birt v Barlow*, 1 Doug 171 *Neuham v Routhbey* 1 Phill R 315 *Ex parte Taylor* 1 Jack & Walk 483=3 Man & Ry 430n, *Doe v Bray*, 8 B & C 813=3 Man & Ry 428 *Wittuel v Waters* 4 C & P 375 Vice Chancellor Shadwell refused even to admit an entry in the register of the Roman Catholic chapel of the Sandman ambassador in London as evidence of the baptism of the ambassador's son *D'Aghe v Fryer*, 13 L J N S Cl 398 'The principle on which even times in a register are admitted,' said Mr Justice Earle in an old case, 'depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth' *Doe v Andrews*, 15 Q. B D 759 See also *Conway v Bearley* 3 Haug Eccl 651 *Athlone's Claim* 8 Clark & Fin 262 *Earldom of Perth*, 2 H L Cas 873 874, *Coode v Coode*, 1 Curt Eccl 764—767, *Hubbock on Succession* 161, 365 366 514, *Kennedy v Doyle* 10 Allen 161 (Am) So in colonial or foreign marriages other evidence is required *Burles v* 1 G 15 P D 76, *Dent v Dent* Phil Ev 302 *King v King* *ibid*

An entry stating a fact in issue or relevant fact The entries referred to in this section differs from those referred to in section 32, clause (2) by reason of the public or official character of the books in which they are made They are also it will be observed, evidence though the person also made them is alive and not called It does not appear that the entry must have been contemporaneous They are equally without the sanction of being under oath, but the official character of the transaction appears to afford a *prima facie* guarantee for its truthfulness—stronger, perhaps, than that which obtains in respect of books kept in the ordinary course of business *Ant Fr* 290



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**Public Book, register or record** The public nature of books and documents admitted under this exception must be proved or sufficiently appear as preliminary to their being received in evidence. It is always a question of determination by the Court whether the document shows on its face, or is by outside evidence proved to be of a character which will justify its admission. There is no definite rule which can be laid down on this subject, as every case presents its own circumstance. *Mekheiy's Ex* 313. This section contains no definition of 'public book, register or record'. According to section 74 of the Indian Evidence Act, the following documents are public documents—(1) documents forming the acts or records of the acts—(i) of the sovereign authority (ii) of official bodies and tribunals, and (iii) of public officers, legislature, judicial and executive, whether of British India, or of any other part of her Majesty's dominions, or of a foreign country, (2) public records kept in British India of private documents. "I do not think" says *Lord Blackburn in Sturt v Freesia* 5 App Cas 623, "that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a minor public in the sense that it concerns all the public interested in the matter. And an entry probably in a corporation book concerning a corporate matter or something in which all the corporation is concerned, would be public within that sense. But it must be a public document and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writ issued by the crown. That may be said to be quasi-judicial. He is acting for the public when that is done, but I think the very object of it must be that it should be for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards. (Vide *Frans v Urban District*, 1899, 1 Ch 241). In many cases, entries in the parish register, of births, marriages, and deaths, and other entries of that kind, before there were any Statutes relating to them, were admissible, and they were "public" then, because the common law of England making it an express duty to keep the register, made it a public document in the sense kept by a public officer for the purpose of a register and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, even after." *Thayer Cas Ex* 432. *Rasabandi* or *Choukidari* papers are not public documents and hence not admissible under section 35. *Thakur Singh v Ghanaya*, 27 P L R 194=91 Ind C 125=A I R 1926 Lah 452. A single document may, in certain cases, be a public record within the meaning of s 35 of the Evidence Act. But it does not follow that every report regarding a particular fact, from a public servant to a superior officer and made in pursuance of orders given by the latter, is admissible evidence to prove such fact. *Malikarjuna v Secretary of State*, 30 V 21=14 Ind C 401.

**Other official book, register or record** It is important to observe that whenever it is the duty of a public official either at common law, or by Statute to record certain facts in any book which is intended "to be kept as a register to be referred to ever after," the book is admissible in evidence to prove not only that such official made those entries, but also that the facts which he recorded in the book are true. And this rule extends to every public document, whether a register or not, which is "made for the purpose of the public making use of it and being able to refer to it." *Pouell* p 271. An entry made in a *Chaukidari* register of births and deaths is not admissible in evidence where it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law. *Mohammad v Emperor* 22 O C 200=64 Ind C 16. The statement of a witness to a Police Officer, under the provision of s 16 Cr Pro Code though reduced into writing, is not a public or official document and the writing in question cannot be used as evidence in any proceeding to prove that the statements contained therein were, in fact made. Such a document

is not a record within the meaning of section 35 of the Indian Evidence Act, and the document in question is not therefore admissible in evidence under the provisions of that section. *Isab Mandal v Queen Empress*, 28 C 348=5 C W N 65. The certificate of guardianship is no evidence of the age of the minor under this section, for it is neither a book nor a register, nor a record kept by any officer in accordance with law. *Satish Chandra v Mohendra Lal*, 17 C 949. *Teishkhana* papers prepared by *patuaries* under section 16, Reg XII of 1817, are not papers of the description contemplated by section 35 of the Evidence Act. *Samar Dasadh v Jaggul Kishore*, 23 C 366. It is doubtful whether the provisions of this section can be taken to apply to an entry in a public register or record kept outside British India. *Ponnammal v Sundaram Pillai*, 23 M 499. A *Teishkhana* Register (so called from the number of columns in the statement or register) prepared by a person who is called a *patuari* and submitted to the Collector in accordance with the rules framed by the Board of Revenue under § 16 of Reg XII of 1817, is not an official public document. *Bay Nath v Sukhu Makhan*, 18 C 534. This section does not apply to ordinary correspondence, though that correspondence might be conducted by officials, for the entries must be in something which is either "a book, register, or record, and they must be made "by public servants in the discharge of their official duties". *Jyotamba v Vengalaksmi*, 7 M L T 117=5 Ind Cas 827. The register of *Minpardari* villages being clearly an official document, in the absence of anything to show that any particular part of it is in excess of the official duty by reason of which it came into existence and that in consequence that part may not be admissible in evidence, is admissible in evidence under this section. *Rai Bhanya Dargaj v Deo Bahadur*, 22 C W N 439=23 M L T 382=28 C L J 1=47 Ind Cas 1 (P C).

**Public Servant.** The term "public servant" in this section must be interpreted in the same way as a "public document" in section 74, Cl 1 (iii), namely, as including the servant of a foreign state. *Maharaj Bhanudas v Krishnabai*, 28 Bom L R 1225=50 B 716=A I R 1927 Bom 11. The term "public servant" has not been defined in this Act. For the definition of the term vide s 21 of the Indian Penal Code and s 2 (17) of the Code of Civil Procedure (Act V of 1908). As regards who are public servants vide 12 B H C R 1, 8 A 201, 7 B L R 448=16 W R 27, 15 M 127, 21 M 428, 6 Bom L R 54, 7 W R 99. Various Acts in British India have declared certain persons to be public servants e.g. Coroners, (by s 5 of Act IV of 1871), Appraiser of Presidency Small Cause Courts (XV of 1882 s 52) Forest Officers etc.

**Register or record.** A register or record differs from a return or a report in that it comprises in a single volume a series of homogeneous statements recorded by entries made more or less regularly, it differs from a certificate that it is kept in the official custody. A return or report differs from a register in that it is a single document made separately for each transaction as occasion arises (perhaps filed or indexed with others having but a separate existence of its own), this difference arising usually in practice from the circumstances that the statement deal with something done outside the official precincts and therefore not fitted for entry in a single office volume. The return differs from the certificate in that it is preserved in official custody. A further distinction, within this class between a return proper and a report is that the former deals with something personally done or observed by the officer, while the latter records the result of his investigation as to something that has occurred out of his presence. A certificate differs from a return in that it is not preserved by the official but is given out by him to an applicant for the latter's use. It differs from a register in that it is not a series of entries in a single volume. *II igmore* § 1637.

**Discharge of his official duty.** In order to make an entry admissible under this section, it must be shown that the entry was made by a person in the discharge of his official duty or in the performance of a duty enjoined especially by law. *Tarak Chandra v Prasanna Kumar* 28 C W N 679=39 C L J 389=78 Ind. Cas 719=A I R 1924 Cal 634. In delivering his judgment in the above case Mr Justice Mookerjee observed "It does not also appear that the person who made the entry did so in the performance of a duty specially enjoined

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by the law. The paper therefore in my opinion does not come under section 35 of the Evidence Act at all. The section is based upon the circumstance that in the case of official documents entries are made in the discharge of public duty by an officer who is the authorised and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity. The circumstances relating to this entry do not stand these tests. It is likely that the books were kept for the information of the Collector but that does not make them binding as official records of the facts contained therein."

**Any other person in performance of a duty, etc.** An entry in a *Chaukidar's* register of births and deaths was relied upon as proof of the date of the birth of a person. The entry was admittedly not made by the *Chaukidar* and there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it. *Held*, that the register was not admissible under s 35 of the Evidence Act. *anpat v Gauri Sankar* 190 C 68,

**Wajib ul arz.** An entry in the *wajib-ul-arz* is admissible in proof of the custom under s 35 and its validity does not depend upon the question whether the *wajib ul arz* has been verified by the proprietors of the village or not. *Mehdi Hasan v Abdul Wahid*, 101 Ind C 820=1 Luck C 73. A *wajib ul-arz* is a village administration paper prepared by a village official in which are recorded the statements of persons possessing interests in the village relating to *ex tunc* rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate the traditions and purport to give the history of the devolution in certain families not even of the narrators stand in no better position than any other tradition. When the incidents in question stated in the *wajib ul arz* are incidents not within the memory of men living at the time that they are prepared the entries in the *wajib-ul-arz* cannot be considered of accuracy as to tradition and it would not be safe to accept the statements in the *wajib ul-arz*. *Madari Singh v Anwar Ali* 4 O W N 1029=105 Ind C 24. The entries in *wajib ul arz* may be taken to have been made after due enquiry by the Settlement Officer, unless the contrary is shown by the party alleging it. *Manya v Sitaram*, 23 N L R 16=100 Ind C 438=A I R 1927 Nag 147. *Wasiq Ali v Athar Ali* 110 Ind C 438=99 Ind A. L. R. 1928 Oudh 409. *Sartaz Koer v Mahalco Bux* 29 O C 103=99 Ind C 657=A I R 1926 Oudh 332. *Subha Singh v Rustam Singh*, 3 O W N (Supp) 240. Entries in *wajib ul arz* afford evidence of the existence of a custom of pre-emption in the village. *Jogai Narain v Nageshar*, L R 6 A 296=88 Ind C 133=A I R 1925 All 663. It is not necessary that the existence of a custom recorded in a *wajib ul-arz* or *Ruwayz* should be supported by instance. *Bayi Nath v Bahadur* 2 O W N 872=12 O L J 571. An entry in a *wajib-ul-arz* is *prima facie* evidence of the existence of a custom unless there is anything in the *wajib-ul-arz* itself which negatives the idea of such an existence or there is other evidence to the contrary or if such custom is unreasonable or not enforceable, the presumption would be that such a custom exists. *Gayan Si v Babu Lal* 21 A L J 822=L R 4 A 557. *Sher Muhammad v Parbhoo Lal*, 9 A L J 801. *Sher Mahammad v Dost Muhammad* 78 Ind C 451. *Lal Chandra v Ram Chand*, 46 A 674=82 Ind C 526=1924 All 753. Where the *prima facie* evidence as to pre-emption as against the *prima facie* case proved by the *wajib-ul-arz* consisted in an entry of *nadarad* in the column provided for the right of pre-emption, *held* that, if the meaning of the word *nadarad*, was merely *nil* meaning no entry, such an entry, though in a public document was not relevant under section 35 of the Evidence Act to prove that no custom existed or that the custom has ceased to exist because no entry as to the custom had been made. *Ali Nasar v Manik Chand* 25 A W N 1902 207.

Declarations as those of *Kamungo* entries made in the village records (*Wajib-ul-arzes*) by the officer charged by the government with that duty are answers to official inquiries made under government directions as to the state of succession prevailing in particular families are *prima facie* evidence as purporting to be made by the proper officer in the performance of a

special duty and presumably with due regard to the rules laid down for his guidance *Mussamat Parbati v Rani Chandra Pal*, 10 C L J 216=13 C W N 1073=31 A 447=11 Bom L R 890=36 L A 125, see also *Musammal Lali v Murl Dhar*, 8 Bom L R 402=23 A 488=3 A L J 415=10 C W N 730 *Lehray v Mahpal Singh*, 5 C 744=6 C L R 593=L R 7 I A 63, *Isi v Gunga* 2 A 876 *Muhammad Hassan v Munna*, 8 A 434, *Gokul v Mohan*, 2 A L J 790, *Deoli v Sri Ram*, 12 A, 257, *Superundhuwa v Garudhuwa*, 15 A 147, *Uma Prasad v Gandhar*, 15 C 20, *Sadhu v Raja Ram* 16 A 40, *Garudhuwa v Superundhuwa*, 5 C W N 33=23 A 37, *Ali Nasir v Manich Chand* 25 A 90

**Riwayt nam** An entry in a *Riwayt nam* recording a special custom is *prima facie* proof of the custom *Labh Singh v Mt Mango*, 8 Lah 281=100 Ind Cas 924=A I R 1927 Lah 241 The *Riwayt nam* being a public record prepared by a public officer in the discharge of his duties is admissible in evidence to prove the facts therein entered and the statements contained in it form a strong piece of evidence *Mt Norani v Jauhar Singh*, 89 Ind Cas 724 Entries in a *Riwayt nam* even when unsupported by instances are important pieces of evidence on which Courts can act *Mt Tabi v Saudagar*, 1924 Lah 698, see also *Samail v Ahmada* 4 Lah 189=73 Ind Cas 452=A. I R 1923 Lah 517, *Nandoo v Bahut*, 5 L L J 203=69 Ind Cas 495

But a statement in a *riwayt nam* opposed to general custom and unsupported by instances possesses very little evidentiary value *Budha v Fatima Bibi* 4 Lah 99=1923 Lah 401

**Recitals in judgments** A recital in judgment not *inter partes* of a relevant fact is not admissible in evidence under section 35 of the Evidence Act *Tripurana Seethapathi v Rolfam*, 45 M 332=42 M L J 324=30 M L T 160=66 Ind Cas 280 (FB) In delivering the judgment of the Full Bench *Kumara suami Sastri J* said "The contention of *Mr K P M Menon* for the appellant is that a judgment is a public record within the meaning of section 74 of the Evidence Act, that a Judge is a public servant and when he writes a judgment, he makes a public record, and that a statement in the judgment is, therefore an entry made by a public servant in a public record, which, if it relates to a relevant fact would be evidence under section 35 irrespective of whether the judgment in which the statement occurs, is or is not between the same parties In support of his argument he refers to the decisions in *Parbatty Dass v Purno Chunder*, 9 C 596, *Byathamma v Arullo*, 15 M 9 *Thana v Kondan*, 15 M 378 and *Krishnaswami v Rayagopala* 18 M 73=4 M L J 212 For the respondents it is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not *inter partes* is not evidence

It would be straining the language of section 35 to hold that a Judge when he writes a judgment is making entries in a public or official book register or record and that every statement made in a judgment is an entry in such book, register or record If section 35 is applicable to judgment and if the contention of *Mr Menon*, is accepted the result will be that every judgment would be admissible to prove a relevant fact if it contains any statement as to a fact in issue or relevant fact, even though the judgment may be between persons who are total strangers to the litigation in which it is sought to be filed in evidence I find it difficult to hold that the Legislature which in sections 40 to 44 has carefully defined the limits within which judgments are admissible in evidence, would have in a previous section practically nullified the provisions as to the relevancy of the judgments by including judgments in the category of public or other official books registers or records Then after dissenting from the judgment of *Prinsep and O'Kinelly JJ* in *Parbatty Dass v Purno Chunder Singh* *supra* and explaining *Lehray Kuar v Mahpal Singh* 5 C 744=6 C L R 593 the learned Judge continued "The correctness of this decision (i.e. *Parbatty Dass v Purno Chunder Singh*,) was doubted in *Sundar Das v Fatimul ul nissa Begum* 1 C W N 513 and in *Ramsundar Gope v Haribala Dhubi* 37 Ind Cas 911 In that case the learned Judge also explained the cases of *Byathamma v Arullo*, *supra* as well as *Thana v Kondan*, *supra* See also *Ramaswami v Apparu*, 12 M 9 In this connection it should

**S 35.** be borne in mind that "although a judgment not *inter partes* may be used in evidence in certain circumstances as a fact in issue or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties" *Per Mookerjee J in Kashi Nath v Jagat Kishore*, 35 Ind Cas 298=20 C W N 643=23 C L J 583 (J.S.) *Ramprohash v Anand*, 33 Ind Cas 583=43 C 707=20 C W N 802=14 A L J 621=18 Bom L R 490=24 C L J 116 On a consideration of the authorities and the provisions of the Evidence Act it is clear that section 35 would not render a judgment not *inter partes* evidence. But judgment *inter partes* is admissible in evidence under section 35 of the Evidence Act as they form a record of facts in issue made by a public servant in the discharge of his official duty *Gopal Rao v Sita Ram*, 97 Ind Cas 694=9 N L J 215

**Birth registers** A copy of the Birth Register is admissible under the section being an entry in a record made by a public servant in the discharge of his official duties *Chakravarthi v Pushpavathi*, 23 L W 688=90 Ind. Cas 1005=A I R 1926 Mad 985 Where an entry in the Register of Birth is made by the Chowkidar himself, the entry could not be admitted in evidence *Shah Balak v Gaya Prosad* 20 A L J 601=L R 3 A 468=1922 All 510, see also *Sampat v Gauri Sankar*, 10 Ind Cas 713=14 O C 68 A Register of Births and Deaths kept at the Police Station is a public document within the meaning of section 35 of the Evidence Act and a certified copy of an extract thereof is admissible in evidence *Sheikh Tamayuddin v Sheikh Tazul*, 22 C W N 822=46 Ind Cas 237 The Birth Register is an official register kept by the Papadar who is a public servant in the discharge of his official duty. It is therefore relevant under s 35, Indian Evidence Act *Gehumul v Hurmumal*, 10 L R 38=35 Ind Cas 551

**Death registers** Death registers kept in Police Station is an official book *Shub Deo v Ramprosad*, 87 Ind Cas 938=A I R 1925 All 79 A death register is a public document and will in ordinary circumstances be bound to be accepted as conclusive of the dates of the death of the recorded *Rangappa v Ranga Suami* A I R 1925 M W N 232=88 Ind Cas 249=A I R 1925 Mad 1000 The register of deaths maintained under para 367 of the Police Regulations is an official register and that its entries are made by a public servant in the discharge of his official duty and as such are admissible under section 35 of the Evidence Act *Zait un nissa v Hasiat un nissa* 22 O C 124=52 Ind Cas 167 see also *Ramalinga Reddi v Kotayya* 33 M L J 60=41 Ind Cas 266 Apart from Madras Act III of 1899, the Registers of Births and Deaths kept under the directions of the Board of Revenue since the year 1865 do come under the section *Ibid*

**Batwara khasra** A batwara khasra is not a public document within the meaning of s 35 of the Evidence Act but if it had been prepared under the provisions of the Estates Partition Act by the Deputy Collector in the discharge of his official duty it is admissible as a public document *Ramsarup v Ram Narain Tewari* 7 Pat 85 Entries in Batwara papers are valuable for purposes of evidence *Chettia Nath v Babar Ali* 29 C W N 333=86 Ind Cas 83=A I R 1925 Cal 635, *Triloke v Lala*, (1922) P 447 A map made for the purposes of a partition which affected the public revenue is admissible in evidence for what it is worth though it may be for a limited purpose only *Abdul Halim v Brojendra Kumar* 90 Ind Cas 643 A batwara khasra is not a record within the meaning of s 35 and an entry made therein in the name of a tenant in a session is not admissible in evidence under s 35 of the Evidence Act, but under section 13 it can be put to show the history of the plot in question before the creation of the tenancy *Sadhu Saran v Ambica* A I R 1923 P 163 The weight cannot be attached to a partition paper in the absence of detailed information as to the history of the document, when it was prepared, by whom, in whose presence and for what purpose *Tara Kumar v Kumar Arun* 74 Ind Cas 383=1923 Cal 261=36 C L J 399 Batwara khasra or a map or document prepared under s 54 of the Estates Partition Act, 1899, does not come within section 35 of the Evidence Act as a public record *Ibid* 17

*Jung Bahadur* 8 Ind Cas 890 see also *Nandalal v Mohant Charupat*, 17 C L J 462=17 C W N 779=18 Ind Cas 143 *Mohi v Dhuro*, 6 C L R 139, *Perma Roy v Kisen Roy*, 25 C 90 Where a Collector according to the provisions of Bengal Act, VII of 1876, makes entries in a register kept by him held, that such entries are entries made in an official register kept by a public servant, and that certified copies of such entries are admissible in evidence under section 35 of the Evidence Act *Sosha Bhoosan v Girish Chunder*, 20 C 940, see also *Ramsarup v Ramnaram*, A I R 1929 Pat 32 A *batuara chitta* is not admissible in evidence under s 35 of the Evidence Act *Isuar Chandra v Taranath*, 1 Ind Cas 807 Entries in *batuara khasra* papers are admissible in evidence, but it is for the Court to decide in each particular case whether the evidence furnished by the *batuara* proceedings is so valuable as to rebut the presumption of the correctness of the Record of Rights *Jugdeo v Bulaki*, 63 Ind Cas 226 see also *Golab v Syed* 36 Ind Cas 515=5 Pat L W 6 A *batuara* map prepared in a partition proceeding between the proprietors of an estate is no evidence against tenants of the estate if it was prepared after their tenancy was created *Banamali v Satis* 56 Ind Cas 138 Certified copies of papers in the collectorate which *prima facie* appear to be the record of a partition made in a proceeding under Reg XIX of 1834 between predecessors of the parties to a suit are good and admissible evidence, quite apart from any thing contained in section 35 of the Evidence Act *Khetra Nath v Mahomed*, 23 C W N 48=15 Ind Cas 921

**Entry in a certified copy** Under this section an entry made on a certified copy indicating the date on which it was completed is certainly relevant But when an enquiry as to correctness of such an entry has been started on its accuracy having been challenged by a party and in such enquiry a report is made departmentally by a copyist to his superior officer such report is wholly outside the purview of section 35 and cannot be referred to as legal evidence without the copyist being cited as a witness and called upon to depose to the statements in the report *Nizam Din v Mahomed Iqbal*, 103 Ind Cas 619=A I R 1928 Lah 643

**Record of rights** The record of rights which is a public record prepared by a public officer appointed under the statutory authority of the Local Government is admissible under this section and a record will have a presumptive value of its correctness *Fazlar Rahman v Golam Cadir Mia*, 30 C W N 689=96 Ind Cas 959=A I R 1926 Cal 862 Under section 101 of the Bengal Tenancy Act, a Revenue Officer has power to prepare a Record of Rights in respect of lands in any local area notified by the local Government He has no power to record the existence of any local custom that may affect such lands as part of the Record of Rights as under s 102 of the Act a village custom is not one of the particulars which has to be recorded If a Record of Rights contains an entry as to custom there can be no presumption under s 103 B of the Act as to its correctness and although under s 35 of the Evidence Act it is relevant, yet the burden of proving the existence of a custom lies on the party who relies on the custom *Suresh Chandra Rai v Sitaram Singh*, 57 Ind Cas 126

**Guardianship certificate—evidence of age** In *Satis Chandra Mukhopadhyay v Mohendra Lal Pathak*, 17 C 849 the certificate of guardianship was held to be a document which could not be considered to be a record kept by a public servant specially enjoined by law of the country See also *Gurraj Kumar v Abhask Panch* 18 A 478=(1896) A W N 158, *Harihar Prasad v Edul Singh* 5 Pat L J 460=57 Ind Cas 333 But it was pointed out in *Mohan Lal v Mohammad Adil*, A I R 1926 Oudh 8 that the certificate of guardianship so far as the province of Oudh was concerned was issued by the Court of a District Judge in accordance with para 253, Oudh Civil Digest They are to be issued in a particular form prescribed therein So in the province of Oudh a certificate of guardianship issued by a District Judge to a guardian appointed by him of a particular minor is a record made by a public servant in the discharge of his official duties and an entry in such record is therefore admissible under section 35 of the Evidence Act *Ameer Hasan v Ejaz Hussain*, A I R 1929 Oudh 135

S 35.

Other documents admissible under this section Where a *Kanungo* who is duty bound to furnish information to the Settlement Court on questions relating to title and consequently who had no special means of knowledge as to relationship of a talukdar's family made a statement to the Settlement Officer in discharge of his official duty and the same was recorded It was held that the statement was admissible in evidence on the question of relationship under this section *Lal Harihar Pratap v Bisheshwar Bahsh*, 3 Luck 326=5 O W N 299=100 Ind Cas 422=A I R 1928 Oudh 307 A survey register which is duly proved by the surveyor who recorded it is admissible in evidence *Ko Maung v Kway Ba Htue*, 5 Bur L J 116=98 Ind Cas 166=A I R 1926 Rang 201, *Krishna Suami v Ananthachari*, 4 Mys L J 264 The remarks made by Settlement Officer in respect of a village at the time of inspecting are admissible in evidence under s 35 of the Evidence Act, being entries in a public record made by a public servant in discharge of his official duty *Sheo Bahadur Singh v Bishunath*, 2 Luck 4=4 O W N, 15=99 Ind Cas 876=A I R 1927 Oudh 74 The entries in a prescription register maintained by a Government compounder in a Government dispensary are admissible under s 35, although the particular compounder or compounders who made these entries have not been called as witness *D'Cruz v D'Cruz*, 1 Luck 203=103 Ind Cas 512=4 L R 1927 Oudh 310

Where the subdivisional officer directed an enquiry by a *Kanungo* of the circle into the matter of the complaint by virtue of s 202 (1) of Cr Pro Code it was held that the result of the enquiry embodied in the report was admissible in evidence under this section *Jagdat v Sheo Pal*, 1 Luck C 259=104 Ind Cas 287=A I R 1927 Oudh 323 The quinquennial register of 1890 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under the B T Act s 50 (2) *Hem Chandra v Prasanna*, 86 Ind Cas 538=A I R 1925 Cal 1037, but see *Sarak Chandra v Prasanna*, 29 C W N 679=39 C L J 389 The idea of preparing *preparats* is to know year by year how much land has been under crop and how much left fallow with a view to know the actual state of cultivation in each village and they are admitted in evidence for that purpose *Sitaram v Humatrao*, 90 Ind Cas 38 The first information being an official record made by a public servant in the discharge of his duties comes under section 35 of the Evidence Act, and is admissible in evidence without formal proof *Mohan Singh v Emperor*, L R 6 A 49 Cr 85 Ind Cas 647=26 Cr L J 551=A I R 1925 All 413 The contents of the report may be used as a corroborative piece of evidence to show that the implication of the accused in the offence is not an after thought It cannot certainly be used as a substantive piece of evidence *Mohan Singh v Emperor*, *supra*

An *Inam Register* embodies the conclusions of the *Inam Commissioner* on such enquiry as he chooses to make The presumption is that they embody the findings after investigation There is no rule prescribing the extent of the investigation to be made by the Commissioner *Krishna Charlu v Vijayaram*, 88 Ind Cas 646=48 M L J 465 Entries in a settlement *khatwat* is admissible *Protap Chandra Deo v Jagadish Chandra*, A I R 1925 Cal 116 Entries in the *Siyohs* are made by the *Patuaries* in the ordinary course of business and are good evidence as to the rent having been collected by a particular person *Raghunath v Khuman*, L R 5 A 150 (Rev) *Sarju v Hira Lal*, L R 4 A 411 Entries in assessment rolls are relevant evidence *Mq Po Lun v Mq E M*, 74 Ind Cas 47=A I R 1923 Rang 57=1 Bur L J 111, *Welland v Miller*, 11 Ir Eq 603 *Swift v M Tiernan*, 11 Ir Eq 602

The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant under s 35 of the Evidence Act as the statement forms part of the record *Thakur Rudra Pratap v Thakur Vir*, 74 Ind Cas 225=1923 Oudh 61 A report made after local enquiry by a *Talukdar* under the orders of the collector in a Land Acquisition case is admissible in evidence under this section *Rathanamavari v Secretary*, 44 M L J 132=72 Ind Cas 214 Extracts from Revenue Registers Nos 1 & 5 and a map showing the party in possession as mortgagees and the claim as mortgagor though relevant are not sufficient by themselves to prove the existence of a mortgage *Ma Mein v Gale*, 1 Rang 562 So also under this section

the entry in a Revenue Register No VII is a relevant fact. Although such entry in the register recording on the alienation does not prove the alienation or the ownership of the alienor at the time it was made, yet it does create a presumption that a report of the alienation in the terms recorded was made by the parties to the alienation. *Maung Hlaing v Maung Chit Su*, 1 Rang 135=1923 Rang 196, see also *Ram Rup v Debi Pershad*, 47 Ind Cas 754=5 O L J 513. The peon's return in execution proceedings being an official record made by a public servant in the discharge of his official duty, is admissible in evidence. *Heramba Nath Surendra Nath*, (1919) Pat 465=33 Ind Cas 20.

A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted, under section 35 of the Evidence Act as proving that the public servant made the statement that he is to have made, if the fact that he made such a statement is a relevant fact. *Sankaracharya v Manali Saravana Mudaliar*, 51 Ind Cas 876.

Revenue Records are not evidence of title for they are kept for fiscal purposes and it is not part of the duty of the Revenue Officer to record title. But when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those titles under section 35, Evidence Act. *Bibi Sahib v Sayad Mn Mahomad*, 9 S L R 143=32 Ind Cas 548.

Though survey entries in survey records may not be sufficient evidence to prove that a certain land is *poramboke* they are good evidence where the only question is as to the extent of *poramboke* land. *Kalayal v Secretary of State*, 2 L W 413=29 Ind Cas 154.

The Settlement Records prepared under Regulation VII of 1822 are relevant under s 35 of the Evidence Act. *Raghunandan v Bibhutibhusan* 12 Ind Cas 147=39 C 304.

An entry of the ward's age in the Administration Report of the Court of Wards is evidence of his age under s 35 of the Evidence Act. *Asi Chattiav v Rama Reddin*, 9 M L T 214=9 Ind Cas 567.

Under section 35 of the Evidence Act, a statement made by the Survey Officer that the name of this or that person was entered as the occupant of certain lands could be admissible if relevant but it would not be admissible to prove the reasons for such an entry as facts in another case. *Govindrao v Rangho*, 8 B 543, see also *Metharam v Jamal* 2 S L R 82. Settlement records are made by settlement officers in accordance with the directions to them, which are executive instructions. So entries of mortgages made in them in the course of official duty are merely a piece of evidence relevant under s 35 of the Act, the weight and probative value to be given to them being a matter to be decided by the Court. *Mi Sa U v Nga Pyan*, U B R 1905, Evidence 3.

The language of Regulation No VII of 1823 regarding the particulars which a settlement officer had to enter in the record prepared by him, is extremely wide. The information which he had to collect was intended to be utilized in the Court of Justice in determining the rights of litigants before them. The settlement officer was directed to ascertain "the real nature and extent of the interests, more especially where several persons may hold interests in the same subject matter of different kinds of degrees." This would include the case of mortgagors and mortgagees whose interests in property are of different kinds of degrees and entries in *theuats* and *khattians* would be admissible under s 35 to prove the existence of a disputed mortgage. *Robert Skinner v Chendun Singh*, 6 A L J 197=31 A 247.

The *Kutardhar* papers drawn up under the Punjab Land Reservation Act are public documents provable by certified copies thereof. *Shamasuddin v Ganesh A*, I R 1929 Lah 328.

Where the question is as to the age of a person, the entry of his date of birth in the school register based upon the statements of his deceased father is admissible under s 32(5) and also under section 35, the entry being in a public register stating a fact in issue and made by a public servant in the discharge of his official duty. *Munna v Kameshri A*, I R 1929 Oudh 113.

A settlement pedigree is admissible in evidence under s 35 if it be shown that it was prepared by a settlement officer in the discharge of public duty.



**S. 35** *Sarfaraz v Rayana*, A I R 1929 Oudh 129 There can be no objection to refer to settlement Reports or District Gazetteers, whether they are strictly speaking evidence or not under s 35 of the Evidence Act *Jogesh Chandra v Mahbul*, 47 C 879=25 C W N 857=60 Ind Cas 934

**Documents not admissible under this section** A sale certificate is not a public or other official book, register or record as it is much the same as a certificate of guardianship which has been held not to answer the description *Ambara Charan v Kumud Mohan*, 110 Ind Cas 521=A I R 1928 Cal 893 A R 1. A return is only admissible against the maker *Suarnamoy v Suranaray Nath*, 42 C L J 14=89 Ind Cas 747=A I R 1925 Cal 1189 Where the question is whether the accused were present at a meeting of an unlawful association, and the prosecution produced a document purporting to be a register of attendance maintained by the unlawful association, it is necessary to show by oral testimony that it was in fact a register of attendance kept for the purpose of recording the names of the persons who were present at the meeting on the date appearing over their names *Baua Sarup v Emperor*, 7 Lah L J 264=88 Ind Cas 92=26 P L R 566=26 Cr L J 1078 In such a case, a list of a person drawn up by the police at the time is not admissible in evidence and if admissible it proves nothing beyond the fact that the police expected to find the person amongst those present *Baua Sarup v Emperor*, 88 Ind Cas 22=7 Lah L J 264=26 P L R 566=26 Cr L J 1078 Certain entries from a school register at Bikaner which were not proved, are not sufficient to show that the defendant was actually at Bikaner at the time of the entries *Mt Chando v Sri Rara*, 1925 Lah 607

Where the question was as to the date of death of one L and the plaintiff appellants produced in support of their assertion, that L died on a certain day an alleged private register in which the crucial entry was apparently interpolated among faded brown entries and was seen in bright blue ink It was held that the register was not of such a character as to enable the Court to pronounce affirmatively that the entry in question was made at the date alleged *R. Mohan v Sriramulu*, 46 M L J 541=1924 P C 136 A *hissawari* which came into existence in consequence of a demand by the Collector under section 30 of the Land Registration Act is not a public or other official book, register or record but being merely the record of information supplied by some of the Collectors is not admissible under section 35 of the Evidence Act *Tunha v Bindhu Singh*, 113 Pat 323 A passage in a District Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it *Balmukund v Bishua* 52 Ind Cas 851 A certificate of age of a private patient is not relevant as a public record under section 35 of the Evidence Act but could only be used for the purpose of refreshing the memory when he is examined as a witness *Venkata Rangappa v Subbaraya*, 33 Ind Cas 142 Where, in reply to a certain reference from the Collector the *Tahsildar* sent the following report "I beg to state that the village Munsif of *Inaiaram* reports that the charities referred to have not been commenced" held that this report was not admissible in evidence of the fact that the charities had not been commenced on the day when the report was made *Mallikarjuna v Secretary of State* 35 M 21=14 Ind Cas 401 The fact that certain lands are entered in the Government records in the name of a particular person is not sufficient by itself to prove that person's ownership in those lands *Pandarang v Anant*, 5 Bom L R 956 Reg XX of 1817 does not impose on the *Droga* any duty of keeping a register of *Choudidars Chakran* and from the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulations held that their could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them That section 30 of the Evidence Act did not cover such entries, but s 32 (2) of the Act applied and they are admissible in evidence *Sheonandan v Jeonandan* 13 C W N 11=1 Ind Cas 376

Where a paper book of Calcutta High Court relating to another case was tried to put in evidence in a case in a Patna Court Held in the absence of proof that the papers printed in that book were the true copies of the original

documents it could not be admitted *Santolhu v Rameshar*, A I R 1929 Pat 41 Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible *Gouri Shenkar v Emperor*, A I R 1930 All 26 The proceeding of a confidential enquiry containing an opinion on an *ex parte* investigation is inadmissible in evidence under this section *Baldeo v Sheoraj*, 56 Ind Cas 807 A porch slip granted in the course of survey proceedings is not a public document and is inadmissible in evidence to prove title or possession *Ram Bhaquan v Emperor*, 47 Ind Cas 82=19 Cr L J 886

**Official reports, registers, etc value of** Although official reports are valuable and in many cases the best evidence of facts stated therein opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination *Mortland Row v Malhar Row*, 55 I A 45=55 C 403=47 C L J 150=107 Ind Cas 7=30 Bom L R 251=32 C W N 621=A I R 1928 (P C) 10=54 M L J 397 (P C) Where the origin of an entry in a Revenue register is not known an entry itself might afford an indication of the rights conferred but where the origin itself is not in doubt and where according to the entry itself the foundation source of the rights can be traced it is not safe to rely upon the entry itself but recourse must be had to the origin itself to discover what the rights conferred actually are *Piritha Singh v Mohammad Ali*, 13 O L J 126=94 Ind Cas 183=A I R 1926 Oudh 427 The matter for adjudication in a Court of Revenue for the purpose of mutations of names is primarily the question of possession and an enquiry into the title of the claimants for the mutation of names is wholly beyond the jurisdiction of that Court *Achehe Mirza v Ahmad Shah*, 3 O W N 693=97 Ind Cas 922=A I R 1926 Oudh 594 A village note prepared by a Settlement Officer is only a piece of evidence and no presumption of correctness is attached to it *Bhaquan Singh v Lochuman*, 3 Pat L R 925=90 Ind Cas 579=A I R 1925 Pat 754

**Absence of entries in official public book** This section only provides 'any entry in an official book which is duly made by a public servant in the execution of his duty, is of itself a relevant fact' But it is no evidence for the purpose of proving the absence in them of any particular entry *In the matter of Juggun Lal*, 7 C L R 356 The *Pergannah* and *Kunungo* Registers are not kept punctually and are not admissible in evidence to prove an omission of an entry as to *lakherajas* *Bypra Das v Monorama* 45 C 574=22 C W N 396=47 Ind Cas 49 The *Thak* officers not being empowered to measure and record *lakherajas* of less than 50 *bighas* in area, the omission of *lakherajas* in the *thak* statement was not of any probative value *Ibid*

### 36 Statements of facts in issue or relevant facts made

Relevancy of statements in maps charts and plans

in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts

**Principle** This section deals with two kinds of maps namely (1) maps or charts generally offered for public sale, and (2) maps or plans made under the authority of Government 'Public maps, generally offered for public sale have been admitted to show matters of general geographical notoriety such as the relative situation of towns and countries' *Halsbury Vol. XIII para 657* 'The admissibility of the first kind depends on grounds similar to those on which a Judge may refer to a dictionary for the meaning of a word or to historical work for information of matters of public history The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed *Field Et* 143 (7th Ed) The person or persons who prepared the map in question, being unavailable both the principle of Necessity and the principle of the Guarantee of Trustworthiness are satisfied Hence there is no objection to admit this exception to the Hearsay Rule As regards the second class of maps, the

**S 36** Necessity principle as well as the principle of the Guarantee of Trustworthiness are satisfied in the same way as in section 35. The admissibility in this case depends upon the authority, hence on the one hand, the returns of the Government surveyor are admissible to evidence only those matters which he is authorized to do, and on the other hand a private person's survey, if made under special warrant or if otherwise sanctioned by proper authority, may become admissible. *Higmore* § 1665, *Evans v Mirthur Tydfil*, (1899) 1 Ch 241 (20).

**Scope of the section** As regards maps or charts offered for public use this section refers to the physical features of the country, etc., and as regards maps or plans made under the authority of Government, the section refers not only to such features but also boundaries of villages, estates, and (in later maps) fields. *Whitely Stoke's Anglo Indian Codes*, Vol II p 878. See also *R v Orton*, *Step Dig Art* 35 where a map of Australia was received to show the situation of places where the defendant was alleged to have lived. For the case in various stages see *Reg v Castro*, 111s *Orton*, L R 9 Q B 300, 17 Cox C C 454, 5 Q B D 406 14 Cox C C 436, 6 App Cas 229, 14 Cox C C 546. Under the rule excluding declarations as to private boundaries ancient maps are not admissible in England to prove boundaries of that character. *Re v Lakin*, 7 Cr & P 481, *Bridgman v Jennings*, 1 Ld Ryms 234. *Wilder v Hearfield*, L R 5 Ch D 709. This section does not require that the authority under which a map is prepared, must be an authority given by statute. *Gajhoo Damor v Jagat Pal*, 11 C W N 230=9 C L J 415.

**Survey maps** No general rule can be laid down as to the weight to be assigned to a survey map as a piece of evidence. It is good evidence of position according to the boundary demarcated thereon and may be taken to have been admitted by those concerned and in each case it must be decided upon the circumstances if it raises a reasonable presumption of title. Revenue Survey maps are not conclusive and may be shown to be wrong. *Rammandan v J. vobind* 2 Pat 839. *Thal* and survey maps are not conclusive as to whether the which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a Court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court. *Secretary of State for India v Upendra Narain*, 71 Ind Cas 849=A I R 1923 Cal 247=36 C L J 336. Maps and surveys made for revenue purposes are official documents prepared by competent persons with due publicity and after notice to parties interested. They are admissible as valuable evidence of the state of things at the time they were made. They are not conclusive but in the absence of evidence to the contrary are of much weight. *Kali Prosanna v Hemanta*, A I R 1924 Cal 977.

As a rule *ex parte* statements in survey maps should be created on the basis as books of account and regarded not as a primary proof, but merely as corroboration of other direct evidence. But where such documents relate to distant times and no direct evidence of the matter mentioned here is any longer available their value assumes greater proportions, and if they indicate a state of affairs which may be presumed as not unlikely to have happened they may be taken into account and relied upon with more certainty. But no hard and fast rule can be laid down as to the value to be attached to documents of this nature of an ancient date. *Kumar Kamalhya v Surendra*, A I R 1925 Pat 281. But *C C Ghose, J* said: "It is perfectly true that a survey map may be direct evidence of possession at a particular time, namely the time at which the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons with due publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made." *Indra v Surendra*, 31 C W N 419=102 Ind Cas 370=45 C L J 474=A I R 1925 Cal 347. See also *Musst Bibi v Deo Nandan*, 5 Pat L J 691=2 Ld L T 759 Ind Cas 293.

Where the parties consent to be bound to regard the boundary lines as laid by the survey authorities as conclusive they cannot afterwards produce evidence to the contrary.

correctness of the same *Babu Raghunath v. Sri Rameswar Singh* 1922 (P 87) *Kistwar* maps (survey maps) are under section 36 of the Evidence Act, evidence between the parties *quantum vale*. They are primarily evidence of possession but evidence of possession is always evidence of title *Chaudhury Nazirul v. Abdul*, 3 Pat L T 140=64 Ind Cas 326. There is *prima facie* presumption in favour of the accuracy of *thal* and survey maps and it is for the party who impugns their accuracy to prove his case. Such a map may be shown to be incorrect by the admission of the parties or adjudication by a Court or by evidence intrinsic or extrinsic to the map in question *Taramoni v. Gopal*, 65 Ind Cas 182. There is no general inflexible rule of law that the facts stated on the *thal* or survey map must be presumed to have been in existence at the time of the permanent settlement. The question is essentially one of fact and must be determined on the facts and circumstances of each case *Profulla Nath v. Secretary of State*, 21 C W N 639=31 C L J 320=57 Ind Cas 29. Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be properly and judicially received in evidence as correct when made *Jagadindia v. Secretary of State*, 7 C W N 193=30 I A 44=30 C 291 P C=5 Bom L R 1. As they are not conclusive, they may be shown to be wrong but in the absence of evidence to the contrary they may be properly and judicially received in evidence as correct when made *Mirza v. Munshi* 12 C W N 273=3 M L J 212. The *thal* and survey maps are valuable evidence of the state of things at the time they are made, but it does not follow that they show conclusively what was the state of things at the time of the permanent settlement *Ananda Hari v. Secretary of State*, 3 C L J 316, *Mirza Shamsher v. Kunj Behari*, 7 C L J 414. Unless it can be proved that the person against whom a *thal* or survey map is attempted to be used expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect *Kristomoni v. Secretary of State*, 3 C W N 99. A survey map as well as a *thal* map is admissible as evidence *Jagdish v. Choudhry*, 24 W R 317, *Sashee Mookhee v. Bissessuree*, 10 W R 343; *Koomodini v. Pooouoo* 10 W R 301. Survey maps are not evidence of title in a dispute regarding a right of fishery *Broma v. Lalit Narain*, W R 1864 120. A survey map is not sufficient in the absence of other satisfactory proof of title or of long antecedent possession to establish a plaintiff's right to the land and to disturb the defendant's present possession *Collector of Rayshah v. Doorga Soondery* 2 W R 210. But a survey map and proceedings may in certain cases form evidence sufficient to prove title *Oommut Fatima v. Bhujio* 13 W R 50, *Nabo Coomar v. Gobind*, 9 C L R 305 *Syam Lal v. Luchmun* 15 C 353, *Mon Mohun Watson & Co* 27 C 336 P C=27 I A 44=4 C W N 113. A survey map sought to be set aside may be used for the purpose of testing the correctness of an Amin's report *Padoo Manee v. Bisseshur*, 5 W R 34. If there has been a Government survey the survey map must be taken as evidence *Radha Choudhram v. Gurdharee*, 20 W R 243 see also *Proanna v. Land Mortgage* 25 W R 453 *Guddadhur v. Tara Chand*, 15 W R 3 *Burn v. Achumbit* 20 W R 14 *Radha Chuan v. Arund Sen*, 15 W R 444 *Mohesh v. Jugul*, 5 C 212. The fact of a later Government survey map having been prepared does not affect the presumption of accuracy, under the Evidence Act of an earlier superceded map *Jaggessur v. Becunt* 5 C 822=6 C L R 519. A survey map is a piece of evidence like other evidence in a case and can be of no effect in determining the burden of proof *Narain Singh v. Nurendro* 22 W R 296 see also *Thiru v. Fakranissa*, 15 Ind Cas 459.

**Thakbust map** There are three kinds of *thal* maps in existence (a) eye sketches in which no actual measurements were made (b) maps in which rough magnetic bearings were used and rough linear measurements made and (c) maps made from careful magnetic bearings and careful linear measurements *Sashi Bhusan Banerjee v. Ramyas Agarwala* 3 Pat 85=A. I R, 1924 Pat 402. The *thal* authorities had nothing to do with title or possession and no deduction as to title or possession can legitimately be drawn from *thal* map *Debendra Lal*

**S. 36.** *v Secretary of State*, 31 C W, N 473=103 Ind Cas 13=46 C L J 321-3. I R 1927 Cal 403, *Jagadima v Secretary of State*, 30 I A 41 (33)=30 C 291=7 C W N 193, *Satcourie v Secretary of State* 22 C 552 (201). It is evidence of possession at the time the survey was made *Satkon v Secretary of State*, *supra*, *Pogose v Mukund* 22 W R 36, *Charu v Zebida*, 20 W R 54. But such maps are not intended to represent and are, in no sense, a record of tenure subordinate to Government revenue-paying estates *Mohima v Wase* 23 W R 277. Thak maps are good evidence of possession, but the value of the evidence varies enormously. In the case of a thak map containing definite landmarks and in disputed boundaries signed by the parties or their accredited agents and representing land which has been brought under cultivation and is in possession of ryots whose names are known or can be discovered from the *zemindari* papers it is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon, that the land was jungle when measured, that boundaries are not discoverable from a mere inspection of the map, and that neither the *zemindars* nor their agents have by their signatures, admitted the correctness of the thak. *Joytara v Mohamed Mubarak*, 8 C 975=11 C L R 399. Although the thakbust map is a part of the thak survey, it is not meant to be and is in fact a scientifically prepared plan but merely a rough sketch, or at most an unscientifically prepared plan showing the number and approximate position of the thak marks or *dhus* for the guidance of the revenue surveyor who followed afterwards and who, having picked up and verified the thak marks indicated roughly in the thakbust map, prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. *Keshabjee v Sashi bhawan* 96 Ind Cas 1027=A I R 1926 P 385. As the object of a thakbust survey and map is to ascertain and delineate the boundaries of the estates borne on the Revenue Map of the District the entry in a thak map that certain lands formed part of an estate become a relevant fact under this section, and such entries are evidence on which a Court may act. *Abdul Hamid v Kiran Chandra* 7 C W N 849.

Entries in a thakbust map are not sufficient to enable a Court of fact to hold that disputed lands were really included in an estate at the time of the Permanent Settlement. They may be good evidence as to what the boundaries of a particular plot was at the time of the Permanent Settlement. *Ramnarayan v Joygovind*, 2 Pat 849. It cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement. *Secretary of State v Wazed*, 34 C L J 141. A thakbust *khasra* prepared by the *Amin* in connection with the measurement preliminary to the survey of a village is a rough register, statements entered in it have no evidentiary value unless it is proved that the persons adversely affected thereby had notice of it and opportunity to controvert it but knowingly acquiesced in the statement before the *Amin*. *Jagdeo Narain v Baldeo Singh*, 3 Pat 1 F 605=36 C L J 499=49 I A 399 (P C). An entry in a thak map that it was prepared in the presence of the representatives of certain parties is a fact in evidence. *Budhumukhi v Jitendra*, 10 C L R 527. So that map is admissible in evidence under this section. *Rajkumar v Balanta*, 7 C W N 613. *Mukhi v Bisessurer* 10 W R 342. But entries in it are not conclusive evidence. *Gokul v Ilara Sundari* 9 C W N 383, *Kalitara v Nithianand*, 12 W R 4. A thak map prepared in 1859 was held to be good evidence of what the boundaries of the parties in dispute were at the time of the Permanent Settlement and also as to what they admittedly were in 1859. *Syama Sundari v J. bandhu Soolar*, 16 C 136. As regards the value of thakbust maps as evidence of the right of parties in a tidal river, *cide Satcourie Ghosh v Secretary of State* 22 C 552.

In case of dispute between Thak and Revenue Survey maps if a revenue survey map which was carefully and accurately prepared by competent officers and the thakbust map do not agree it is quite impossible to rely on the thakbust map unless indeed the demarcation pillars, put down on the ground by the thakbust authorities are still in existence and they correspond to the boundary pillars as shown in the map or the field book and the entries collected by the thakbust authorities furnish sufficient data. The presence

survey map prevails over the *thalbust* map. The signature of the revenue surveyor on the *thal* map does not mean that if the *thal* map is reduced to the same scale as the revenue survey map, then the two boundaries will necessarily agree but merely that the surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground, and correctly surveyed on the revenue map. *Shashi Bhushan v Ramjas* 3 Pat 85=A I R 1924 Pat 402 *Keshabji v Sashibhusan* 96 Ind Cas 1027=A I R 1926 P 385, but see *Maharajah of Cooch Behar v Rajah Mahendrasa Ranyan*, 4 C L J 465 where it is held that there is no inflexible rule that a survey map must have the preference over a *thal* map. There is no general or definite rule making it incumbent upon the Courts to follow either the one or the other, the Court may if it considers that the *thal* map is more reliable, follow that in preference to the survey map. Where the *thal* proceedings and the decision of dispute took place in the presence of the predecessors of the parties to the suit, the *thal* map is a valuable evidence in a suit between the successors of the persons who were present. As a general rule the *thal* and the survey maps should agree, where they differ, the one that more clearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other, the Court may, if it considers the *thal* map more reliable follow that in preference to the survey map. *Abid Hossein v Doucurry Pal* 6 C W N 629.

**Topographical survey map** When the question was in which of the two adjoining villages—the boundary line between which admittedly corresponded with the boundary line between two *perganahs*—the land in dispute was included, held that a Topographical survey map of 1869, in which the boundary line between the two *perganahs* was given, was admissible in evidence under section 36 of the Evidence Act. When *pergannah* boundaries are found entered in such map, the presumption is that they were so entered in pursuance of instructions received. Assuming that Topographical survey maps were not prepared for revenue purposes they are official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong but in the absence of anything to the contrary, they may be properly judicially received in evidence as correct when made. In cases of boundary disputes the fact that no satisfactory evidence as to possession is obtainable does not relieve the Court of the duty of settling the boundary line on the evidence before it. Held on second appeal that, in the absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical survey map as evidence of possession at the time the map was made. *Gajhoo Damor v Kotwar Jagatpal*, 11 C W N 230=9 C L J 415.

**Other maps** Where a certain map was referred to in the report of the Commissioner but the map was not produced their Lordships of the Privy Council received the report of the Commissioner as admissible in as much as no objection was taken to the report and the Commissioner himself was neither examined nor cross-examined. *Naresh Narayan v Secretary of State for India*, 45 M L J 441=50 C 446=50 I A 121=(1923) M W N 511. The map in respect of area which is the original record is the settlement map and the entry in the *Khasra* is no more than a copy in a different notation and therefore the *Khasra* is no more reliable than the map, nor is it an independent piece of evidence. *Laharam v Gurmukh Rao*, 99 Ind Cas 628=A I R 1927 Nag 204. Maps prepared under the Calcutta Survey Act have great evidentiary value as regards question of title. *Debendra v Surendra*, 31 C W N 419=102 Ind Cas 370=45 C L J 474=A I R 1927 Cal 345. A site-plan prepared for the purposes of a case can have a very little probative value on the question of title. Entries in such documents in support of title of a Municipal Board are no more than admissions in favour of the Board and are not relevant. *Gauri Shankar v Emperor* A I R 1930 All 26.

Under sections 36 and 83 a map prepared by a Deputy Collector particularly for the settlement of land forming the settled bed of a river is not admissible. *Hanto Prosad v Jagat Chandra*, 23 C 333. A map prepared for one purpose

**S 37** cannot be used for another purpose *Preonath Mozumdar v Durga Tarai* 14 C L J 578=10 Ind C 15 376 Where maps and plans were prepared by the authority of Government for public and not for a private purpose, such maps and plans are relevant facts under section 36 of the Evidence Act *Rahmutulla v Secretary of State*, 112 P W R 1913=113 P L R 1913=63 P R 1913=15 Ind C 15 799 A map prepared by a *lanungo*, is not relevant under the section *Tarini Sarai v Fakirannissa*, 15 Ind C 15 459

**Chittas** Chittas prepared by Government are admissible in evidence though their value will depend on the circumstances of each case *Sarat Chandra v Sarala Bala*, 105 Ind C 15 61 The *batwara maps* and *chittas* prepared under a 54 of the Bengal Estates Partition Act (VIII of 1876), are admissible in evidence independently of s 35 of the Evidence Act where some evidence introducing the maps and *chittas* are given *Matua v Dhannu Mollah* 59 Ind C 15 453 Maps and plans prepared by *patuaries* who are government servants are admissible under this section *Rahmutulla v Secretary of State*, 113 P L R 1913=18 Ind C 15 799

**37** When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861 the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"\* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact†

**Legislative recitals—Principle** It is clear, in the first place that the statements concern matters not within the personal knowledge of the declarant; the recital deals not with the legislative proceedings but with extrinsic facts. It follows then, under the general principle (*vide* notes under section 34, under the head *personal knowledge of the official making the entry*), that, unless there is an official duty to investigate and obtain adequate information, the statement ought not to be received. The publicity and solemnity of the declaration—an argument sometimes advanced (*vide R v Sultan & M & S* 532, 549)—cannot otherwise suffice to give it any weight as evidence in controversy. But, next, it is clear enough that the Legislature has within itself the authority to inform itself properly for if it can give such authority to others it can assume the authority for itself. Accordingly when the recital is not a mere allegation but a statement of the result of due investigation, it should be receivable, and it was in fact the distinction applied to the use of recitals of pedigree in F & F Peerage Acts and the like *Wymore* § 1662 In *Wharton Peerage Case* 12 Cl & F, 295 302 *Lyndhurst L C* admitted the recitals of family relations saying "It is a well settled practice of this House not to allow the insertion of a statement in the recitals of a private Act of Parliament, unless it is of that statement has been previously proved to the satisfaction of the House to whom the bill has been referred. But in *Shrewsbury Peerage Case* 7 H L C 1 13 *Lord St Leonards* referring the above observation of *Lyndhurst L C* said "That used to be the practice but it is not so now and recitals will not therefore be evidence. See also *Polin v Gray* L R 1 1 12

\* Substituted by Act X of 1914 Sch 1  
† The first paragraph added by s 2 of the Indian Evidence Act 1 (Act 1599) was repealed by the Schedule II of Act X of 1914

D 411 (432) where *Brett and Cotton L L J* expressed doubts as regards such recitals "But statutory recital" says *Prof Wigmore* "have not ordinarily such a basis. They may represent merely the *partisan prejudgments of the majority*, they may represent only general conclusions in which the recited particulars have not been varified with special attention, they may have been inserted without any investigation at all, and they are in general only a statement of motives—an apology for the passage of the act rather than a deliberate binding fact. *Wigmore § 1662* These observations have been demonstrated in India and as such the admissibility of recitals in the Statutes of Parliament and in the Indian Acts should depend upon the nature of the recital and the circumstances under which the Statute or the Act has been passed. "For to assume that the recital in every act of Parliament is even *prima facie* evidence of the facts recited in it, would lead to very extensive consequences, and might sometimes perhaps bring the truth into hazard. *Ide Argument of Denman and Phillips in R v Sutton 4 M & S 332, 539* These considerations indicate it as the wiser course to reject ordinarily such recitals as evidence should it appear that the recitals offered in a given case are not merely allegations resting on an unknown basis, but are in fact the findings of the Legislature after proper means of information have been deliberately sought there seems good ground for their admission as official statements made with due authority and upon adequate sources of knowledge. *Wigmore § 1662* The reason for the reception of this kind of evidence is thus stated by *Baley J in R v Sutton 4 M & S 532 (519)* When we consider in what manner an act of Parliament is passed and that it is a public proceeding in all its stages and challenges public enquiry, and when passed is in the contemplation of law the act of the whole body, it seems to me that its recital must be taken as admissible." But the reason set forth by the learned Judge is not sufficient to meet the objection raised by *Prof Wigmore* neither it guarantees trustworthiness in the contingencies contemplated by *Prof Wigmore* "The appropriate functions of the Legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence such a preamble as the present ought in such a controversy to be taken to answer the purpose for which it was intended, that is an apology for the passage of the act and the reason why the Legislature so acted. Such a preamble is evidence that the facts were so represented to the Legislature and not that they are really so. *Elmondraff v Carmichael 3 Litt 472, 480* So the better opinion seems to be that "the Legislature has no jurisdiction to determine facts touching the rights of individuals." *Parmalee v Thompson, 7 Hill N Y 77 (80)*

Recital contained in any Act of Parliament, etc. "The rehearsal or preamble of a statute is to be taken for truth, for it cannot be thought that a statute that is made by authority of the whole realm, as well of the King as of the lords spirituall and temporall and of all the commons, will recite a thing against the truth. *Coke upon Littleton 19b* So a recital in a Public Act was held admissible. *Leister v Haydon, 1 Plowd 584, 396, 393 R v Sutton 4 M & S 512* But in England recital in a Private Act was not admissible. *Griffin Peerage Case Le Merchant's Rep 276, Beaks v Brett M & M L 22* But this distinction is apparently not only without principle to say the least, also ill-adapted to indicate the true grounds of trustworthiness. *Wigmore § 1662* So according to English law where certain public Statutes recited the great outrages had been committed in a certain part of the country, and a public proclamation was issued, with similar recitals, and officers appointed for the discovery and conviction of the perpetrators those were held admissible as sufficient evidence of the existence of those outrages, to support the inference to that effect in *R v Sutton 4 M & S 532* So also a recital of a crime in the preamble of a Statute is good evidence of the crime, and it will be taken not as a mere proof and this whether the crime be related to a party to the Statute or not. *Berenger, 3 M & S 67 69* *Beesley v O'Connell & Bishop, 3 M & S 831* Similarly legislative recitals in the preamble of the Statute, when they relate to the facts of the case, are admissible as evidence. *R v Sutton 4 M & S 532* The House are the proper judges of the value of the recital.



**S 37** before it *Jones v Randall* Cowp 17, *Root v King*, 7 Cowen 613, 4 G v *Bradlaugh*, 14 Q B D 667 *Greenl Ev* § 491 This section makes no distinction between Public and Private Acts and recitals contained in a Private Statute is as much relevant as the same while contained in a Public Statute. But in England recitals in Private Statutes may be evidence of the matters recited as between the persons in whose behalf they are enacted *Pur Jones* § 501 They are not however evidence against the strangers to the act *Elliott v Carmichael*, 3 Litt (K) 472—14 Am Dec 86 This rule is applicable even where the Act, though private in its nature contains a clause declaring it to be Public act *Brett v Beale*, 1 Moody & M 416 Section 9 of the repealed Act II of 1855 ran as follows: "Any recital contained in any Act of the Governor General of India in Council, constituted for the purpose of making Laws and Regulations hereinafter to be passed, of any fact of a public nature shall be deemed, before all such Courts and persons, to be *prima facie* evidence of the truth of the fact recited" This has been incorporated in this section.

Whether such recitals are conclusive A recital of fact in a Statute though it may in some conditions be admissible as an official statement, is not conclusive testimony. The recitals of the Legislatures are commonly intended merely as explanations of motives and purposes and not as determinations of controverted fact. They could not, without gross injustice be made evidentially conclusive and this is generally conceded *Wigmore* § 1352, see also *Harrell v Wise*, 9 B & C 712 *R v Green* 6 A & E 518 So a legislative declaration of fact that are material only as the ground for enacting a rule of law—for instance that the use is a public one—may not be held conclusive by the Court, but a declaration by a Legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect *Block v Heigh* 26 U S 135=41 Sup 458 As a contract or an estoppel, or otherwise, the recital may be binding, but that would not be due to any rule of evidence *Wigmore* § 1352 This is only *prima facie* evidence *Vide* s IX of Act II of 1855

**Executive proclamations** Executive proclamations are difficult to classify, they are precisely neither register nor returns nor certificates. So far as recitals of fact therein are german to the doing of the executive act itself they are on principle admissible. The executive cannot be supposed to need express authority because he has no superior. And, in general the office of the executive should suffice to make admissible any recital of fact announced or recorded by him in the line of duty *Wigmore* § 1663 So the diplomatic correspondence communicated by the President to Congress is sufficient evidence of the acts of foreign governments and functionaries therein recited *Radcliffe v United Ins Co* 7 Johns 38 51 A foreign declaration of war is sufficient proof of the day when the state of war commenced *Thelluson v Corling* 4 Esp 266 *Bradley v Arthur*, 4 B & C 292, 304 Recitals in state papers are also admissible *Thelluson v Corling* 4 Esp 266, *R v Franklin* 1, How 31 Tr 638, *Radcliffe v Union Insurance Co* 7 Johns 38, *Talbot v Seem* 1 Cranch 1, 37, 38 The Governor General's proclamation is evidence that the necessary preliminary proceedings to the coming into force of a law were duly made *Stone v Nash*, 2 P E I 415 (Canada)

**Government Gazette** The Government Gazette is admissible and sufficient evidence of such acts of the executive or of the Government, as are usually announced to the public through that channel, such as proclamations and the like *R v Holt*, 5 T R 436, 443 *Att Gen v Theakstone*, 8 Price 89 For besides the motives of self interest and official duty which bind the public to accuracy, it is to be remembered that intentionally to publish anything emanating from public authority, with knowledge that it did not so emanate would be misdemeanour 2 Phil Ev 108 But in regard to other acts of public functionaries having no relation to the affairs of government, the Gazette is not admissible evidence *R v Holt* 5 T R 443 *Greenl Ev* § 492 Section 8 of the Repeated Act II of 1855 was enacted as follows: "All proclamations or Acts of State whether Legislative or Executive, nominations appointments, and other official communications of the Government appearing in any such Gazette may be proved by the production of such Gazette, and shall be *prima facie* proof

of any fact of a public nature which they were intended to notify. So under that section the *Calcutta Gazette* and *Gazette of India* were admitted in evidence. *Queen v Amiruddin*, 7 B L R 63 = 15 W R 25 (27). The Indian Evidence Act embodies the provisions of the English law rendering the Government *Gazette* provable by mere production. It constitutes the appearance in any such *Gazette* of Proclamations, Acts of state, Nominations, Appointments, and other official communications, proof of the fact itself. It renders recitals in Acts of Legislation *prima facie* evidence of the fact recited,—and the publication in the *Gazette* of certain defined public advertisements of a Government or Judicial nature proof of the publication under due authority. *Goode v El* 307. The Government *Gazette* is also evidence of various Acts of state at common law. *R v Holt*, 5 L R 436, 4 G v *Thealstone* 8 Price, 89, *Taylor* § 1662, *Phy* Lr 4th Ed 711. The appointment of an officer may be proved by the government *Gazette*. *R v Gardner*, 2 Camp 513. see also *Greenwood v Woodham*, 2 Mod & R 363 where the Government *Gazette* was admitted to prove the division of a parish. The Government *Gazette* containing the advertisement of sale, and a printed paper purporting to be the conditions of sale alluded to in the *Gazette* and issued from the Master's Office in the name of the Master, were admitted in evidence to prove the actual conditions of the deeds of sale. *Jatindia v Brayo* W R (1864) 50. The inference of knowledge of a fact is not conclusive even where such knowledge is presumed from the publication of a fact in the Government *Gazette*. *Harriet v Wise* 9 B & C 712.

**Gazette of India.** Previous to 1863, the Government of India had no exclusive organ of its own, its notification, orders, etc., being published in any of the Local Gazettes of the Local Governments as was necessary. In that year the Gazette of India was first published as the Gazette of the Government of India exclusively, and Act XXXI of 1863 was passed to give to publication in the Gazette of India the same effect as publication in any other Gazette in which publication was prescribed by the law then in force. Vide s 1 of Act XXXI of 1863. *Field's Lr* 7th Ed 152.

**Proof of gazette.** The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession by judicial decision or by Statute (vide s 84 *infra*), that such purporting publication, at least when in the form of a standard official document constantly used and referred to are to be assumed genuine. Two principles however are in fact usually involved first, the admissibility of a copy, proved to be printed by official authority, as hearsay evidence of the contents of the original, and secondly the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated either in decisions or in Statutes. A sanction of the former, principle has usually been regarded as carrying with it a sanction of the latter also. *Wigmore* § 2151. In *R v Forsyth* R & R 274, to prove the publication of a notice in the Gazette a printed paper purporting to be the Gazette was put in and no evidence of its authenticity was offered. The Judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from. *Wigmore* § 2151. Section 81 of the Indian Evidence Act enacts 'The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India or the Government Gazette of any local Government, or of any colony, dependency or possession of the British Crown or to be a newspaper or journal or to be a copy of a private Act of Parliament printed by Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.'

**Fact of a Public Nature.** The fact as to the existence of which the Court has to form an opinion must be a fact of a public nature. *Field Ev* 7th Ed 152. But the word public is ambiguous. It may signify 'open to all' 'capable of being known or observed by all' or it may signify 'having an interest for persons in general' or it may signify 'made or done by an officer of the Government'. *Wigmore* § 1630. This Act does not define what are

**S 38** facts of a public nature as distinguished from facts of a private nature. But it seems that a fact is an fact of a public nature, when it is open to all and capable of being known or observed by all and in which persons in general have an interest as well as which is done by an officer of the Government, executive, legislative or judicial.

**38** When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such ruling, is relevant.

**Principle** There is no reason why an officer may not be authorized to give printed copies as well as to give written copies, nor has there been any doubt that such authorized copies are admissible. Yet it cannot be said that such an authority has ever been implied from the nature of an office. An official printer's copies have been usually regarded as admissible, but the official printer's authority, though a general one is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source not so much in a doubt of any of these principles, as in the difficulty of presuming the authenticity of a printed copy purporting to be an official one. The doctrine of presuming the genuineness of an official seal has served to furnish a mode of authenticating certified copies, but there has naturally been a hesitation about extending this doctrine to impressions of type purporting to represent an official seal or certificate. Thus it is with the authentication of the copy rather than the authority to furnish it that the difficulty has arisen. *Wigmore* § 1684. Not that the printed Statutes are perfect and authentic copies of records themselves, but every person is supposed to know the law and therefore the printed Statutes are allowed to be evidence because they are the hints of what is supposed to be lodged in every man's mind. *See Buller J. Trials at Nisi Prius*, 225. The reason of their reception is thus stated by *Duncan J. in Jones v. Maffet* 5 S. & R. 532. Such authorized authentic publication would be more satisfactory evidence than a sworn copy, in a dinner of mistake or corruption or falsification. It is not the being in a Statute book which gives them authenticity, but by the publication by the King's printer. So far as foreign law is concerned such a course seems called for by the great convenience and saving of expense that it affords to all parties and by that confidential relation which exists between the state. The rule too, would seem to be almost entirely free from any danger of abuse, and error or imposition could easily be detected. *Eastman J. in Emery v. Berry* 28 N. H. 413, 414. *Wigmore* § 1684. Section 84 of the Indian Evidence Act provides that the Court shall presume the genuineness of every book purporting to be printed or published by the authority of the Government.

**Scope of the section** The words "any country" are wide enough to include India, Great Britain and other foreign countries and as such the Indian Act, British Statutes as well as foreign laws can be proved by the authorized edition of the Statute of the country concerned. But it seems from the words "form an opinion" that the Legislature did not intend to include in this section the domestic laws as well as laws of those countries of which a Court of law, under a judicial notice. Those laws require no proof under s. 57 cl. (1) and (2). But if it be necessary for a Court to form an opinion as regards the domestic law of which it can take judicial notice it is to refer to the authorized edition of the book containing the particular law. Moreover this section deals not only with the Statute-law but also with the Judge-made law. When the Indian Evidence Act was enacted in 1872 there was no provision in any other Statute which enabled the Court to ascertain the case-law from the authorized Report. The author

as well as unauthorized reports were in existence at that time, and if we give this narrow construction to this section, it would seem that in cases of foreign law authorized reports of foreign countries would be admissible to show the foreign case law but authorized reports of the domestic Government as well of the British Government would not be admissible. Taking every thing into consideration it is better, it seems, to extend the meaning of the section and to make it include Statute law of India, Great Britain and other foreign countries.

**Book purporting to be printed or published.** The distinct authority for printing the laws need not appear in any case where they purport to be published under the authority of the Government. *Per Munton J* in *Wilt v. Cutler* 38 Mich 196.

**Foreign law, how proved.** The laws of other nations and States—not being laws of the forum at all, except by adoption—will not be judicially noticed. *Greenl* Ev § 6(h). So in regard to foreign laws the established doctrine now is that no Court takes judicial notice of the laws of a foreign country, but they must be proved as facts. *Ibid* § 486. Where a Court consists of a Judge and a Jury the better opinion is, that such proof should be adduced to the Judge and not to the Jury. *Story on Conflict of Laws* § 638. The next question is, may the terms of the law, if it is a Statute be proved by an expert witness (*Vide* s 45 *infra*) instead of by an exemplification or other copy? It is usually said that in such a case a copy must be used. But the argument for the opposite view is that the state of the law at a given time, consists not merely of the words of the Statute, but of such additional elements as the construction and effect given to them by usage and judicial decision and the repealing or modifying effect of later Statutes so that to testify to the condition of the Statute law is not necessarily to testify merely to the terms of a document and this may be allowed without producing the Statute or a copy of it. This argument has much force but has rarely prevailed, except that expert testimony to the judicial interpretation of a Statute already proven by copy would not be objected to. *Mostyn v. Fabrigas* Corp 161 174, *Paton's Trial* 30 How St Tr 509, *Laron v. Higgins* 3 Stark 178, *Altan v. Fumal* 1 C M & R 291, *Millere v. Hemrick*, 1 Camp 155, *Baron de Bode's Case*, 8 Q B 200, *Cocks v. Parday* 2 C & K 270, *Nelson v. Brulport*, 8 Beav 539, *Sussex Peerage Case*, 11 Cl & F 115, *Bremer v. Freeman* 10 Moore P C 362. *Greenl* Ev § 488. The particular question is whether the evidence of a foreign 'written law' should be presented in the shape of a copy or merely by recollection to a witness of one qualified to know it. *Wignore* § 1271. In *Baron de Bode's Case* 8 Q B 250 *Patterson J* said: 'I quite agree that a witness conversant with the law of a foreign country may be asked what in his opinion the law of that country is. But I cannot help thinking that, as soon as it appears that he is going to speak of a written law his mouth is closed. The general rule is not denied, that when the contents of a written instrument are to be proved, the instrument itself should be produced, or when the instrument from its nature is provable by an examined copy, then such examined copy. I cannot see why the rule should not be the same in the case of a foreign written law. I think the rule would be just the same if the question related to the French Code as existing at this moment. If a witness were asked what the law now is with respect to a bill of exchange in France and were immediately cross-examined as to whether that law was not in writing and answered that it was, I think a copy of the law must be produced.' So also *Justice Story* says.

Generally speaking, authenticated copies of the written laws, or other public instruments of a foreign Government are expected to be produced. For it is not to be presumed that any civilized nation will refuse to give such copies duly authenticated which are usual and necessary for the purpose of administering justice in foreign countries. It cannot be presumed that an application to a foreign Government to authenticate its own edict or law will be refused. *Story on Conflict of Laws* § 640.

According to this section evidence of foreign statute law can be given by the authorized copy of the statute of the foreign government. But section 1, of the Act says that it can be proved as well by the opinions of persons specially skilled in such law. Now the question is whether there are two modes of proving a foreign statute, or they contemplate proof of foreign statute under

**S. 38** different circumstances. The question is thus answered by Prof Wigmore 'But the answer to this is clear. It may be conceded that if the question were purely and simply directed to the contents of a specific statute, the proof should be by copy of its terms. But in the usual case this is not the question. The inquiry is as to the state of law at the present time or at a given time past. This inquiry can be answered only by taking into consideration the appropriate statute, if any, the pre-existing rule of custom or judicial precedent as affected by the statute, the validity of the statute under some possible constitution, and the actual effect of the statute as determined by prior and subsequent judicial application of the constitution and by judicial construction of the statutory words. In short, an answer as to the state of the law at a given moment can not be a mere reproduction, offered in place of a copy, of statutory words, it is a statement of a net fact separate from the words of a statute and involving many considerations in which the words of a statute are but a single element. The acceptance of a mere copy of the statute, far from securing greater accuracy, under the contrary tend rather to mislead, by ignoring these other material elements.' Wigmore § 1271, see also per Denman and Coleridge JJ in *Baron de Bode's Case* 8 Q. B. 250, *Sussex Peerage Case* 11 Cl & F 115, *Coel's v Purday* 2 C & K 270, vide notes under s 43. But in some cases a copy was required. Vide *Harford v Morris*, 2 Hag Cons 439, *Boentling v Schneider*, 3 Esp 58, *Clegg v Levy*, 3 Camp 166, *Miller v Hennek*, 4 Camp 135, *Alles v Hodgson*, 7 T R 241, *Male v Roberts*, 3 Esp 161, *Inglis v Usherwood* 1 Esp 520 K. B. In *Sussex Peerage Case*, 11 Cl & F 113, Lord Denman going to the other extreme said "We have both the materials of knowledge offered to us. We have the witness and he tells the law which he says is correctly laid down in the books. The books are produced but the witness, describes them as authoritative. Proof of the law itself in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says 'I know the law and the book truly states the law, then you have the authority of the witness and of the book.' So it is clear that although an authorized printed copy of a foreign statute is admissible in evidence under this section, foreign law cannot be proved from such authorized edition alone but some expert should be called to testify that it contains the law in question. In England by Stat 22 and 23 Vict. Cap 63, a case may be testified for the opinion of a Superior Court in any of His Majesty's Dominions to ascertain the law of that part. *Philp Et 4th Ed 309*. *Lord v Colvin* 1 D & S 24, *Logan v Princess of Coorg* 30 Beav 637 = 1 Jour O S 109. So also by Stat 24 and 25 Vict Ch 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for ascertainment of such law. *Philp Et 4th Ed 309*. An unauthorized translation of the Code Napoleon is not a work to which reference can be made under this section. *Christian v Delanney* 26 C. & F. 303. 3 C W N 614. Under this section the Ceylon Insolvency Ordinances might be looked at to decide the question of the defendant's liability. *Demanyagam v Muthu Kumar Suamy* 14 Ind Cas 560.

**Rulings of the Courts** Reports of rulings need not however, be published under authorities if only the book containing them purport to be a report of the rulings of the Court of such country. *Field Et 7th Ed 101*. So according to this section reports of cases recognised by the Courts of a country may be evidence and be relevant and receivable. *Port Et 202*. So far as foreign law is concerned where the law is found in usage or judicial precedent the oral testimony from an expert is concededly receivable. *Green Et § 485*. See also section 45. So far as the Law Reports of this country are concerned, this section admits authorized as well as unauthorized Law Reports when the latter are recognized by the Court. "But no Court shall be bound to hear cited or receive or treat as an authority binding on it the report of any case decided by any of the said High Court or by the Chief Court of Oudh other than a report published under the authority of any Local Government." *Indian Law Reports Act 1875*. But the Indian Law Reports Act has no application to a decision of the Privy Council and therefore the Courts are at liberty to refer to an unauthorized report of the decision of the Privy Council.

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and, if they are satisfied that it is a correct report they are bound to follow it *Shuja ul mulk v Ummululmra*, A I R 1926 Mad 20=48 M 846=49 M L J 498 In *Mukbul Ahmed v Rakhai Das*, 4 C W N 732, an unreported case, namely *Jagabandhu v Deenu*, 4 C W N 734, was referred to the Court. But the Court observed: 'We are unable to agree with the ruling in that case, and as that ruling is not reported, we are not bound, under section 3 of Act XVIII of 1875, to follow it and to treat it as an authority binding upon us'. See also *Sourindra v Surnamayee*, 5 C W N 307=28 C 171. But in *Mahamed Ali v Mir Nisar Ali*, 5 C W N 326=28 C 289, *Maclean C J* said: 'I cannot however part with this case without taking the opportunity of expressing my dissent from the view taken by *Mr Justice Rampini* and *Mr Justice Pratt* in the case of *Malbul Ahmed v Rakhai Das Hazra*, 4 C W N 732, where they held that they were not bound to receive or treat as an authority binding on them an unreported case or ruling bearing that view upon section 3 of Act XVIII of 1875. That section was framed to constitute a monopoly, if the Judges so desired, for the authorized Law Reports, it only says that no Court shall be bound to hear cited the 'report' of any case etc., it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. This has always been done and ought to be done. A judgment is none the less an authority because it has not been reported otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter. I therefore respectfully dissent from the view on this point expressed in the case reported in 4 C W N 732'. *Brett* and *Banerjee JJ* concurred with him, see also *Trustees P D v Venkata Chalam* 92 Ind Cas 710. An unauthorised report of a High Court case is entitled to respect. 8 N L J 153=A I R 1925 Nag 414. Unauthorised reports are on the same footing as an unreported case. 24 O C 319.

## HOW MUCH OF A STATEMENT IS TO BE PROVED

**39** When any statement of which evidence is given

What evidence is to be given when statement forms part of a conversation, document book or series of letters or papers?

forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement

conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to enable the understanding of the nature and effect of the statement and of the circumstances under which it was made.

[illegible]

**S. 39.** sentence may vary the whole sense and import of the thing produced, and give it quite another face" *Buller, J. Trials in Assi Pours* 228

**Scope of the section** Whether the statement be in civil or criminal proceedings (admission or confession), the whole of it which contains the statement must be read and taken together, for thus alone can the whole of what the person making the statement intended to convey be certainly arrived at. It would be unfair practice to extract what is against the interest of the declarant while the very next sentence might contain a material qualification. *North v. 203, Cobbet v. Grey* 4 Exch R 729, *Earl of Borth v. Battersea* 5 Mod 4, *Temperley v. Scott* 5 C & P 341, *Thornton v. Stephen* 2 M & R 4. Unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. *Stoddale Trial* 20 H L St 1r 257. In *Algernon Sidney's Trial* 9 How St Tr 817, 829 88. In arguing passages piecemeal said "My lord if you will take scripture piecemeal you will make all the penmen of scripture blasphemous. You recuse David of saying there is no God," and accuse the Evangelists of saying 'Christ was a blasphemer and seducer, and the Apostles, that they were false.' *Jeffries L C J* said "Look you, Mr Sidney, if there be any part of it that explains the sense of it, you will have it read. Indeed, we are trifled with a little. It is true, in scripture it is said (There is no God,) and you must not take that alone, but you must say, 'The fool hath said in his heart, There is no God.' Now here is a thing imputed to you in the bible if you can say there is any part that is in excuse of it call for it." This rule applies to conversations in general, including the admission of an agent and to inconsistent statements of a witness used in impeachment. When a series of letters in a correspondence, or of entries in an account book are involved, it is sometimes difficult to draw the line between those which are effect part of the same statement and those which are not. (*Call v. Howard Stark* 6, *Shuge v. Buchanan*, 10 A & E 59, *Roe v. Day*, 7 C & P 70.) It seems that so far as the letter or oral statement put in as an admission was made or made in reply, or contains within it a reference to a remark or letter from the party offering it, the anterior statement may be put in evidence. *Hartman v. Co v. Hoog*, 104 In 269. *Tischel v. Ins Co*, 14 Gray 457. But though the whole of what he said at the same time and relating to the same subject, may be put in evidence yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit, but it is for the Court to consider all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him. *Smith v. Blandy* R & M 257. *Gray v. Hiff* 1st M 257. *Bermon v. Woodbridge*, 2 Doug 788. *R v. Cleves* 4 C & P 221. This section includes depositions and former testimony admissible under sect 7.

*Abbot C J* in the *Queen's Case* 2 B & B 297, observed "The admissions of a party to the suit, relative to the subject matter of the suit are themselves evidence against him in the suit and if a counsel chooses to call a witness as to anything which might have been said by an adverse party counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation—not only so much as relates to or qualifies the matter introduced by the previous examination but even that not properly connected with the part introduced upon the previous examination provided only that it relate to the subject matter of the suit, because it is not just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire conversation said on the same occasion. But this liberal allowance cannot in the least be depended upon." *Hampson* § 2113(h). In *Prince v. Dorman* L C J referring to the above passage in the *Queen's Case* said "I cannot assent to it. We will merely observe that it was not introduced in answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extrajudicial that it was not introduced in answer to the question that was proposed that it was not in fact introduced by Lord Eldon or any of the other Judges who concurred that it was evidence."

denied by *Lords Rodesdale and Wynford*, and that it does not rest on any previous authority. The Indian Legislature has wisely left to the discretion of the Court as regards how much of the statement, conversation, document, book or series of letters or papers should be admitted. Under s 39 so much of the statement made by an accused can be given in evidence as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement. But so far as the admissibility of the words deposed to is concerned they are still governed by the provisions of section 27 which must be construed as favourably to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely sections 25 and 26 which are in his favour. *Karam Din v Emperor*, A I R 1929 Lah 338. So section 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by ss 24, 25 and 26 Evidence Act has not been removed by s 27. *Salhan v Emperor* A I R 1929 Lah 314.

**By whom such evidence be given and how much.** The principle underlying the section however raises two sorts of questions first, whether the party offering the admission must, as a preliminary condition, put in the whole, or other parts of the conversation, document, etc., secondly, whether the party whose statement it is may afterwards by way of explanation put in the remainder or other parts, or other statements. It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desires to use—whether a speech or conversation (*Eaton v Earl* 11 How St Tr 423, *R v O Connell* 5 State Tr N S 1, 196) or a writing (*Cornish v Trial* 11 How St Tr 423, *Sei et v Burt* 4 Den 126) and so far as the portion of it allowed to be given is concerned the substance is sufficient without the precise words whether of an oral statement (*R v Edmond*, 1 State Tr N S 76) or a lost writing, *Haidys Trial*, 24 How St Tr 681. As to a letter forming part of a correspondence it does not seem usual to require the preceding letter to be put in, unless they are expressly referred to in the one offered. A party against whom the admission is offered and who wishes to explain the same may put in only so much as is necessary for his purpose, i.e. to qualify or explain the portion put in against him. *Prince v Samo*, 7 A & E 627. So no utterance irrelevant to the issue is receivable and no more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part is receivable. The remainder thus received merely aids in the construction of the utterances as a whole and is not in itself testimony. *People v Schlessel* 196 N Y 476=96 N L 41, *Higmore* 2113, *Bulunta Nath v Chandra Mohan*, 1 B L R A C 133=10 W R 190, *Pulin Behary v Watson* 9 W R 190.

**Statement.** A statement may be verbal or written and it may also be in a civil or criminal proceeding i.e. admission or confession. *Ailmoney v Ramanoopiah* 7 W R C R 29, *R v Challoo Khan* 5 W R 70, *Ishan v Havan* 11 W R C R 325, *Sheikh Boodhoo* 8 W R C R 38.

**Conversation.** It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his favour and the whole should be taken and considered together. This is essential to a complete understanding of what he intended to express by the particular phrases and language which he uses. To give effect to general statements, without regard to the qualifications with which they are accompanied, and by which they may be materially modified, would manifestly lead to error, and be likely to be directly productive of injustice. All therefore is to be heard and weighed before it can be affirmed that the force and effect of language whether written or spoken are fully and justly apprehended. *Per Verel J in Com v Hayes*, 11 Gray 323, 324. *Higmore* § 2094. Complete certainty as to the true meaning of an utterance can only be ascertained by considering every word in it. The change omission, or addition of even a single word may radically alter the meaning. But for oral utterances such verbal precision need not and cannot be required. The general rule universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating



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this substance as best as he can from the impression left upon his memory. This rule is applicable to oral utterances generally,—including admissions, conversations (whether as forming contracts or merely as admissions), and the like. It applies also to an accused's confessions, and to seditious utterances. *P v Hunt* 1 State Tr N S 171 (22), *R v Edmonds*, 1 State Tr N S (8), *R v O'Connell*, 5 St Tr N S 1, 196, *Wignore* § 2097. For a party's admission and conversations involving admissions, and for oral words charged as seditious or defamatory, the proponent need prove in the first instance that part only which serves his purpose. *Wignore* § 2099. In *Stuart v Sherman* 5 Conn 244, 14 *Hosmer C J* said: 'It is correct principle that the whole of a conversation must be taken together, in order to show distinctly the full meaning and sense of the party. The question is merely this whether a particular conversation is part of a preceding conversation because a negotiation begun was still pursued. (Here) the conversation, in the manner above mentioned, was not the same. The past and future cannot thus be brought together in order to form an artificial identity. The law never intends that a party may make evidence for him from his own declarations, but merely that the meaning of a conversation shall not be perverted by proof of a part of it only.' So the application of this principle to conversations including oral admissions and confessions depends almost entirely on the circumstances of each case. *Wignore* § 2119.

**Document.** It seems reasonable that where a party produces a document in evidence, he must be considered as producing the whole of the document. His opponent has therefore a right to refer to any part of it as already in proof. In other words he may extract the remaining contents of the document (provided they be relevant to the subject matter) and bring them before the jury, on the same principle that he may by cross examination extract from a witness all facts within that witness's memory provided they be relevant to the subject matter." *Moody & Robinson Note to 2 Mo & Rob 46*.

**Account books.** Where the statement is contained in an entry in an account book, the rule will not warrant the reading of distinct entries in the book. *Cott v Dorard*, 3 Stark R 6. *Gregory v Tavernor*, 6 C & P 280. In *Deary v Holtkiss*, 30 N Y 497 502, *Hogebloom J* said: "The books constituted the entire series of accounts between these parties, and for the purposes of this case may be regarded as if they contained nothing else whatever.—Indeed as if they had all been presented in Court by the plaintiffs on a single paper or account current. In such a case could the defendant be permitted to call particular entries from the account and exclude the residue?" I think not. *Wignore* § 2118, *Darston v Oxford*, 1 Lq Cas Abi 10, *Rouland v Blaksley*, 1 Q B 497.

**Letters or papers.** As to letters forming part of a correspondence, it does not seem usual to require the preceding letters to be put in unless they are expressly referred to in the one offered. *Watson v Moore* 1 C & K 626. So where the plaintiff read three letters of the defendant admitting parts of the plaintiff's case the defendant was not allowed to read other letters of his in the same book dealing with the same correspondence. *Sturge v Buchanan* 10 A & E 798. In that case *Denman J* in delivering the judgment said: "This is a series of copies of letters written from time to time on principle exactly the same things as if they had been kept in his counting house on a file, it is like proving what a party said in one conversation, one of those letters or one of these conversations may be proved without authorizing the opposite party to bring forward for this own benefit what he himself said or wrote in another conversation or a different letter. But "where a letter is written in answer to another it may often be unintelligible without referring to the previous letter. By referring to the letter to which he is replying the writer to that extent makes it a part of his own communication." *Per Hoar J* in *Trishchal v Innes* C 14 Gray 457.

**As the Court considers necessary.** Great prolixity and waste of time may occur if the whole of long rambling statements were to be introduced simply on the ground that the whole of the document or documents or conversation must be before the Court. The Judge is therefore constituted in every case a referee by whose decision is limited the quantity of the document, etc., contained

the statements which shall be put in evidence His discretion is to be guided by the principle of letting in so much and so much only, as makes clear the nature and effect of the statement, and the circumstances under which it was made *Nort Pl* p 203 The Court would exercise a sound discretion in admitting only so much as explains or qualifies the statement *Prince v Samo* 7 A & L 67 is the leading case on this subject In that case *Denman L C J* said 'My opinion was that the witness might be asked as to every thing said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross examined, but that he had no right to add any independent history of transactions wholly unconnected with it'

## JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

**40** The existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial

**Previous judgments relevant to bar a second suit or trial** Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue *Step Intro 164* Judgments are said to be of two kinds—in *Rem* and in *Personam* The former term seems never to have been clearly defined but it is commonly understood to apply to all judgments affecting the legal status of some subject matter, person or thing e.g. Admiralty judgments in cases of forfeiture or prize, Divorce Court decrees, grants of Probate and Administration, and adjudication in Bankruptcy Such judgments are conclusive evidence against all persons, whether parties or strangers Such judgments are always relevant (*vide* section 41) Judgments in *personam* are all ordinary judgments between persons not so affecting status Such judgments bind only parties and privies to the facts in issue Privies are divided by *Coke* (*Co Lit* 271 a) and other writers into three classes (1) *In estate* (or interest) as donor or donee lessor and lessee or vendor and purchaser (2) *In blood*, as ancestor and heir, or co-purchaser, (3) *In law* (or representation) as testator and executor intestate or administrator tenant and lord claiming by escheat, or successive incumbents The same rule applies to these privies as to original parties, viz., that a party claiming through another is estopped in the same manner as the original party All judgments are conclusive against all persons of their legal effect as distinguished from the facts upon which they are based (*Cockle Cas* 44)

The distinction between judgments in *rem* and judgments in *personam* was thus laid down by *Blackburn J* in *Casrique v Inne* L R 4 H L pp 427—429 Some points are clear Where a tribunal, no matter whether in England or a foreign country, has to determine between two parties and between them only, the decision of that tribunal, though in general binding between the parties and privies does not affect the rights of third parties, and if, in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing for the tribunal neither had jurisdiction to determine nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest if any, in the thing All proceedings in the Courts of common law in England are of this nature, and it is every day's experience that where the Sheriff, under a *fieri facias* against A, has sold a particular chattel B, may set up his claim to that chattel either against the Sheriff or the purchaser from the Sheriff And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country But when the tribunal has jurisdiction to determine not merely on the

**S. 40.** rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the case of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject matter."

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is deemed to be relevant to the issue (*Stephen's Digest* Art 40, see also *Gopi v Kherod*, A I R 1925 Cal 194). The only cases in which a judgment is conclusive are those specified in section 41. In all other cases, a judgment is, under this Act, only relevant. By section 40, the existence of a judgment, etc., is declared to be relevant when 'by law' its existence and production bar a second suit or trial. A judgment is proof of its own existence and of its legal consequences not simply *inter partes*, but against all the world, but not of the truth of the fact on which it rested. A judgment delivered by a Court of law upon a matter thoroughly investigated by it, is evidence of the highest authority. The maxim of the law is, *Pes judicis pro veritate accipitur*, a matter already adjudicated on, must be accepted as truth, and this for two reasons—first on account of the solemnity and publicity attending such judgments, secondly on account of the principle, *Interest reipublice ut sit finis litium* (It concerns the state that there should be an end to all law suits). Hence the maxim, *transet in rem judicatum*. The production of a judgment is proof of its existence and of its legal consequences against all the world. Thus in action by A against B for malicious prosecution—If A puts in evidence the judgment of his acquittal on the former trial, that is proof both of the existence of the judgment, as a fact, and of his legal acquittal. So again in an action by a surety against the principal to recover money which the surety has been compelled to pay on his guarantee—if the surety puts in evidence the judgment of the Court in the suit in which he was compelled to pay, that is proof of the amount of damages which he has sustained. So again, if a man is tried for a crime and puts in evidence his former conviction for the same crime, the judgment is conclusive both as to the fact of the judgment and also of all its legal consequences,—that is its efficiency to protect him from a second indictment, for the maxim of the law is *Nemo debet bis vexari pro una et eadem causa*. No man ought to be troubled twice for one and the same crime, which is in itself another application of the maxim *interest reipublice*, etc., except, in as far as the one maxim looks to the case of the individual, the other to the peace of the public at large—*Non Er* 205 206. So the general principle is that the mere existence of a judgment, its date and its legal consequences are conclusively proved, as against all the world by the production of the record or the production of an examined copy, (for a judgment being a public transaction of a solemn character must be presumed to be faithfully recorded), but that it furnishes no proof whatever of collateral facts, even though, as between the parties to a judgment themselves such facts must be proved. *Tay Er* 10th Ed § 106. See also *Abinash v Paresk Nath* 9 C W N 102 (410), *Phup Er* 4th Ed p 373. *Abdul Latiff v Abdul Huq* 28 C W N 62, *Budyanath v Aliyan* 36 C L J 4.

Sections 40 to 43 of the Evidence Act deal with the subject of relevant judgments. *Fer Miller J in Gayu Lal v Patch Lal*, 6 C 171 (144) F. R. In the cases, which the Evidence Act provides for, are cases in which the judgment of a Court is in the nature of a law, and creates the right which it affects, and exists. *Step Introduction* pp 167 168. Decisions would be binding *inter partes* and become relevant in another only if they fall under ss 40 to 43 of the Act. *Tay Er* 10th Ed p 106. *Dis v Fakir Mohamed* 19 S L R 376 = 1926 Sind 161. This section is applicable when the Court has jurisdiction to decide the matter and one party says it is

not do so because that matter has been decided before *Lakshman v Ramdas*, S, 40 A I R 1929 Cal 374 (F B)

**Judgment, meaning of** The word judgment in sections 40—44 means any final judgment, order or decree of any Court *Step Dig Ev* art 39

**Scope of the section** In *Ranbhoddas v Bapu Narhor*, 10 B 439, *Seargent C J* said 'In the Bombay case (*Naranji v Dipa* 3 B p 3), it is plain that *Westropp C J* is alluding to judgments on material issues between the same parties or their representatives which were conclusive under the old law. And it is not clear from the report of the case before *Couch C J* (*Neamut Ali v Goroo Dass* 22 W R C R 365) that the judgment there in question was not of the same nature. We do not, however, think that exclusion of such judgments is a necessary inference from the Evidence Act without calling in aid sections 11 and 13. Section 40 may, we think, without unduly straining the language, be read as including them. In *Soorjomonee Dayee v Suddamund Mohapattei*, 12 B L R 304, the Privy Council held that the term cause of action in clause 2 of Act VIII of 1859 was to be construed as including a material issue and we think that, similarly the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties, in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied. This section provides that the existence of a judgment, decree, or order is a relevant fact if it by law has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. *Per Mitter J* in *Gujju Lal v Fateh Lal*, 6 C 171 (176). In the same case *Garth C J* at p 190 said 'It is true that s 40 might have been more clearly worded. It is in fact, much the same defect as s 2 of Act VIII of 1859 which was pointed out by the Privy Council in case of *Soorjomonee Dayee v Suddamund Mohapattei*, 12 B L R 304. But I cannot doubt that it was intended to include all judgments which by law operate to prevent a Court whether civil or criminal, from taking cognizance of a suit or trying any particular issue. The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, and we ought to confine their meaning in the same way in s 40 of the Evidence Act." See also the judgment of *Mitter J* in page 176. An entry in a record prepared under s 108 of the Bombay Revenue Code by the Survey Officer, describing certain lands as *khots* is by force of s 17 of the Bombay *Khots* Act conclusive and final evidence of the liability thereby established and the Civil Court cannot look behind the entry. And under the circumstances mentioned above, the evidence of a decision otherwise relevant under s 40 of the Evidence Act as proof of *res judicata* earlier than the date of the survey entry where a Civil Court adjudged the land to be *dhora*, and the evidence that the *khots* have never received that, are inadmissible for the purpose of depriving the conclusive effect of the entry by the survey authority. All these matters must have been shown to the survey officer before he arrived at the decision of which the record is the entry. *Ram Chandra v Raghunath*, 20 B 475 see also *Balaji v Balaji*, 21 B 235 *Gopal v Dasarathi*, 21 B 244 *Gopal v Mageshewar*, 21 B 608, *Anaji v Madhab*, 21 B 480. Where a subsisting judgment, order or decree relevant under this section is set up by one party as a bar to the claim of the other the latter can show that the judgment, order etc was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary for him to have it previously set aside by a separate suit. *Bansi Lal v Deapo*, 24 A 242 = A W N 1902 33. This section simply renders admissible judgments which operate as pleas in bar of the action of the kind known as pleas of *res judicata* or otherwise under some other rule of law. This section has nothing to do with question of evidence beyond the admissibility of the judgments because a plea of *res judicata* is not a plea as a matter of evidence but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence. *The Collector of Gorakhpur v Palakdhari*, 12 A 1 (F B) 44, see also *Sita Ram v Amir Begam*, 8 A 324. Where a judgment *inter partes*

**S 40** . contin. recital of the pleadings it is admissible in evidence, if the recital refers to a point in issue *Udamathal v Parameswara*, 85 Ind Cas 996=96 L W 460=A I R 1925 Mad 1019

**Foreign Judgment** A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will, in the view of the foreign Court, render the judgment thereon nullity. *Gudaru v Maradugula*, 30 M 292, see also *Kesho v Chokalinga*, 7 M 105. As regards what amounts to submission vide *Sriraman v Iburam* 18 M 327, see also *Copin v Adamson* L R 9 Ex 15. *Emanuel v Symon*, (1908) 1 K B 302. Section 13 of the Civil Procedure Code runs as follows: 'A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except— (a) where it has not been pronounced by a Court of competent jurisdiction, (b) where it has not been given on the merits of the case, (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable, (d) where the proceedings in which the judgment was obtained are opposed to natural justice, (e) where it has been obtained by fraud, (f) where it sustains a claim founded on a breach of any law in force in British India.'

So a foreign judgment operates as *res judicata* except in the cases specified in section 13 of the Civil Procedure Code of 1908. *Bababhat v Ankerbhat*, 13 B 224. 'Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced.' *Per Parkes B in Williams v Jones* 13 M & W 633, *Russel v Smith* 9 M & W 819. *Goddard v Gray* L R 6 Q B 111.

So where the subject matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits and the authority has conferred on the Court jurisdiction to decide as to the disposal of the thing and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might be right or wrong. *Carl Fraz v Wingon* A I R 1928 P C 83, *Chatterjee v Imrie*, L R H L 414. So all foreign judgments in *personam* if pronounced by a competent Court for the purposes of estoppel, on a fact analogous to home judgments provided they are final and unalterable by the Court pronouncing them. *Duchess of Kingstons' case* 2 Sm L C 1. *Ricardo v Garcias* 12 Cl & F 368. *Nonion v Freeman* 15 App Cas 1.

**Previous Judgment to bar a second suit** A judgment which is a judgment *in rem* is not admissible in evidence against those who are not parties to it nor derive title through such parties, as proof of the facts & terms therein. *Kesho Prosad v Astanathi* A I R 1926 Pat 577=97 Ind Cas 221. Under section 40 the existence of a decree is a relevant fact when the question is whether in view of that decree the Court ought to take cognizance of it or to hold the trial. This means that it is relevant on the question as to why it operates as *res judicata* under section 11 of the Civil Procedure Code or as some other general principle of finality of judicial decisions which according to recent decisions of the Judicial Committee (vide *infra*) must be taken to apply to this country although not incorporated in that section. *Per Mukherjee J in Beni Madhab v Sarbanand* 43 C L J 135=95 Ind Cas 130=A I R 1947 Cal 693 at p 700. A previous decree for rent between the same parties may be admissible under this section for proving that the claim for certain years was decreed and so no suit would lie for the rent of that period and it is not necessary to conclude the trial of the question as to what was the rate of rent at the date of that suit if the decree showed that that question was finally decided in that suit. *Ibid*. 'It is not competent for the Court to take

case of the same question arising between the same parties, to review a previous decision. If the decision was wrong it ought to have been appealed against." *Per Lord Macnaghten in Badar Bee v Habib Merican*, (1909) A C at p 623, see also *Huntley v Gaskell*, (1905) 2 Ch 656 *Mangma v Wright*, (1909) 2 K B 953, *Humphries v Humphries*, (1910) 1 K B 796

**Res judicata by general principles of law** Where a matter has been finally settled between the parties, the mere fact that the decision was given in an administration suit does not affect its finality *Peareth v Maniot*, 23 Ch D 182. A question finally decided at one stage of a suit cannot be reopened by the parties subsequently in the same suit. The decision is *res judicata* upon general principles of law and apart from the limited provisions of section 11 of the Civil Procedure Code *George Henry v Administrator General*, 25 C W N 915=48 C 499=60 Ind Cis 631=40 M L J 423=1921 M W N 313=19 A L J 366=23 Bom L R 648 (P C), see also *Ram Kripal v Musumant Rup Kuari*, L R 11 I A 37 at p 41=6 A 269 *Syam v Secretary of State* 36 M 141 *Peari v Dwilair*, 18 C W N 954. In *Sheoprosad Singh v Ramnandan Prosad* 43 I A 91=43 C 694=20 C W N 738 at page 744 *St Lawrence Jenkins* in delivering the judgment of the Judicial Committee, of the Privy Council observed "But in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata* while founded on ancient precedent, is dictated by a wisdom which is for all time 'It hath been well said', declared Lord Cole, "*interest rei publicae ut sit finis litium*" otherwise great oppression might be done under colour and pretence of law. *Priddle v Napper* 6 Coke 9 A. Though the rule of the Code may be traced to English source it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators *Iyanaesara* and *Millanta* who include the plea of a former judgment among those allowed by law, each citing for this purpose the text of *Katyayana* who describes the plea thus 'If a person though defeated at law sue again he should be answered, you are defeated formerly. This is called the plea of former judgment [See 'the *Mital shara* (*vijayakar*) Bk II Ch 1, edited by J R Ghoshpore p 14, and the *Mayukha* Ch I, Section 1 p 11 of *Mandlik's edition*] And so the application of the rule by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law." The decision of a Probate Court on the question of relationship of one of the parties with the deceased is *res judicata* in a subsequent title suit *Dnyapada v Kalpada*, 31 C W N 898 *Lachmi v Bhuthi* 8 L 384 (F B) but see *Lalitmohan v Radharaman*, 15 C W N 1021. So also in *T B Ramchandra Rao v A N S Rama Chandra Rao* L R 49 I A 129=45 M 320=26 C W N 713 their Lordships at page 137 of the Indian Appeals stated "How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Court. So the real principle is that if a matter has been brought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Court might not be the same. *Dnyapada v Kalpada* 31 C W N 898 see also *Badar Bee v Habib Merican Noordin* (1909) A C 623, *Hook v Administrator General of Bengal*, 48 I A 187=25 C W N 417, *Bam Ram v Nanihi Mal*, 7 A 102=11 I A 181, *Rameswar Singh v Harendra Singh* 29 C W N 413=40 C L J 431 (P C) *Kalyan v Sitabai*, 38 B 309 (F B) at p 330, *Maung Hemat v Ma Hlay* 1 L R 1 Rang 208

**Res judicata** The following rule was laid down by Sir William De Grey C J in the *Dutchess of Kingston's Case* 20 How St. Trial, 355 (357) "As a general principle a transaction between two parties in a judicial proceeding, ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or appeal from a judgment he might think erroneous and therefore the deposit of witnesses in another cause in proof of a fact the verdict of a jury in find the fact and the judgment of the Court upon the facts found although evi against the parties, and all claiming under them, are not, in general, to be

## S. 40

to the prejudice of strangers From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow: generally true first, that the judgment of a Court of concurrent jurisdiction directly upon this point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment " But a former judgment between the same parties on the same subject matter will operate as an estoppel and be conclusive only when it is so pleaded, or there is no opportunity of so pleading it Otherwise it is only a relevant fact from which the Court may draw a conclusion in favour of the person who tenders it as evidence *Booth v. Wright* 3 B & Ald 662

But 'the plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litem ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or substance a rule of the law of evidence is furnishing a ground of estoppel In England and I may say also in America the rule is usually dealt with as belonging to the law of evidence, for there judgments *in personam*, which operate as *res judicata* are as often treated as falling under the category of estoppel by record See *James Fitz James Stephen*, the distinguished jurist who framed our Indian Evidence Act (I of 1872) and whose views have been accepted by our Indian Legislature in framing section 40 of the Act adopted what seems to be the only logical and juristic classification by treating the rule of *res judicata* as falling beyond the proper region of the law of evidence, and as appertaining to procedure properly so called That the effect of the plea of *res judicata* in the result operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted But here the similarity between the two rules virtually ends, and it is equally clear that the ratio upon which the doctrine of estoppel, properly so called rests is distinguishable from that upon which the plea of *res judicata* is founded" see also *Raicharan v. Kumud* 25 C 271=2 C W N 297

Sections 11 and 12 of the Civil Procedure Code, lay down the law where a previous judgment of a domestic tribunal in a civil suit operates as *res judicata* in a subsequent civil suit The provisions of section 11 run as follows —

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or he or they claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court

*Explanation I* The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was in issue prior thereto

*Explanation II* For the purposes of this section the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

*Explanation III* The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other

*Explanation IV* Any matter which might and ought to have been a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

*Explanation V* Any relief claimed in the plaint, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused

*Explanation VI* Where persons litigate *bonafide* in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating.

Section 12 of the Civil Procedure Code runs as follows Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies

A judgment in *personam* is conclusive only between the parties to the record and their privies *Res inter alios acta alieni nocere non debet*—Things done between strangers ought not to injure a party, or *Res inter alios judicata nullum inter alios predicum facit*—Matters decided between third parties do not affect strangers or any but themselves Between such parties the facts actually decided by a Court of competent jurisdiction cannot be again litigated *Boilem v Rutlin* 2 Ex 665 If, as remarked by Lord Kenyon C J in *Greathead v Bramley*, 7 T R 456 ‘an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment’ The same learned Judge in *Marratt v Hampton* 7 F R 269, said “If this action could be maintained I knew not what cause of action could ever be at rest After recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person

**Stay of suits** “No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction or before his His Majesty in Council

*Explanation* The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action’ Vide section 10 of the Civil Procedure Code of 1908, see also *Meekjee v Kasouji* 4 C L R 282 *Ballissen v Krishan Lal*, 11 A 148 *Ramalinga v Raghunath* 20 M 418 *Venkappa v Manjunath*, 16 M L J 526, *Bissessar v Ganpat* 8 C L R 113 *Kanjil v Bhagabutty* 7 C W N 720 *Mahadeo v Gopadkar* 16 C W N 897 *Sital v Gaya* 19 C W N 529 *Padamsee v Lalhamsee* 43 C 141, *Venkata v Venkata* 22 M 256, *Sua Prosad v Tricundar* 42 C 926 This section does not apply merely because one issue alone is common to the two suits The words ‘the matter in issue in the section denote “the entire subject in controversy between the parties’ *Vellachamy v Muthiah Chettiar*, 103 Ind Cas 274 The object of section 10, is to avoid a conflict of judicial decision In order to try a suit under that section it must be shown that the cause of action as disclosed in the pleadings the matter directly and substantially in issue and the relief claimed are substantially the same in the two suits Identity of reliefs is not necessary as under the old Code But the mere identity of one or more issues apart from their importance and bearing does not suffice *Din Shaye v Galstoun*, 29 Bom L R 382=102 Ind Cas 229=A I R 1927 Bom 245 see also *Kuberan v Korman* Nan 88 Ind Cas 421=48 M L J 251=A I R 1925 Mad 574

**Omission to sue for the whole of the claim** Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court Where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished A person entitled to more than one relief in respect of the same cause of action may sue for all of any of such reliefs, but if he omits except with the leave of



**S. 41.** the Court, to give for all such relief he shall not afterwards for any offence committed. For the purposes of this rule, an obligation and a collateral matter for its performance and success are claims arising under the same obligation shall be deemed to pertain to a single cause of action. Order for trial procedure Code

**Previous Acquittals or Convictions.** Section 193 of the Criminal Procedure Code 1898 which bears a subsequent trial runs as follows—A person has once been tried by a Court of competent jurisdiction for an offence, convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor for any other offence for which a different charge from the one against him might have been made under section 230, or for which he might have been convicted under section 237.

A person acquitted or convicted of an offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 241 sub-section (1).

A person convicted of any offence constituted by any two or more acts which together with such act constituted a different offence from the one for which he was convicted may be afterwards tried for such latter offence if the consequences had not happened or were not known to the Court to have happened at the time when he was convicted.

A person acquitted or convicted of any offence constituted by any two or more acts may notwithstanding such acquittal or conviction, be subsequently tried for any other offence constituted by the same acts which he has committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

**Explanation.** The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273 is not an acquittal for the purposes of this section.

**Judgments how proved.** If a party offering a record does so in support of a plea of *res judicata* or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, the whole record so far as it concerns the facts and stages must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is a regular record of the proceedings. Before the record be produced with proof. Wharton on Evidence § 824. Before the document whether an original or a copy, can be received in evidence of a judicial proceeding it must, in general appear that the record or entry of such proceeding has been finally completed. Taylor & 10th Ed § 1570.

**41** A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character,

Relevancy of certain judgments in probate etc jurisdiction

which declares any person to be entitled to any such character, or to be entitled to any specific thing, not against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—that any legal character which it confers accrued at the time when such judgment, order or decree came into operation,

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, \* [order or decree] declares it to have accrued to that person,

that any legal character which it takes away from any such person ceased at the time from which such judgment, \* [order or decree] declared that it had ceased or should cease,

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, \* [order or decree] declares that it had been or should be his property

**Principle** The principle of the conclusiveness of judgments *in rem* is regards *per se* is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt and as regards *things*, that generally speaking every one who can be affected by the decision may protect his interests by becoming a party to the proceedings *Phipson Lr. 3rd Ed* 365

**Judgment in rem meaning of** A judgment *in rem* has been defined to be the judgment of a Court of exclusive or at least peculiar jurisdiction, declaratory either of the nature and condition of some particular thing, or of the condition and status of some particular person *2 Phillips Lr.* It is an adjudication pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this that the latter judgment is in form as well as in substance between the parties claiming the right, and that it is *so inter partes* appears by the record itself. A judgment *in rem* is founded on a proceeding instituted not against the person as such but against or upon the thing or subject matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself and the judgment is a solemn declaration of the status of the thing and it *ipso facto* renders it what it declares to be *Hoodruff v Taylor* 20 Vt 65. The most concise definition of a judgment *in rem* is that 'it is an adjudication upon the status of some particular subject matter by a tribunal having competent authority for that purpose, depending for its effect on this principle that it is a solemn declaration proceeding from an accredited quarter concerning the status of the thing adjudicated upon which very declaration operates accordingly upon the status of the thing adjudicated upon and *ipso facto* renders it such as it is thereby declared to be' *2 Smith's Leading Cases* 58, 186. I do not think, says *Sir Barnes Peacock* in *Kanhya Lal v Radha Chaman*, in 7 W. R. 338 (F. B.) at p. 342 'that Mr. Smith's definition of a judgment *in rem* is accurate. But Mr. Justice Holway has not I think attached sufficient importance to the words used by Mr. Smith 'which very declaration operates upon the status of the thing adjudicated upon and *ipso facto* renders it such as it is thereby declared to be'. This would not be the effect of a finding upon a question of status in a suit *in personam* though it might have been so under the civil law in a suit *in rem* not for the purpose of asserting a right against a particular person but for the purpose of adjudicating upon the status.

**Scope of the section** This section consists of two parts. The first part makes the judgments, etc. relevant. The second part makes the judgments conclusive evidence in certain matters. The conditions necessary for making a judgment relevant may be considered under two heads, those having reference to the contents of the judgments and those to the nature of the proceedings in which the judgment is sought to be relied upon. First with reference to the

\* These words in s. 41 wherever they occur were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s. 3

**S 41.** judgment alleged to fall under s 41 it must be (1) of a competent Court in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person (i) to be entitled to any such character, or (ii) to be entitled to any specific thing, not as against any specified person, but absolutely. Secondly, with regard to the proceedings in which the said judgment is sought to be relied upon as a piece of evidence, the existence of any such legal character, or the title of any such person to any such thing must be relevant. *Per Tyabji J C J in Radha Kishen v Mt Gangabai* A I R 1925 Sind 121=22 S L R 105. A judgment can be conclusive if it falls under the second part of this section. No doubt this section makes no distinction between a positive or a negative judgment or between the point adjudicated upon and the grounds on which the decision is based but it arrives at the same result in a more simplified manner. It declares the purposes for which the judgment of a competent Court operates as conclusive against the world and so far as such purposes relate to the status of what is referred to as legal character of a person it specifies three purposes only: it provides that the judgment is conclusive proof only for showing (a) that the judgment has conferred a legal character, or (b) that it has declared that a person had such a legal character; or (c) that it has declared that the legal character of a person which subsisted had ceased to exist. *Per Rup Chand A C J in Ibid*. So a decree of divorce, though conclusive upon all persons that the parties have been divorced and that the parties were a lawful husband and wife is not even relevant against strangers, though the cause for which the decree was pronounced existed. *Kanhaya Lal v Radha Charan*, 1 W R 388=B L R Sup Vol 662 (F B). The only kind of negative judgment which is contemplated by this section is that which expressly takes away from a person a legal character which has up to that time subsisted. *Kalyan Chand v Subodh* 38 B 309=23 Ind Cas 325=16 Bom L R 5 (F B). This section would only be conclusive proof of the fact that the legal character ceased at the time from which such judgment declared that it had ceased or should cease.

An order adjudicating a person as an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the ground on which the order is based has no such effect. There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in a judgment *in rem* is always as to the status of the res and is conclusive against the world as to that status whereas in a judgment *in personam* the point whatever it may be which is adjudicated upon (it not being as to the status of the res) is conclusive between parties or privies. *Radha Kishan v Mt Gangabai* *ubi supra*, see also *Ballintyne & Co v Mackinnon*, (1906) 2 Q B 455=6 I J Q B 616=75 I L 95.

Where a judgment operates as a judgment *in rem* (as the decision of a Probate Court does under s 41) it is not subject to collateral attack while it remains in force it is conclusive not only on the person who was party to the judgment but upon all persons and all Courts. *Rim Hemangus v Smt Sundari* 34 C L J 457.

'The whole question of judgment *in rem* in India was exhaustively discussed in *Jayalalamma v Unalala* 2 M H C R 276, *Kanhaya Lal v Pathak* 7 W R 338 (F B) *Jogendra Deb v Laxmidha Deb* 14 M F A 367. In these rulings learned Judges specified what were judgments *in rem* in this country and what were not and the result was embodied in section 41 of the Indian Evidence Act'. *Rahamat v Bibi Zuhra* 11 Ind Cas 480=14 P L 1912. For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgment *in rem* the legislature has adopted the statement of Law in *Su Bunes Peacock* in *Kanhayalal v Rudharcharan* *ubi supra*—Report of the Select Committee. After discussing the history and theory of the judgment *in rem* Phillips J and Holliday J in *Jayalalamma v Unalala* 2 M H C R at page 288 observed: 'The result seems to be that the rule which makes a judgment conclusive only against the parties and those who claim under them is subject to certain exceptions which are off-spring of positive law and that the reason for the exception may be generally stated to be both in English and in Indian Law, that the nature of the proceeding, by which the result is affected is such

generally not unjust extension of putative renders it proper to use the judgment against those not formally parties. This decision was in the main approved of by *Peacock C J* in 7 W R 335 (F 1), see also the *Shiva Ganga Case*, 9 M I A 339, *Ahmedbhai v Tulbehay* 6 B 703. This section is exhaustive as to judgments *in rem* *Rahmat v Babu Zahra*, 14 Ind Cas 486 = 14 P R 1912. Under this section only the final judgments of the Courts of Probate, Matrimony, Admiralty and Insolvency can have the operation of estoppels or conclusiveness against all the world as judgments *in rem* and in those cases alone all the world is thus supposed to be a party. *Nort Et 214 Cunningham Et 187*. The four classes of judgments, etc which alone are to be conclusive, affect, it will be observed the *status* of a person or thing (when that is relevant) either by (a) conclusively proving that such personal status accrued at the time of the judgment and confirmed it or (b) where the judgment, etc does not confer but simply declares the status—that such status accrued when the judgment, etc declares it so to have done or (c) when the judgment, etc, takes away a personal status—that it ceased when the judgment declared that it ceased or should cease or (d) where the status is that of a thing—that the title to it accrued at the time when the judgment declares it did or should where the vesting is in *future* *Nort Et 215*, see also *Radhakrishnan v Mt Gangabai* 22 S L R 105 = 1928 Sind 121. Judgments declaratory of status, passed by a Court exercising any other jurisdiction, such as ordinary decrees declaratory of adoption or legitimacy will not be operative except against the parties to the judgment and their representatives as provided by section 40 *Cum Et 187*, see also *Ujjan v Mathura* A I R 1928 All 395. No judgment except passed by a Court in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction upon any matters indicated in s 41 can have the effect of a judgment *in rem* and therefore a judgment holding that A is not the adopted son of B is not conclusive against the whole world *Ujjan v Mathura* 26 A L J 197 = A I R 1928 A 395.

**Probate Jurisdiction.** The Courts in India exercise the Probate jurisdiction under Act XXXIX of 1925. But this section is applicable to probate granted to Hindus before the passing of the Hindu Wills Act (XXI of 1870) *Grish Chandra v Broughton* 14 C 861. In that case *Tierclay J* in delivering the judgment observed: 'Mr Binnerjee contends that as the testator died before the Hindu Wills Act came into force and as the executor of the Will of a Hindu dying before that Act came into force was a mere manager having no title to the estate the probate neither conferred a legal character nor declared the executor to be entitled to any legal character. I have examined the cases which have been cited but I am of opinion that s 41 of the Evidence Act applies to this case. It is quite true that a Hindu executor was at any rate until the passing of the Hindu Wills Act only a manager, but as such manager he had certain powers over the estate, and for many purposes he represented the testator. It may be that the probate did not confer upon the executor any legal character, but I think that the effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. The words "legal character" are not anywhere defined but I think that it is quite clear that it is intended to include the case of an executor. The fact that this section has been frequently applied to cases of persons after the Hindu Wills Act came into force shows this. The only legal character which the Probate Court declares a person to be entitled to is that of executor. It confers the character of an administrator. It does not declare it. So the section would be meaningless unless "legal character" included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited, makes any difference in the construction of the section.'

The probate of a Will which is only granted after satisfactory evidence has been furnished to the Court of adequate capacity on the part of the testator or testamentary intention untroubled by fraud and of due execution (*Jones v Goodrich* 5 Moo P C 16) constitutes the title of the executor, without which this character cannot be recognised and with which it cannot in general be impugned, in any Court *Trotter on Executor* 74, 75 *Allen v Dundas*, 3 T R 125 *Keynes v Duke of Wellington*, 9 Bery 579, *Fayth on Evidence*, 9th Ed p 1352, *Concha*

**S 41** *v. Coucha*, 11 App Cas 541, *Balgongadhar Tilak v. Sakurbari* 26 B 137, *Griffiths v. Hamilton*, 12 Ves 293, *Hormusji v. Dosabhai*, 12 B 164, *Bailey v. Harris* 18 L. J. Q. B. 115. The decision of a Probate division is a judgment *in rem*. *Noel v. Wells*, 1 Leas 235, *Allen v. Dundas*, 3 F. R. 125. A finding not essential to the judgment in the probate action cannot be said to operate as a finding *in rem* but all that is essential to the decision that the executor is entitled to probate must be taken to have been conclusively determined and therefore probate is conclusive proof of the due execution of the Will which is the foundation of the title of the executor. *Chandeshwar v. Bakeshwar*, A. I. R. 1937 Pat. 61 = 5 P. 777. But where a judgment operates as a judgment *in rem*—(a) the decision of a Probate Court does under section 41 of the Indian Evidence Act is not subject to collateral attack, while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts. Such a judgment furnishes conclusive evidence of the point thereby decided not only against the parties who are the actual litigants in the case but against all others and unless it can be shown either that the Court had no jurisdiction, or that the judgment has been obtained by fraud or collusion, no evidence can be admitted for the purpose of disproving the facts adjudicated upon. *R. v. Duchess of Kingston*, 20 How. St. Tr. 544. See also *Balabundy v. Janamanjari*, 79 Ind. Cas. 44, *Komallo Charan v. Vitruttun* 4 C. 360, *Mayho v. Williams*, 4 C. W. N. W. P. 268. *In re Nilmony Singh*, 6 C. 429. *Manjanabai v. Ram Das* 4 C. W. N. clxxvi. *China Sami v. Harharabarda*, 16 M. 390, *Jagan Nath v. Rampal* 25 C. 354.

So the action of a Probate Court of competent jurisdiction when it admits a Will to probate or rejects it is not duly attested and executed is in the nature of a proceeding *in rem* and so long as the order remains in force it is conclusive as to the due execution and the validity of the Will. *Saroda v. Gobind* 1 P. C. L. J. 91. But when an appeal has been preferred the matter ceases to be *res judicata* and becomes *res sub judice* in other words till the final order has been made by the Court of appeal either in affirmance or reversal of the decision of the Probate Court, there is no decree which operates as a judgment *in rem* under the section. *Ibid*.

The decision of a Probate Court cannot be impeached in the same or in other Court by showing that the facts on which it immediately rests are false. But when these facts are themselves put directly in issue in a subsequent action the judgment does not furnish conclusive evidence of their truth however necessary it may have been for the Court proceeding *in rem* to have determined the question before it adjudicated upon the principal point. *Bailey v. Harris*, 12 Q. B. 115. The fact that probate of the Will of a person or letters of administration to his estate have been granted is not *prima facie* proof of the fact that the person is dead. *Thompson v. Donaldson* 3 Esp. 63, *Moons v. De Bernal*, 1 Ru. 501. *French v. French* 1 Dick. 268, but see *Rilly v. Fitzgerald* 6 Ir. Eq. R. 316. Again though a probate cannot be granted until the Probate Division be satisfied of the genuineness of the Will when granted, and though when granted the title of the executor cannot be impeached in a Court of law by showing that the Will was forged still if a party be indicted for forging the Will the probate will not be conclusive, if indeed it be *prima facie* evidence in favour of the defendant. *Noel v. Wells* 1 Leas 235, *R. v. Buttery* R. & R. 342, *R. v. Gibson*, 31 L. J. 393. But in *Manjanabai v. Empress*, 4 C. W. N. clxxvi it was held that it is for the Civil Court to find whether a Will is genuine, and it is not open to the Criminal Court to find to the contrary or convict any person of having forged that Will in the face of this finding by a competent Court. In the same case it was further held that this section provides that the finding of the Civil Court in such matters is conclusive. See also *Field Et* 335.

An order granting letters of administration is conclusive proof of such facts when the legal character of the grantee is relevant, also such an order is conclusive proof that the legal character which it confers accrued at the time when such order or decree declares it to have occurred. But it does not operate as a bar to preclude the starting of criminal proceedings in a matter appearing in the case but which was not in issue in the proceeding relating to letters of administration. *Mah. Vithal v. Emperor*, 4 Rang. 251 = 97 Ind. Cas. 1054 = A. I. R. 1936 Rang.

Neither would the production of a probate preclude a party from showing in a common law Court either that the testator was in one at the time when he executed the Will (*Marriot v Marriot*, 1 Str 671) or that his domicile was not then in England (*Whitaker v Hume* 7 H L Cas 126, *Bradford v Young* L R 29 Ch D 606), provided the object of his evidence was not to impeach the title of the executor, in which case it would be inadmissible (*Taylor on Ex* 1433). But where the points were directly in issue and actually decided by the Court between the same parties or persons claiming under them the judgment *in rem* will be conclusive evidence of the matters decided in it. (*Spencer v Williams*, 2 L R P & D 230=40 L J P & M 15). For instance, if, in a suit for administration, the sole question be, which of the two parties is next of kin to the intestate the sentence of the Probate Division declaring that as far as appears by the evidence, the defendant has proved himself next of kin and that administration be granted to him as such will be conclusive evidence of the relationship of the parties in a subsequent action between them for distribution, instituted in another Court. (*Bair v Jarlson* 1 Phill 782, *Bouhier v Taylor* 4 Bro P C 703, *Dogliotti v Crispen* 3 L J P & M 129, *Thomas v Kettle* 1 Ves Sen 333). But the probate is conclusive as regards the due execution of the Will, the validity of the Will and the appointment of executor (*Hummus v Bai Dhanbai*, 12 L 161). But refusing of the grant is not conclusive (*Ganesh v Ramchandra* 21 B 563, *Chunna Sam v Haridara* 16 M 380). This question was considered in *Ramani Debi v Kumud Bandhu* 14 C W N 924 and the Court delivering the judgment observed: "The judgment in a probate proceeding operates as a judgment *in rem* and, as has been repeatedly held, an application for probate of a Will is not subject to the law of limitation (*In re Ishan Chandra Roy* 6 C 707). A probate proceeding, therefore, while it enjoys the advantage of exemption from the law of limitation leads to a special result that a decision therein properly obtained operates as a judgment *in rem* though it is clear from the cases of *Arunmoy v Mohendranath* 20 C 888 and *Ramanandan v Sheoprasad*, 11 C L J 623 that questions of considerable nicety may arise as to the precise matter in respect of which such decision operates as a judgment *in rem*. It would not, in our opinion, be right to apply to such a proceeding the provisions of section 103 (of Civil Procedure Code of 1882) which by their very terms are plainly intended to apply to suits for enforcement of cause of action. This view is supported by the decision of *Ganesh v Ramchandra* 21 B 563. In this case it was ruled that the refusal to grant probate does not conclusively show that the Will propounded is not the genuine Will of the testator and does not prevent the adjudication of the question in a subsequent proceeding in other words the judgment of a Court by which probate is refused does not necessarily operate as a judgment *in rem* in the same way as a judgment by which the probate is granted. No doubt, such a judgment if it declares that the Will is a forgery, or that it has not been duly executed by the testator with a sound disposing mind or that it has not been duly attested, may take away from the executor named in the Will the legal character of an executor and from the legatees and beneficiaries their legal character and this result may be final as against all persons interested under the Will, but every refusal to grant probate does not conclusively show that the Will propounded is not the genuine Will of the testator. The decision may be based upon entirely different ground, which do not touch the question of the genuineness of the Will. Such a judgment cannot operate conclusively unless it embodies a final decision against the genuineness of the Will. The learned Judges of the Bombay High Court while they lay down the proposition carefully guarded themselves, however, against any expression of opinion upon the question whether, if an issue had been raised upon the question of forgery of the Will and had been decided the decision might not be conclusive. The true rule is thus formulated in the case of *Schultz v Schultz* 10 Gratt 358. "When a Will has been propounded by a party interested and fairly rejected on the merits it would defeat the policy of the law and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested and the contest thus renewed from time to time. The sentence, therefore, against the Will must be regarded as a sentence against all claiming under it: it stands upon a footing analogous to the

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cases known as judgments *in rem*, which being adjudications upon the matter are regarded as final and conclusive not only in the Courts in which they are pronounced but in all others in which the same question arises. It has been adjudication on the merits, whether the adjudication be for or against the validity of the Will, it is a final settlement of the matter and it cannot be collaterally attacked, impeached or avoided in the same or in any other Court by any of the parties thereto or by any person in privity with them, in other words a refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. *McCormack on Judgments* Vol 1, section 319 (b). On the other hand if probate has been refused, not on the merits but merely by reason of the insufficiency of some matter of form or procedure there is no adjudication that the instrument is not entitled to probate, and, therefore it may again be propounded. *Lilly v Lobbin* 103 Missouri 477 = 23 Am St Rep 83. It is manifest therefore, that if the application by an executor for probate of a Will has been dismissed for default that fact by itself cannot deprive an applicant for probate by another person for example, a legatee who claims an interest under the Will if so, it would be futile to hold that an executor who has made default cannot propound the Will again. *Ramani v Kumud*, 14 C W N 101. The finding as to the execution of the Will of the Probate Court binds as to the parties and privies to the probate proceeding. *Chavell v Bishwanath* A I R 1927 Pat 61.

A contentious probate proceedings must take the form of a suit in accordance with the provision of section 83 of the Probate and Administration Act, such proceedings constitute a suit within the meaning of section 11 of the Civil Procedure Code and therefore, the findings of fact of a Probate Court in such proceedings, that the testator was not of sound disposing mind when the alleged Will was made would operate as *res judicata* between the parties to the proceedings although the judgment in such proceeding would not be a final judgment such as is contemplated in section 41 of the Evidence Act inasmuch as such judgment does not confer upon or take away from any person any legal character. *Kalyan Chand v Sitabai*, 23 Ind Cas 1320 = 16 Bom J R 309 (F B).

Under the provisions of the section a final judgment of a Probate Court granting probate is a judgment *in rem* and it is conclusive so far as the question relating to the genuineness and validity of the Will is concerned. *Srinivas Ramoji*, 5 Mys J J 107. See also *Monmohini v Banga* 31 C 357 = 8 C W N 197.

The expression 'legal character' in section 41 Evidence Act when it has reference to a judgment of a Court of Probate means the status of an Administrator or Executor and that only though when it has reference to a Court of Probate it includes wifehood and widowhood, and a judgment of a Court of Probate is conclusive proof that the person to whom letters of probate have been granted has been clothed with the powers and the responsibilities of an executor deceased and of nothing else. *M. Agur v M. Shene* U B R. (1910) 41 Q B 61 = 10 Ind Cas 987.

Where it is alleged that letters of administration have been wrongfully granted the proper course is to apply to the Court which granted the letters to revoke the same. The grant of letters of administration so long as it subsists is conclusive evidence as regards the proper evidence of the Will and the legal character conferred on the executor. *Ditaph v Sauti* A I R 1929 Lah 483.

**Matrimonial jurisdiction.** This section enacts that a final judgment of a competent Court in the exercise of matrimonial jurisdiction which confers or takes away from any person any legal character not as against any person but absolutely is relevant when the existence of any such legal character is relevant and is conclusive proof that any legal character which it takes away from any such person ceased at the time from which such character ceased to exist had ceased or should cease. *Sita Debi v Gopal Saran* A I R 1937 Pat 375 = 9 P J T 39. In India the Court exercises a matrimonial jurisdiction under the Indian Divorce Act (Act IV of 1869) Indian Christian Marriage Act (Act XX of 1872) Parsi Marriage and Divorce Act (Act XV of 1869) Native Marriage and Divorce Act (Act XXV of 1869) and Special Marriage Act (Act III of 1908).

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A sentence of divorce has or may have a dual nature. A judgment of divorce is a decree *in rem*, so far as it finds the status of the parties by dissolving their matrimonial obligation. But so far as it disposes of any other than the marriage relation, it is *in personam*. *Teem Judd 4th Ed 384 Kanhya Lal v Rudha Charan 7 W R 338*. The English Courts have held that no foreign Court has power so far as any consequences in England are concerned to annul the marriage solemnized in England between English subjects *Briggs v Briggs 5 P D 163, Parry v Lindsay, 1 Dow 117, In re Wilson's Trusts 35 L J Ch 243*. Decrees of the Divorce Court provided they alter status *e.g.*, decrees of judicial separation, or for dissolution or nullity of marriage but not a judgment of adultery not followed by a decree, fall under the section *Phip Tr 363 Needham v Bremner L R 1 C P 583*. Section 20 of the Indian Divorce Act IV of 1869 does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge and such a decree may therefore be confirmed before the expiration of six months from the pronouncement thereof. Asuming the proviso in section 17 to be applicable to a decree of nullity a decree by the High Court confirming the same before the six months period has expired cannot on that ground be treated as made by a Court not competent to make it, within the meaning of sections 11 and 44 of the Indian Evidence Act 1872 and is therefore under section 11 conclusive proof that the marriage was null and void *Eduard Gaston v L H Gaston 22 A 270 (F B)*. If a marriage between Mohamedans were set aside upon the ground of consanguinity or affinity or for instance in the case of a Mahomed in that the marriage was with the sister of another wife then living the decree could be conclusive that the marriage has been set aside and that the relationship of husband and wife had ceased if it existed but it would be no evidence against third parties for instance in a question of inheritance that the two ladies were sister *Per Peacock C J in Kanhya Lal v Rudha Charan, 7 W R 338=B L R Sup Vol 662 (F B)*.

**Admiralty jurisdiction** Adjudications on the subject of prizes or enforcement of maritime liens are among the judgments generally designated as judgments *in rem* *Allen v Dundas 3 Term Rep 125*. So judgments *in rem* include judgments in Courts of Admiralty in cases of prize, bottomry, salvage, forfeiture or the like where the jurisdiction is founded on the actual or constructive possession of the subject matter (*Castrique v Imrie L R 4 H L 428*) or maritime lien (*Ulnia Craig v Chartered etc Bank, [1897] 1 Q B 160*). Judgments in condemnation of property as forfeited are also judgments *in rem* *Geyer v Aquilon T R 696*.

**Insolvency jurisdiction** As regards the jurisdiction of the High Courts to exercise insolvency jurisdiction vide Letters Patent of different High Courts, as well as the Provincial Town Insolvency Act (III of 1909). So far as the jurisdictions of municipal Courts are concerned vide the Provincial Insolvency Act (V of 1920). A judgment in bankruptcy proceedings has the effect, in England, of a judgment *in rem*, but this effect it owes to the Bankruptcy Act 46 & 47 Vict C 52 s 132(2) see also *Frparte Leteroyd In re Loutils 10 Ch D 4*. A creditor who has unsuccessfully opposed his debtor's application to be declared an insolvent on the ground that he had made fraudulent transfer of property cannot in a subsequent suit raise the plea that the transfers were fraudulent and void. He is barred by the previous decision which is as a judgment *in rem* under this section *Narayan v Hardutta Lai 16 N L R 201*. The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely against him but absolutely within the meaning of this section *Pitaram v Shaghar 33 Ind Cas 793* see also *Mussamat v Mathura 40 Ind Cas 102 Bhavn v P C Dass 17 A L J 787*.

Where a creditor of his unsuccessful opponent applied the application on the ground that the debtor had made fraudulent transfers, the creditor is bound by the decision of the Bombay High Court and cannot in a subsequent suit filed in the Punjab Court raise the plea that the transfer of the property in suit was fraudulent and



**S 41.** void, in spite of the fact that the property in question is situated in the Part I. The estoppel is not based merely on the provisions of s 41, Evidence Act, but even if it could be held that the decision was not a judgment *in rem*, it is a judgment *inter partes* and binds the creditor *Ram Narain v Durga Prasad* Ind Cas 768=55 P R 1912=242 P W R 1912

An order of an Insolvency Court refusing to adjudicate a person as insolvent on the ground that he was not a member of a firm which had been declared insolvent is not a final order which conferred upon him a legal character within the meaning of this section and hence it is not a judgment *in rem*. Being a partner in a firm is not a legal character. *Off Assigner of Rangoon* 46 M L J 580=1924 Mad 660=24 V L T (H C) 90=83 Ind Cas 174 see also *Radha Kishen v Mt Ganai* A I R 1928 Sind 121=22 S L R 105. An order adjudicating a person as insolvent and vesting his property in the Official Receiver is not a judgment *in rem* but the grounds on which the order is based have such effect. *Radha Kishen v Mt Gangabai*, A I R 1923 Sind 171=22 S L R 105.

**Judgments in other cases.** The decision of an issue as to the age of a minor in proceedings relating to the appointment of the guardian for person or property or both of such minor or in curatorship proceeding is not one of the judgments *in rem* enumerated in this section, which are declared conclusive against the world. *Hussain v Sahib Nur* 7 Ind Cas 505=86 P W R 16. On an application for probate of a Will under the Probate and Administration Act 1881 which was opposed by the widow of the alleged testator and her father it appeared that an application has previously been made under the Guardianship and Wards Act 1890 on behalf of the widow for a declaration that he was guardian of the person and property of the infant son of the alleged testator and that an application had been opposed by the present petitioners who claimed to be testamentary guardians of the property appointed by the Will and propounded and that the Will had been found to be a forgery. Held that the question of genuineness of the Will was not *res judicata* for the purpose of the proceedings under the Probate and Administration Act. *Chinnasami v F. Haraborda* 16 M 380. A judgment of a Civil Court deciding a question of adoption is not admissible between third parties as evidence of the truth of the matters decided therein. *Gurun Mahadei v Jagatray* 71 Ind Cas 999, A I R 1913 Lall v Radha Churn 7 W R 338. *Yasalamma v Ana Kola Narayan* M H C R 276.

**Value of judgment in rem in subsequent civil and criminal cases.** *Duchess of Kingston's Case* 20 How St Tr 355, 537 the Duchess of Kingston was indicted and tried in the House of Lords for bigamy in marrying the Earl of Kingston in March, 1769 during the lifetime of her husband the Earl of Kingston. The Duchess pleaded that in a suit for pretitiation of marriage instituted against the Earl of Bristol in the Ecclesiastical Court, namely in the Court of the Bishop of London it had been decreed and declared in February 1769 that she was a spinster, and that the Earl of Bristol had wickedly and maliciously boasted and publicly asserted (though falsely) that they were married and contracted together in matrimony. It was objected that such declaration from the Ecclesiastical Court was not binding on the Crown, and did not estop the Crown from proving that in fact there was a lawful marriage as alleged at the trial. Such decree on the grounds (1) that the crown was not a party to the proceedings in the Ecclesiastical Court and (2) that the decree was obtained by the collusion of the parties to such proceedings. *Sir William Dey Grey* (in dissent) the unanimous opinion of the Judges) and 'A sentence of nullity and a sentence of affirmation of a marriage have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a peerage.' A sentence in a case of pretitiation has been received upon a claim to a peerage as evidence against a marriage and in like manner in personal actions directly founded on a supposed marriage. But in these cases the evidence is not the sentence, or at least the parties against whom the evidence was received are parties to the sentence and had acquiesced in it, or claimed to be parties to it.

were parties and had acquiesced. But although the law stands thus with regard to civil suits, proceedings in matters of crime and especially of felony, fall under a different consideration first because the parties are not the same, for the King in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is not party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, in any manner intervene or appeal, secondly, such doctrines would tend to give the Spiritual Courts which are not permitted to exercise any judicial cognizance in matters of crime an immediate influence in trials for offences and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. But if a direct sentence upon the identical question in a matrimonial cause should be admitted as evidence, yet a case of perjury is of a different nature, it is ranked as a cause of defamation only. The sentence has only a negative and qualified effect viz, 'that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears.' But it has been contended that this opinion of the Judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, it being merely an *obiter dictum* unnecessary for the decision of the points submitted to them. 2 *Smith L C* 676, 677. In answer to the reasons, it is stated that nothing can be more inconvenient or dangerous than a conflict of decisions between different Courts and that, if judgments *in rem* are not regarded as binding upon all Courts alike, the most startling anomalies may occur. *Taylor Et* § 1680. But so far as section 41 of the Evidence Act is concerned, the finding of the Civil Court in such matters is conclusive. *Manjivati v Ramdas* 4 C W N clxxvi. But this section does not operate so as to preclude the starting of criminal proceedings on the matter appearing in the case but which was not in issue in the proceeding relating to Letters of Administration. *Valu Muthu v Servai*, 4 Rang 251-97. Ind Cas 1044=A I R 1926 Rang 202 see also *Oates v King Emperor*, 38 C I J 163.

## 42 Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state

Relevance and effect of judgments, orders or decrees other than those mentioned in section 41

### Illustration

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

**Scope of the section.** This section admits all judgments not as *res judicata*, but as evidence although they may not be between the same parties provided they relate to matters of a public nature relevant to the enquiry. *Per Garth C J in Gayy Lal v Fateh Lal* 6 C 171 (191) T B. So by this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. *Per Mitter J in ibid* at p 174 see also *Collector v Paludhari* 12 A 1 (F B). The reason for admitting such judgment is thus stated by *Pontifex J in Gayy Lal v Fateh Lal* at p 183. "In matters of public right the new party to the second proceeding as one of the public, has been virtually a party to the former proceeding and therefore he is properly excused." So decrees of competent Courts are good evidence in matters of public interest such as the existence of custom in succession in particular communities. Such decisions form an exception to the general rule which excludes *res inter alios actae*. *Ean Baiji v Bat Santol*, 20 B 53. "This section is the sum of Taylor's section 1496 (= § 1683)" *Norton Et* 226, see also *Madhab Chandra v Tannee Beulah*, 7 W R 210. The law on the subject is thus stated

**S 42** by Taylor "The exception just stated is allowed in favour of verdicts upon matters, and other adjudications upon subjects of a public nature (*Mulholland v Allen*, L R 9 I q 471), such as customs (*Reed v Jackson*, 1 F & T 357, *Berry v Banner*, P & R 156), prescriptions, tolls boundaries between parishes, counties or manors (*Biscoe v Lomax*, 8 A & E 193, *Evans v Rees*, 10 A & E 141, 153), rights of feyry (*Pim v Curell*, 6 M & W 234, *Humphill v M Kinn*, 1 Ir L R 13), liabilities to repair roads (*R v St Pancras*, P & R 94), P & R *Hungham*, 1 E & B 501) or sea walls (*R v Leigh* 10 A & E 393) modes (*Croughdon v Blale* 12 M & W 205) and the like. In all cases of this nature as evidence of reputation will be admissible, adjudications,—which for the purpose are regarded as a species of reputation—will all so be received and too, whether the parties in the second suit be those who litigated the first, or be utter strangers. The effect, however of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment, but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive. *Reed v Jackson*, 1 East 357, *Croughdon v Blale*, 12 M & W 205. Even before the enactment of this section such judgments were held admissible in the country. *Doorga v Narendra* 6 W R 232, *Madhab v Toorne*, 7 W R 210 *Tolaram v Mohan* 2 Agra 120, *Venkata v Subba*, 2 M H C 1.

**Origin of the Rule** It has often been said that verdicts of juries, and judgments, decrees, and orders of Courts of competent jurisdiction, are evidence of reputation, and possibly, when juries were summoned *de vicineto*, and were consequently assumed to be acquainted with the subject in controversy this may have been a correct mode of stating the ground on which verdicts were admitted. *Taylor* § 624. Thus in *Reed v Jackson*, 1 East 357, *Laurence J* said "Reputation would have been evidence as to the right of way in this case, a fortiori therefore the finding of twelve men upon their oaths." Now a days there is no possible justification of the admission of such evidence as an exception to the Hearsay Rule. *Wigmore* § 1593. Because "that was when the jury was summoned *de vicineto* and their functions were less limited than at present. Per *Alderson B* in *Pim v Curell* 6 M & W 254. So its allowance upto the early part of the 18th century was merely "a relic of the time when a jury verdict was a conclusion upon their own knowledge." *Taylor Cas Et* 429, *P & R Treat Et* 90 ff, 168 ff. But in the modern practice neither the jury's verdict nor a judge's decree can well be regarded as a vehicle of reputation in any true sense. That its acceptance was anomalous practice came to be perceived in England in the middle of the last century it was half heartedly admitted as a 'sort of reputation'. In *Biscoe v Lomax* 8 A & E 211 (1838) *Luttrell's J* said "It is not reputation but it is as good evidence as reputation." In the same case *Patterson J* said "Now it is certainly difficult to say that a verdict can be received merely as evidence of reputation, for a jury are summoned from the body of the country at large and are not themselves likely to know the matter. Yet where a matter has been before a jury, the verdict is generally given in evidence as a sort of reputation if I may, so term it." Similarly *Coleridge J* said "It is not precisely evidence of reputation." So whatever be the principle on which they are admitted, the rule has been established by too many authorities to be now questioned (*Evans v Rees* 10 A & F 156), that in all cases involving matters of public or general interest wherein reputation is evidence, a verdict or a judgment upon the matter directly in issue though pronounced in a cause litigated between strangers to the parties on the record is also admissible not as tending to prove any specific fact existing at the time but as evidence of the most solemn kind of an adjudication by a competent tribunal upon the state of facts and question of usage at the time. Per *Lord Abinger* in *Pim v Curell*, 6 M & W 266 *Taylor* § 624. No doubt a previous verdict or decree should properly have an evidential value but it is certainly not to be forced into evidence on the ground of reputation and this as an exception to the Hearsay Rule. *Wigmore* § 1593. In *Neil v Duke of Devonshire* 8 A & C 147 which was decided in 1882 such evidence was again received not as evidence of reputation but as a Verbal Act, already explained in notes under section 6 *supra*. In that case *Sellborne L C* said

"such evidence, admissible in cases in which evidence of reputation is received, is not in itself in any proper sense evidence of reputation. It really stands upon a higher and a larger principle, specially in cases, like the present, of prescription. It comes within the category of *res gestae* and of declarations accompanying acts. The effect of this evidence is extremely strong to establish a state of possession and enjoyment of the fisheries' In the same case Lord O'Hagan said 'I think the proceedings were admissible, not as evidence of reputation, which I agree they are not, but of something higher and better than reputation. of the possession in fact at the time of the bills being filed of the several fishery. Evidence of acts, and proceedings with reference to the river generally—the leases, the covenants and reservations the actions, the judgments, the licences, and the successful assertions of right under the patents—was properly admitted.' Lord Blackburn agreed that the Court's decree 'is perhaps not properly evidence of reputation but as strong or stronger than reputation.' In *Rogers v Wood*, 2 B & Ad 256 a decree of Court by certain Judges was excluded when offered as reputation. The Court observed 'Here the persons acting as Judges had no knowledge of the fact except what they derived in the course of that proceeding.' But see *Duke of Newcastle v Braxlow*, 4 B & Ad 279 where Parke J said 'Though they (Justices) are not proved to be residents in the county or hundred they must from the nature and character of their offices alone be presumed to have sufficient acquaintance with the subject to which their declarations relate.' Similarly in *Evans v Rees*, 10 A & E 155 Denman L C J said '(The opinion of an arbitrator as to a boundary is) formed not upon his own knowledge as declarations used by way of reputation commonly are.' But the sounder view appears to be that adjudications on particular cases are analogous to the presentments of particular acts in customary Courts and are to be regarded rather as *res gestae* or acts of ownership than as reputation. This is the view that has found most favour with the Courts (*R v Brightside Bierlow* 13 Q B 933) and it seems to receive some support from a recent case in which it was held that old depositions are not admissible under this head of evidence if they contain testimony only as to particular facts *Mercer v Denne*, (1904) 2 Ch 534, (1905) 2 Ch 538, *Wills Est* 234.

Cases in which judgments were held admissible where they relate to public matters. In the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming the same right *Reed v Jackson*, 1 East 357, see *Petrie v Nuttall*, 11 Ex R 569 *Roscoe Est* 192. So a verdict with regard to a public right of way *Reed v Jackson* 1 East 357. A judgment in favour of a lord of a manor on a *quo warranto* for usurping a franchise is evidence of the right even against copy holders of inheritance *Carnarvon Earl of v Villebois*, 13 M & W 313. In a suit for pre-emption based on custom evidence of decrees passed in favour of such a custom in suits in which it was alleged and denied is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom *Gundyal v Jhandu*, 10 A 585, see also *Lochman Rai v Akbar Khan*, 1 A 449, *Shimblunath v Gayan Chand*, 16 A 379 *Harnath v Mundul* 27 C 379 (391), *Kalian Das v Bhagwanthi*, 6 A 47, *Akbar Khan v Sheonarayana*, 1 A 373 *Sheobaran v Bhairu* 7 A 880. Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant evidence of the existence of the same custom amongst the Jains of another place unless it is shown that the customs are different, and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the person setting up the custom resides *Harnath v Mundul*, 27 C 379. A judgment of a High Court as to the transferability of similar tenure in an adjoining village of the same pergunnah is admissible as evidence of such usage under section 42 of the Act *Dalglisch v Guzuffer* 23 C 427. In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple. Held that judgments in other suits against other persons in which claims under the same right have been decreed in favour of the trustees of the temple were relevant under s 42 of the

**S 43.** Act as relating to matters of a public nature. *Ramasami v Apparu*, 12 M 9. When the question as to the nature of interest of a certain family and a certain shrine was decided by a decree, that decree, though not operating as *res judicata* between the parties in a subsequent suit, is still admissible under this section to show that the disputed villages form part of the shrine. *Sri Ganesh v Keshav Rao*, 15 B 625 (935), see also *Kalulrishna v Secretary of State*, 16 C 110 (183). The decisions as to the rate of rent in previous suits are admissible as evidence of local usage, though the tenants in the cases before them were not parties to them. *Taswara Punga v Jana Chari*, 13 M 361. The fact that a settlement officer is in accordance with village custom has been recorded by a settlement officer is important evidence of custom, but not conclusive proof of it. *Lala v Hira Singh*, 2 A 19. But proof of a custom whereby the zemindar of a village is entitled to one fourth of the purchase money when a house is sold in the village is sold privately is not proof of similar custom in respect of sales in execution of decrees. *Kahan Das v Bhagirthi*, 6 A 47 (F B).

In dealing with the case of a particular family, the evidence given in litigations between members of that family which raise the question of caste and decisions of Courts as regards the caste of a family are relevant. If the judgment or evidence the recital in the judgment of the evidence of the witness is also relevant especially when the original depositions have been destroyed under rules of Court. *Maharaja of Kohapur v S Sundaram*, 18 M 1 = A I R 1925 Mad 49, A I R 1925 Cal 191. Previous judgment is sometimes admissible against a stranger. *Id.* Remarks made incidentally in judgment about another plot which was not the subject of the suit are not admissible. The proper way to prove it is to produce the witness who made it. *Banwarilal v Sheochand*, 8 Ind C 15 795 = A I R 1913 Lah 384. When a question of status is in issue, judgment and order between the parties in mutation cases, succession certificate cases, rent suits, suits for possession etc are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden. *Jumilal v M H B*, A I R 1924 Nag 387. It is well settled that, although a judgment not in issue or a parties may be used in evidence in certain circumstances as a fact in issue or a relevant fact, or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between parties. *Kashinath v Jagat Anand*, 20 C W N 643 = 23 C L J 583 = 35 Ind Cas 298, see also *Ram Narayan v Ram Narain*, 23 C 533 (P C), *Bhutto v Kesho Prosad*, 1 C W N 263 = 24 I A 10, *Tepu v Rajani*, 25 C 52 = 2 C W N 501, *Dinomoni v Brojmoni*, 29 I A 24 = 6 C W N 386, *Malcomson v O Dea*, 10 H L C 593, *Brich v Cormican*, 3 App Cas 641.

The defendants in a civil case for damage were tried and convicted by the Sessions Court at Faridkot of the murder of L and sentenced each to transportation for life, and after the expiry of about three years they were released (in conjunction with various other prisoners) at the time of the Imperial Darbar. The plaintiffs who were the minor sons of L, and L's brother, K, brought the present suit claiming damage. The judgment of the Faridkot Criminal Court was offered as evidence in the civil proceedings for proving that defendants caused the death of L. Held that such judgments were not admissible in evidence. *Bishen Das v Ram Lakhaya*, 106 P R 1915. The morbid interest of a section of the public in the details of a murder trial cannot constitute such trial a matter of a public nature within the meaning of section 42, and the judgment of the Faridkot Court is not therefore relevant as relating to a matter of public nature. *Ibid*.

**43** Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are not relevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of the Act.

Judgments, etc., other than those mentioned in sections 40 to 42, when relevant

## Illustrations

S 43.

(a) A and B separately sue C for a libel which reflects upon each of them. In each case A says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

\* (e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

\* (f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

**Principle.** It is well settled that a judgment *in personam* is not admitted in a suit between strangers or a party and a stranger, except in a question of public or general interest. Though the above rule is well settled, the reasons of the rule are by no means clear. Such judgments when tendered against strangers are sometimes said to be excluded as opinion evidence. *R v Fontaine* (1804) 11 Q. B. D. 1028, sometimes as hearsay (*Step* 1st 14 *What* s 820) though it has been objected to this view that even if the Judge were called as a witness he would not be competent either to pronounce on or to prove his judgment, but more commonly on the ground expressed in the maxim *res inter alios acta* (or *judicata alteri nocere non debet* it being considered unjust that a man should be affected, and till more that he should be bound by proceedings in which he could not make defence (examine or appeal). This however, though a legitimate ground for refusing conclusiveness to such judgments, seems no satisfactory reason for denying them admissibility since it is to be remembered that the objection of *res inter alios acta* will not suffice to exclude other and less solemn acts of strangers if relevant to the issue. *Phip* *Et* 3rd *Ed* 384. So where the instance of judgments, orders or decrees is a fact in issue or a relevant fact under some other provisions of the Act, the judgments, orders or decrees are not excluded.

**Scope of the section.** Section 40 deals with judgments which render the matter *res judicata* between the parties; section 41 deals with judgments which are called by English lawyers as judgments *in rem* and which from their special character are conclusive against all the world, and section 42 deals with judgments which as relating to matters of a public nature are relevant though not conclusive, between strangers to the suit. This section contains the general rule of exclusion, namely that all other judgments are irrelevant. To this rule however there is a highly important limitation. A judgment though inadmissible for proving the truth of what it asserts may be valuable as evidence for some other purpose. Its very existence may be a fact in issue, and then of course evidence of it may be given or it may be a fact relevant within some one of the classes of relevant facts given in the Act and then, again evidence of it can be given [vide ss 8, 11, 13, 54 expl (2)] *Cunningham* *Et* 190. So this section expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under s 40, 41 or 42. So the cases referred to in this section are such as the section itself

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illustrates it, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sues B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This would be one of the many cases alluded to in s 43. *Per Garth C J in Gattu Lal v Fatch Lal*, 6 C 193. Section 43 declares all judgments, orders or decrees, other than those specified in sections 40, 41, 42 to be irrelevant unless the existence of the judgment is itself a fact in issue or is relevant under some other section of the Act. *Per Beaman J in Mahamad v Hasan*, 31 B 143 (152). In *Collector of Gorakhpur v Palakdhari* 12 A 1 (25) F B, *Shaughnessy J* said "I do not think that in taking this view I am doing any violence to the language of s 43 of the Evidence Act, which if I understood it aright, declares that judgments, orders and decrees other than those mentioned in ss 40, 41 and 42 are of themselves irrelevant that is, in the sense that they can have any such effect or operation as mentioned in those recited sections *qua* judgments orders and decrees, but I do not take this to make them absolutely inadmissible, when they are the best evidence of some thing that may be proved *alunde*." So a judgment or decree not *inter partes* is not admissible in evidence under this section unless as a fact in issue or as a relevant fact under other sections of the Evidence Act. *Hilendra v Rameswar* 87 Ind Cas 849=6 P L J 634=4 Pat 510=A 1 R 1925 Pat 625 see also *Kashi Nath v Jagat Kishore* 20 C W N 643=23 C L J 583=35 Ind Cas 298 see also *Shanwar Ganesh v Kesheo* A I R 1930 N 1 (F B), *Shamisunder v Ramhelawan* A I R 1929 Pat 739.

**Existence of judgment etc is a fact in issue**—If the object of the judgment be merely to prove the existence of the judgment its date, or its legal consequences the production of the record, or the proof of an examined copy is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. [*Abinash v Paresh* 9 C W N 402 (410)]. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal although the parties are necessarily not the same in the action as in the indictment (*Legatt v Tollertry* 14 E 4, 302), but it is no evidence whatever, that the defendant was the prosecutor even though his name appears on the back of the bill or of his malice or of want of probable cause (*Parcell v Macnamara* 9 East 361, *Inclendon v Berry* 1 Camp 203 N A, *Aghore v Radhika*, 14 W R 339, *Keramat v Gholam* 9 W R 77), and the defendant notwithstanding the verdict is still at liberty to prove the plaintiff's guilt. *Taylor* § 1667, but see *Jaduban v Sheosaran* 21 A 26. So a judgment against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact that the master or principal has been compelled to pay the amount of damages awarded, but it was not evidence of the fact upon which it was founded, namely the misconduct of the servant or agent. *Green v New River Co* 4 T R 590, *Pichard v Hitchcock* 6 M & Gr 165 per *Cresswell J*, *Tyler v Ulmer*, 12 Mass 166, per *Parley C J*. *Taylor* § 1667. "So a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor but it furnishes no proof whatever of his having been legally liable to pay the amount through the principal's default. *King v Norman*, 4 Com B 884. The same doctrine will apply to other cases where the party has a remedy over as for contribution, or the like. *Pouell v Hayton*, 2 N R 371. *Aip v Bighwan*, 6 Johns 158. *Griffin v Brown* 2 Pick 304. In an action against a surety where the defence was that the plaintiff had received certain moneys from the principal in satisfaction of his damage, it was held that the plaintiff, on traversing this plea might put in evidence a judgment recovered from him by the assignee of the principal for the amount so received as money paid to their use not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally

explaining the transaction *Pichard v Hitchcock*, 6 M & Gr 151' *Taylor* § S. 43  
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"If the object be to discredit a witness, by proving that he has given different testimony on a former trial, the judgment in that cause, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statements *Charges v Sherwin*, 12 Mod 343, *Foster v Shaw*, 7 Serg & R 156" *Taylor* § 1668 In an ejectment, the question being as to the legitimacy of the plaintiff, his mother who was a witness stated on cross examination, that she 'was never before the Magistrate about the child, that she never said the child was born before marriage, that she never affiliated the child' Held that an order of affiliation made by Magistrates, who were dead was admissible for the purpose of contradicting the witness *Watson v Little*, 5 H & N 472=29 L J Ex 270

Irrelevant under some other provisions of this Act Ordinarily a statement of opinion made by the Judge in a previous judgment not *inter partes* is no evidence in a subsequent case *Harnath v Mohan Lal*, A I R 1929 Lah 123=10 L L J 519 Judgments in previous suits as regards the value of the entries in the revenue papers are admissible in evidence *Nageshan v Hanuman Singh*, 7 L R 10 (Rev)

In a suit by plaintiffs for a declaration that the sale of suit land is not binding on them, the land being ancestral land, the judgment in a previous suit by the same plaintiffs but not *inter partes* for a declaration that alienation of part of the land in suit was not binding on the ground of the land being ancestral, can only be treated as admissible for the purpose of showing that on former occasion the right of the alienee to alienate part of the property in suit was called in question on the ground that the property was ancestral The finding of the Court in the previous suit that the property was ancestral is not relevant *Partap v Mothu* 8 Lah L J 492=96 Ind Cas 998=27 P L R 544

A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff's title, disputed in the present suit *Haritha Prasad v Khesho Prasad*, 5 Pat L T (Sup) 1=A I R 1925 Pat 68 Where title of a party is in question a previous judgment not *inter partes* though not *res judicata* is a valuable proof of title and is admissible under s 43 read with s 8 *Abdul Majid v Tukaram*, 101 Ind Cas 774

In assessing the market value of a piece of land the price paid in other transactions relating to land in the neighbourhood is admissible in evidence, as previous decisions in Land Acquisition cases are relevant in a subsequent case where the market value of the land in the same neighbourhood is in issue *Madan Mohan v Secretary of State*, 78 Ind Cas 557

An order of the Board of Revenue is not evidence in a case before the High Court but the latter should not make a decree in disavowance with a decision of the Board without fully considering and giving all weight to the reasons advanced in the making of that decision *Manno Choudhary v Munshi* 3 Pat L J 188=5 Pat L W 97=43 Ind Cas 393

One N, who was a usufructuary mortgagee of the share of one R leased her right to recover profits in that share as well as her own share to the defendant for a number of years R redeemed his share but the defendant's name continued to be recorded as a leasee There was a litigation between the defendant and R and the former was held liable to account for the profits of R's share during the years in dispute He brought a suit against the *lambardar* in the Revenue Court for recovery of profits of the shares of R and N for the years in suit The suit was decreed on the ground that he was a recorded co-sharer The *lambardar* brought the present suit for a declaration that the defendant had no right to recover profits the lease in his favour having come to an end by the redemption of mortgage The defendant pleaded an arrangement between himself and R by which he was allowed to remain in possession during the unexpired portion of the term of the lease He produced the judgment of mortgage suit between himself and R in evidence Held, that the arrangement pleaded by the defendant could be set up in defence and the judgment was admissible under the provisions of s 43, as being relevant to prove it. *Mahomed Ahmed v Masih ulla Khan*, 13 A L J 317=28 Ind Cas 387

S 43

Recited in the judgment in the claim case is not evidence under this section *Satindra v Krishna Kumari*, 36 Ind Cas 882

As a rule judgments, orders or decrees are admissible if they are admissible under the provisions of ss 13, 10, 11, 12 or 43 of the Evidence Act. So far as a judgment in a case under s 9 of the Specific Relief Act is concerned it does not come under s 41 or under s 42 and it is relevant only under s 13 and ss 40 and 43 that is to say as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree, or in order either to found a further claim or determine whether cognisance should or should not be taken of a suit or whether a trial should or should not be held *Chhadel v Syed Ali*, 85 Ind Cas 979 (931)

**Judgment of Criminal Courts in subsequent civil cases** In an action for damages caused to the plaintiff by fire negligently started on his land by the defendant the fact that a Criminal Court had found that the fire was accidental is not evidence and the judgment of the Criminal Court is inadmissible in evidence *Maung Pim v Ma The Ngue* 1925 Rang 143=2 Ring 549, see also *Ali v Sheikh*, 12 W R 477, *Aghore v Radhulha*, 14 W R 339. The judgment of a Magistrate who, disbelieving the genuineness of the signature of the executants of a bond on which a suit had been brought directed the prosecution of the plaintiffs in the case of forgery, is not legally admissible in evidence in a trial for the offence *Gogoi Chunder v Empress*, 6 C 247=7 C L R 74, see also *Raj Kumar v Bama Sundari*, 23 C 610, *Pei Ramayam J*. In *Nitya Aunda Sarma v Kashinath* 5 W R 26 the decision of the Criminal Court was sought to be used as evidence in a civil suit but the Court held that the decision was not conclusive. See also *Ramlal v Tularam* 4 A 97 *Bissonauth v Hara Gobinda*, 5 W R 27 *Doorga Das v Doorga Charan*, 6 W R C R 26, *Oomanauth v Raghunauth*, Marsh 43 *Tatapada v Kalipada*, 28 C W N 587. But in *Raj Kumar v Bama Sundari* 23 C 610 at p 618 *Ghosh J* said "I am not prepared to say that the decision in the civil suit would not be admissible in criminal cases if as I understand it to be the main issue in both the cases is identically the same. See also *Manjanadi Debi v Ram Dass*, 4 C W N 485. In a suit for malicious prosecution the order of the Criminal Court acquitting the plaintiff is admissible in evidence. Although the reasonings in the judgment and the conclusions drawn from them are not binding or conclusive yet the judgment may be looked into for the purpose of seeing what the circumstances were which resulted in the acquittal *Rai Jung Bahadur v Rai Gaudar Sahoy* 1 C W N 537 see also *Jaduban v Sheo Saran* 21 A 26.

The judgment in a criminal case is admissible in evidence to show what order has been made who the parties to the dispute are, and what the land in dispute is and who is entitled to possession *Krishna Nath v Mahomed Hafez* 21 C W N 93, *Dinomoni v Biojo Mohun*, 29 C 187 (P C)=6 C W N 357.

**Judgments, etc are admissible, meaning of** The general principle is that the mere existence of a judgment its date and legal consequences, are conclusively proved, as against all the world by the production of the record, but that it furnishes no proof whatever of collateral facts even though, as between the parties to such judgments themselves, such facts must have been proved. The judgments *in personam* though generally binding upon the parties and privies thereto may be used as against third persons, for the purpose of proving conclusively against them, in the absence of fraud upon them the relationship between the parties and of the extent of the relation, though the judgments cannot be used in favour of such third person *Abinash Chandra v Paresb Nath* 9 C W N 402. Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive but are admissible in evidence under s 13 though the parties in the present suit are different from those in the former suit *Naranji v Depa* 3 B 3 see also *Acanut Ali v Gooloo Das*, 22 W R 365 *Lalshman v Amrit* 24 B 591 *Gopi v Kherod A. I R* 1925 Cal 194. The fact that a judgment is admitted in evidence in order to prove that there was litigation which terminated in a certain way does not make all the recitals in that judgment part of the evidence in the subsequent action *Abdul Latif v Abdul Haq* 23 C W N 62=81 Ind

Cas 667, see also *Tripurana v Rollam* 12 M L J 324 (Γ B)=45 M 332, *Aashinath v Jagat Krishore* 20 C W N 643=23 C L I 783, *Saroda v Uma Kanta*, 50 C 370. Where a judgment *inter partes* contains a recital of the pleadings, it is admissible in evidence, if the recital refers to a point in issue. *Udamanthal v Parameswar* A I R 1915 Mad 996=85 Ind Cas 996=22 L W 460. Statements in the judgment as to the respective claims which the parties put forward are not evidence at all. *Chhadel v Sayad Ali* 85 Ind Cas 979 (931). But where the pleading is not available and the substance of the pleading is narrated in the judgments the judgments furnish evidence of the allegations made by the parties on that occasion. *Kailash v Byou*, 72 Ind Cas 680, see also *Purbatty v Purno*, 9 C 786. *Bhaya v Pande* 3 C L I 521, *Byathamma v Atallu* 15 M 19. *Phama v Kondar* 15 M 378. *Krishnaswami v Rajagopal*, 18 M 73. *Udcomson v O'Dea* 10 H L C 593, *Lyell v Kennedy*, (1889) 14 A C 437. *Nel v Devonshire* 8 A C 135.

#### 44 Any party to a suit or other proceeding may show

Fraud or collusion in obtaining judgment or incompetency of Court, may be proved that my judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion

**Principle** If a judgment be a direct and decisive sentence upon the point so long as it stands, it is to be admitted as conclusive evidence upon the Court and is not to be impeached from within yet like all other acts of the highest judicial authority it is impeachable from without, although it is not permitted to show that the Courts were mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal. *Per Sir William De Grey in The Duchess of Kingston's Case* 2 How St Tr 355, 357. The principle on which this section rests is thus stated by Lord Brougham in *Bandan v Becher*, 3 Cl & F 379. "It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction upon parties legally before it cannot now be questioned in another Court of co ordinate jurisdiction, but if brought into dispute at all should be brought into dispute in the Court where it was originally pronounced. I agree generally to the proposition, but I must add to it, this one qualification, that you may at all times in a Court of competent jurisdiction—competent as to the subject matter of the suit itself—where you appear as an actor, object to a decree made in another Court upon which decree your adversary relies, and you may either as actor or defender object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description or not in a real suit, or if pronounced in a real and substantial suit between parties who were really not in contest with each other. This rule has been embodied in the Indian Evidence Act. *Barlatunissa v Fa-l Huq*, 26 A 262 (283). So under this section the defendant is entitled to show that the decree is obtained by fraud. *Ibid* see also *Hara Krishna v Ramesh*, 62 Ind Cas 962=6 P L J 373.

**Scope of the section** When one of the parties to a suit tenders or has put in evidence a judgment etc., under section 40, 41 or 42, it is open to the other party under this section to avoid its effect on either of two grounds, (a) want of jurisdiction in the Court which delivered the judgment, (b) that the judgment was obtained through fraud or collusion. *Not Li* 218. Section 44 lays down that any party to a suit or other proceedings may show that any judgment, order or decree which is relevant under s 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. *Prayag Kumari v Siva Prosad* 93 Ind Cas 395=A I R 1926 Cal 1=42 C L J 280 (428). This section was construed by *Unclean C J* and *Banerjee J* in the case of *Rajib*

**S 44** *Pandey v Lakham Sindh*, 27 C 11=3 C W N 660 and it was held that a party to a suit can show that a decree obtained by the opposite party against him in another suit was obtained by fraud and it is not necessary for him to bring an independent suit for setting it aside. See also *Ahmedbhoy v Vullubhoy*, 6 B 703 *Manchha Ram v Kalidas*, 19 B 821 *Nistami Dass v Nundo Lal Bose*, 30 C 369=7 C W N 353. When a decree which has been obtained by fraud is sought to be used against a person, he is entitled to show the true nature of the decree, notwithstanding the fact that he has not previously taken steps for cancellation of the decree. But where he is a party to the decree and the materials on the record show that he did subsequently act in accordance with the decree, he cannot be permitted to challenge the decree unless he sets out specifically the circumstances which constituted the alleged fraud on him and on the Court. *Puln v Satya Chavan*, 73 Ind Cas 548. "This section provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The application of this rule it will be observed, is limited only to cases in which a decree is treated as relevant under section 40, 41 or 42 of the Indian Evidence Act. None of these sections has any application to execution proceedings. Section 40 deals with the question of relevancy of a judgment, order or decree as barring a second suit or trial. Section 41 relates to the relevancy of a judgment *in rem* while section 42 deals with the question of relevancy and effect of judgments relating to matters of a public nature. When however, an application is made for execution of a decree, the execution proceeding is a continuation of the suit, it is incumbent upon the Court to execute the decree because it is the duty of the Court to give to the successful party the fruits of the litigation. Consequently the principle which underlies the cases of *Rajib v Lohhan*, 27 C 11 and *Nistami v Nundo*, 26 C 891 has no application to proceedings in execution of decrees." *Bisua Nath v Bhagundin*, 14 C L J 648, *per Mooljee J*. Section 44 is applicable not only where a previous judgment is attacked on the ground of fraud or collusion but also where it is alleged to have been obtained owing to the gross negligence of the guardian of the person disputing it. *Harri Bahanna v Sullari Yeramma*, 74 Ind Cas 218=18 L W 49=45 M L J 324=A I R 1923 Mad 718=33 M L T 46. The principle laid down in section 11 of the Civil Procedure Code is substantially modified by the provisions of s 44 of the Indian Evidence Act and the principle of *res judicata* does not operate in the case of a decree obtained by fraud. *Sri Radha Krishan v Wajid Ali Khan*, 19 O C 334=36 Ind Cas 746 see also *Ismi Kumar v Banamali*, 21 C W N 594. This section lays down not only a rule of law relating to evidence but also a rule of procedure. *Rajib v Lakhan*, 27 C 11=3 C W N 660. Section 44 of the Evidence Act does not purport to enumerate the grounds on which a decree can be attacked by a separate suit. *Shamu Nath v Ramya*, 9 A L J 1=13 Ind Cas 80=31 A 113. A consent decree will, except in the case of fraud and collusion, be binding on all parties thereto so long as it subsists. A party to such a decree cannot escape from its effects merely by the plea that his consent thereto was given by his plander in excess of his authority. The exceptional case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *Balanthia v Mohendra*, 1 C L J 6. To set aside a decree on the ground of fraud it is not sufficient to prove constructive fraud but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance. *Lishen Singh v Wasant Singh*, 92 Ind Cas 317=A I R 1926 Jh 177. Where a party wants to avoid a judgment on the ground of fraud or collusion such fraud or collusion as is contemplated by section 44 of the Evidence Act, must be raised in the defence. *Ambika v Kuli Chandra*, 10 C W N 122 (424). Where a party seeks, under section 44 of the Evidence Act to avoid a judgment on the ground that it was delivered by a Court not competent to deliver it, that incompetency must be patent and not latent—a manifest lack of jurisdiction on the face of the proceedings. *Washo v Gana Kumli*, 3 N L R 185. The competence of the

foreign Court can also be shown under s 44 of the Evidence Act *Sita Devi v Gopal Saran*, 9 Pat L 1 197=111 Ind Cas 762=A I R 1928 Pat 675 S 44

**Not competent** The words "not competent" in this section refer to a Court acting without jurisdiction *Kethilamma v Kelappan*, 12 M 229 (230) "Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, in other words by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision" *Per Moolerjee J in Hriday Nath v Ramchandra*, 24 C W N 723 (F B) at p 732=31 C L J 482, see also *Sukhlal v Tara Chand*, 33 C 68(71)=9 C W N 1046 F B An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction", which has been stated to be 'the power to hear and determine issues of law and fact,' 'the authority by which judicial officers take cognizance of and decide causes,' 'the authority to hear and decide a legal controversy,' 'the power to enquire into the facts, to apply the law to pronounce the judgment and to carry it into execution' *Hriday Nath v Ramchandra*, *ubi supra* see also *Ashutosh v Behary Lal* 35 C 61=11 C W N 1011, *Charagudi v Varadaraja*, 36 C 193 This jurisdiction of the Court may be qualified or restricted by a variety of circumstances Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject matter The power of a tribunal may be exercised within defined territorial limits Its cognizance may be restricted to subject matters of prescribed value It may be competent to deal with controversies of a specified character for instance testamentary or matrimonial causes, acquisition of lands for public purposes record of rights as between landlords and tenants Thus classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject matter is obviously of a fundamental character *Per Moolerjee J in Hriday Nath v Ramchandra* 24 C W N 723 at p 732 A judgment pronounced by a Court without jurisdiction is void *Ibid* When a decree is void and a nullity it is not only the duty of the Court which passed it to ignore it but of every Court to which it is presented *Kunja Mohan v Manundia Chandra*, 27 C W N 542 So where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction *Gora Chand Haddai v Profulla Kumar Roy*, 42 C L J 1 (F B) *Jungli Lal v Laddu Ram* 4 Pat L J 240 (F B), *Imdad Ali v Jagan Lal*, 17 A 478, *Haji Musa v Purnanand*, 15 B 216, *M Subramania v Vaithianathu* 38 M 682, *Roop Narain v Ramayee Singh* 3 C L R 192 *Laxendra v Gopal* 17 C L J 634 One must be careful to distinguish exercise of jurisdiction from existence of jurisdiction for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction and when there is jurisdiction of a person and subject matter the decision of all other questions arising in the case is but an exercise of that jurisdiction Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced for the power to decide necessarily carries with it the power to decide wrongly as well as rightly *Hriday Nath v Ramchandra*, 24 C W N 723=31 C L J 482 In *Halkarjun v Narayan*, 27 I A 46=25 B 337 (347)=5 C W N 10 Lord Hobhouse said "A Court has jurisdiction to decide wrong as well as right If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however wrong cannot be disturbed See also *Ramesh Chandra v Moomraj* 45 C L J 24

The plea of *res judicata* can be satisfactorily met by showing that the judgment, in which the issues pleaded were decided was delivered by a Court not competent to deliver it If the Court was incompetent this would be a complete answer under this section of the Evidence Act *Abdul v Kadir* 37 B 563 (569)=15 Bom L R 672 In *Sardar Mal v Aramajal*, 21 B 205, it

**S 44** is contended that the order of adjudication of the Madras Insolvent Court upon which the vesting order was based was delivered by a Court not competent to deliver it within the meaning of section 44 of the Evidence Act. The objection was based on the contention that the creditor's petition in the Madras Court disclosed no act of insolvency which could legally justify an adjudication under section 9 of the Indian Insolvent Act, Stat 11 & 12 Vict C 21. In delivering the judgment *Strachey J* observed. It appears to me that this argument ignores the distinction between an order which a Court is not competent to pass and an order which even if erroneous in law or in fact, is within the Court's competency. To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the Official Assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court but every Court in which the Official Assignee might sue or be sued and would be inconsistent with section 41 as well as section 44 of the Evidence Act. What, then is the test of whether an order of adjudication in this case was not merely wrong but an order which the Insolvent Court was not competent to make? In *Kethamma v Kalappan*, 12 M 228 it was held that the words not competent in section 44 referred to a Court acting without jurisdiction and that the decree of a Court in a suit which should have been dismissed is barred by section 244 of the Code of Civil Procedure though wrong, could not be treated as passed by a Court not competent to pass it. In article 46 of *Sir James Stephen's Digest* of the law of Evidence, the rule of English law corresponding with section 44 of the Indian Evidence Act is stated to be that whenever a judgment is offered as evidence the party against whom it is so offered may prove that the Court which gave it had no jurisdiction. The 'competency of a Court and its jurisdiction are thus synonymous terms. They do mean in the right of a Court to adjudicate in a given matter. They do not mean, in a case where that right exists the coming to a correct conclusion upon any question of law or fact arising in that matter'. See also *Ex parte Coates*, 5 Ch D 940, *Brilau v Kennard* 1 Br & Bing 432. The competency of a Court does not depend on whether a point which it decides has been raised or argued by party or by counsel. It cannot be said that whenever a decision is wrong in law or violates a rule of procedure the Court must be held incompetent to deliver it. It has never been and could not be held that a Court which erroneously decrees a suit which it should have dismissed as time barred or barred by the rule of *res judicata* acts without jurisdiction and is not competent to deliver its decree. Vile *Woodroffe Et* 2nd Ed p 379, 8th Ed p 413 cited with approval in *Nathu Ram v Kallan Das* 26 A 522 (526)=1 A L J 217=24 A W N 110. The above statement of law is in the main founded on the elaborate judgment of the late Chief Justice Sir Arthur Stacey in the case of *Caston v Caston*, 22 A 270.

Although a Court cannot set aside the proceedings of another Court for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by the proceedings of another Court then in that way the jurisdiction of the Court whose proceedings are pleaded may be enquired into. *Ganesh Patro v Ram Nulher*, 22 W R 361 see also *Golab v Choudhury* 2 C L J 781=9 C W N 956. *Kalka Prasad v Kanhya Lal* 7 N W P 99. *Pearry v Secy of State* 39 C L J 451 (455). *Sukhran v Goudy* 19 W R 281. A decision in a previous execution proceeding which merely lays down what the law is and is found to be erroneous cannot have the force of *res judicata* in a subsequent proceeding for a different relief. *Day Nath v Padmanand Singh* 39 C 818. Section 20 of the Indian Divorce Act No IV of 1869 does not make the provision in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Assuming the provision in section 17 to be applicable to a decree of nullity a decree by the High Court confirming the same before the six months period has expired cannot on that ground be treated as made by a Court not competent to make it, within the meaning of sections 11 and 44 of the Indian

Evidence Act and therefore under section 41 conclusive proof that the marriage was null and void *Edward Caston v L H Caston*, 22 A 271 (F B) S 4

**Fraud, meaning of** "*Trans et jus nun quam co habitabit*," (Fraud and justice never dwell together) says Lord Coke. It vitiates the most solemn proceedings of Courts of Justice says Lord De Grey C J in the *Duchess of Kingston's case* 20 How St Tr 355. It vitiates all judicial acts, ecclesiastical or temporal, *Ibid*, see also *Shadden v Patrick*, 1 Macq 535. But the difficulty is that no definition is given in the Act of the word 'fraud'. This section provides that any party to a suit may show that any judgment was obtained by fraud. It is clear says Martin C J in *Bhilaraj v Balwant*, A I R 1927 Bom 510 = 29 Bom L R 1046, that some limitation must be put upon that section. For instance if party A, and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud. On the other hand if a decree is eventually passed in favour of that party, even on the perjured evidence it cannot be open to the opponent to start a new action on exactly the same evidence on the sole allegation that the previous evidence was wrongfully believed by the Court. If that were so, there would be an end to the doctrine of *res judicata*. There could be no finality in litigation because either party might alternately bring the cross actions with varied results *ad infinitum*. Consequently the authorities show, I think, that if the case merely turns on, in effect a rehearing of the previous suit on substantially the same evidence, then the Court will not hear the second suit. On the other hand it is to my mind clear that in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance the existence of certain evidence has been stoutly denied by one party and the Court has been induced to frame its decree on the basis that that evidence did not exist then, if that evidence is afterwards discovered and it is of such a nature that if it had been before the first Court, the probabilities are that the Court would have arrived at a different conclusion then, it may be when all the circumstances are looked at that in that case the Court would set aside the original decree.

In *Nanda Kumar v Ram Jiban*, 41 C 99 = 19 C L J 457 = 23 Ind Cas 337 = 19 C W N 681 at p 687 *Jenkins C J* said "The jurisdiction to impugn a previous decree for fraud is beyond question it is recognised by section 44 of the Evidence Act and is confirmed by a long line of authority. But it is a jurisdiction to be exercised with care and reserve for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated. Decrees may be (1) by consent, (2) *ex parte* or (3) after contest apparent or real and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on him self a very heavy burden and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. A prior judgment, it has been said, cannot be upset on a mere allegation of fraud or collusion it must be shown how where, and in what way, the fraud was committed." See also *Shadden v Patrick*, 1 Macq 539. "The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." Per Sir John Roll, L J in *Patch v Ward* L R 3 Ch App 203. Although it is not permitted to show that the Court was mistaken, it may be shown that it was misled. Per Lord De Grey in *The Duchess of Kingston's Case*, 20 How St Tr 544. Lord Selborne quoted this dictum as sound law in *Ochtenbun v Papelier*, L R 8 Ch App 695 at p 698. So also in *Hyll v Palmer* (1899) 2 Q B 106 = 68 L J Q B 709 Lord Lindley said at p 110. As a general proposition I think it dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud. So the fraud contemplated under this section must be a fraud practised on the Courts below. *Rajwant Prasad v Mahant Ram*, 17 Bom



S 44 L R 754=37 A 485=42 J A 171 P C So the fraud must not consist in the fact of a fraudulent defence having been set up, it must be fraud in procuring the judgment, such as collusion or the like between the parties, or fraud in the Court itself *Cammell v Seucell*, 4 Jun N S 798. Thus it may be shown that the seal of a Court has been forged *Noel v Mills*, Nor 219. The fraud clearly as it seems to me, must be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. I apprehend the fraud, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity or the insisting upon right which, upon a due investigation of the right might be found to be overstated or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled. *Per Lord Cairns L J in Patch v Ward*, L R 3 Ch 203, see also *Chen v Johnston* 2 Sch & Lef 305.

In *Foulter v Lloyd*, L R 10 Ch D 327 decided on appeal by *James, Baygally and Thesiger L JJ*, the suit was dismissed on the ground that the fraud was not proved, but *James L J* on his own behalf and that of *Thesiger L J* said 'Assuming all the alleged falsehood and fraud to have been substantiated is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action brought out adversely between two litigants *en juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been given to interrogatories or a misleading production of documents, or of a machine or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting and must be on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries falsehoods frauds, when detected, must be punished and punished severely but in their desire to prevent parties litigant from obtaining any benefit from such foul means the Court must not forget the evils which may arise from opening such new sources of litigation amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries falsehoods and fraud.' In the same case *Baygally L J* and

I desire to reserve for myself the opportunity of fully considering the question how having regard to general principles and authority it would be proper to deal with cases if and when any such shall arise in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties which judgment but for such fraud would have been in favour of the other. The observations which were *obiter dicta* were cited by *Petheram G J* in *Mahomed Gola v Mahomed Soliman* 21 C 612. He then continued at p 619 'The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage the decree is not binding upon him and that the decree may be set aside by a Court of Justice in a separate suit and not by an application made in the suit in which the decree was passed to the Court by which it was passed but I am not aware that it has ever been suggested in any decided case and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other party which is of course fraud of the worst kind, that he can obtain a rehearing of the question in dispute in a fresh action by merely changing the form in which he

places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to void the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well." The observations of *Su Comer Petheram* in the above case were mere *obiter dicta*. But the view his Lordship expressed was cited and acted upon in *Abdul Huq v. Abdul Hafez*, 14 C W N 695, *Munshi Mosuful Huq v. Surenthia Nath*, 16 C W N 1002, *Nanda Goomar v. Ramyiban*, 18 C W N 691, *Nahm v. Hari*, 29 C W N 325 *Sarat Kumar v. Mecher*, 29 C W N 11, *Muktamala v. Ramcharan*, 31 C W N 258 *contra*, *Lakshmi Churn v. Niv Ali*, 38 C 936=15 C W N 1010 *Tenkhatappa v. Subba*, 29 M 179.

A Division Bench of the Madras High Court has in *Tenkhatappa v. Subba*, 29 M 179, taken a contrary view and ruled that a suit lies to set aside a judgment on the ground that the defendant had obtained it by fraud in that he had committed deliberate perjury and suppressed evidence. The learned Judges (*Bodham and Moore JJ*) there declare that the law in England has been authoritatively and finally laid down in *Aboucoff v. Oppenheimer*, L R 10 Q B D 295 and *Ladala v. Laues*, L R 25 Q B D 310, and that it is the same in India. "With all deference, be it said, we doubt the completeness and finality, even in England, of these two cases. They are, of course, very high authorities, but in view of them the judgment impeached is a foreign judgment and foreign judgments unquestionably stand on a footing of their own." *Priestman v. Thomas*, 9 P D 210 and *Cole v. Langford*, L R (1898) 2 Q B 36, are the only English cases we know of which at all support the Appellant. *Munshi Mosuful v. Surenthia Nath*, 16 C W N 1002 (1004). In *Baker v. Wordsworth* 67 L J Q B D 301 *Wright and Darling JJ* held that a judgment in an action could not be set aside on a subsequent action brought for that purpose on mere proof that the judgment was obtained by perjury on the part of the plaintiff in the former action.

In *Mamdranath v. Hari Mandal*, 24 C W N 133, *Mr Justice Chatterjee* laid down the following rules, with respect to the question as to what constitutes fraud for which a decree can be set aside: "the first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence. See also *Sarat Kumar v. Mecher Mollah* 29 C W N 11. In *Muktamala v. Ram Chandran* 31 C W N 258, *Mr B B Ghosh J* said: "As all the recent cases which I have already cited have followed the previous decision of *Su Comer Petheram* in the case of *Mohammad Golab v. Mohammad Sulliman* 21 C 612, I do not think that it is at all necessary to refer this question for the decision of a Full Bench. It is also not possible to define the grounds upon which fraud can be found for which a plaintiff may be entitled to bring a suit for setting aside a decree. The only thing that can be definitely laid down is that the mere allegation that a previous decree had been obtained upon perjured evidence is not a ground on which a previous decree can be impeached."

In *Ram Narain Lal v. Tooki Sao*, 5 P L J 29=1 P L J 119=(1920) Pat 93=58 Ind Crs 182 the Court observed: "I do not at all agree with the view that the test is whether the original suit was a false suit. The test, in my view, is whether there was a fraud practised in relation to the proceedings in Court by which the defendant in the original action was prevented from placing his case before the Court. Until this is found the Court, in my judgment has not arrived at the stage when it can investigate the question whether the original suit was a false suit or not." A person not actual party to the fraud may set up fraud as an answer to a decree either of an English or any foreign Court. *Sri Rangammal v. Sandammal* 23 M 216 *Astarini Das v. Vando Lal*, 3 C W N 670 *Cole v. Langford*, (1898) 2 Q B 36 *Pulin v. Satya*, 70 Ind Crs 548.

S 44

**Instances of fraud in Probate Case** Section 44 provides that any judgment, order or decree which is relevant under section 40, 41 or 42 may be shown by any party to a suit or other proceeding to have been obtained by fraud and section 41 includes a final judgment, order or decree of a competent Court in the exercise of probate jurisdiction. But in *Komolothun v Nihuthum*, 4 C 360 *Markby J* states at p 362 that the grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction. These remarks were not necessary for the purposes of his decision as he states that fraud was not alleged in the case. At page 363 he sets out the confusion that would arise if after probate is granted the validity of a Will could be questioned in a civil suit and quotes some apposite remarks in a decision of the Allahabad High Court in *Mayho v Williams*, 2 N W P H 265 (274), see also *Ambica Churn v Kala Chand*, 10 C W N 422. In *Allen v Macpherson*, 1 H L C 191, (decided in 1847 at a time when grants issued from the Ecclesiastical Courts) the House of Lords held by a majority that where a grant of probate had issued from the Prerogative Court, the Court of Chancery had no jurisdiction to decide that a codicil had been obtained by fraud. See also *Melmsk v Milton*, L R 3 Ch D 27. In *In re Henry Hankin v Turner* L R 10 Ch D 372, letters of administration had been granted to the defendant out of the Probate Division as the natural and lawful brother of the half blood of the intestate and the plaintiff sued in the Chancery Division for administration of the estate alleging that the defendant was illegitimate and that he was not next of kin and that as long as the letters of administration remained in force they were exclusive evidence that the defendant was one of the next of kin and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled. The Court says 'If he (the defendant) was not the next of kin the Probate Division has been deceived and the application must be made to that Court to revoke its grant. It can only grant administration to the next of kin and if the party applying is not the next of kin the Court has no power to grant it to him, although so long as the letters remain they are binding upon this and every other Court. I do not think that that is now in issue. I do not say that it is not competent for this Court to try the matter since the Judicature Act but the Probate Division is certainly the proper Division in which to try it. In *Priestman v Thomas*, L R 9 P D 210 at p 214 *Cotton L J* said 'Although the Chancery Division has no jurisdiction to revoke the Probate of the Will it has full jurisdiction to decide that it was a forgery. *Rai Shah v Srimati* 25 C W N 207=62 Ind Cas 448. 'Having regard to the wide terms of section 41 of the Evidence Act, it is not possible to say that it is not open to a Court other than the Court from which a grant has issued in cases of fraud or collusion to deal with the matter and decide whether the grant has been obtained by fraud or collusion. I think however that in such cases, and where it is open to the party alleging fraud to apply to the Court from which the grant issued, that the better course would be to try the suit to enable an application to be made to revoke that grant. It is manifestly inconvenient that a Court which has no jurisdiction to recall or revoke the grant should deal with the matter when it can be dealt with in a Court which is both competent to pronounce on the fraud and if necessary to revoke the grant. *Ibid*

**Fraud—Instances of** Where the plaintiff in an ejectment suit relies on his title as a purchaser in a Court auction it is open to the defendants in possession of property to show that such purchase was procured by fraud and therefore passed no title to the plaintiff. *Gnamiar v Krishna Aiyar* 23 Ind Cas 1. The plaintiff, an executor under a Will applied to the District Court for probate of the Will. The defendant No 2 a relative of the testator filed a caveat contending that the Will was a forgery. An arrangement was then arrived at between the parties under which in consideration of the withdrawal of the opposition by defendant No 2 to the grant of probate the plaintiff agreed to restore the property of the deceased to him (the second defendant) or to pay the equivalent in cash directly the probate had been granted. The probate was accordingly granted to the plaintiff but he failed to carry out the agreement. The defendant No 2 then applied to the District Court for revocation of the

probate, on the ground that in declining to carry out his part of the arrangement the plaintiff had committed a fraud on the one hand upon the Court and on the other on him (the second defendant) The Court rejected the application on the ground that the second defendant on his own showing was a party to a fraud upon the Court and that he had not come to the Court with clean hands The plaintiff must file a suit in the Court of the Subordinate Judge to recover possession of a field belonging to the testator from defendant No 1 who was a tenant of the testator Both the defendants contended that the Will was a forgery and the grant of probate was induced by fraud Held that the second defendant was barred by the decision of the District Court in the revocation matter from raising again the question in the Court of the Subordinate Judge Further held that as regards the first defendant the title of the plaintiff was conclusively proved by the production of the probate in the Subordinate Judge's Court which had no jurisdiction to deal with the question of probate and that it was no valid defence on the part of the first defendant to join in the allegation of the defendant that the Will was a forgery and that the probate had been obtained by fraud and deception *Kishoribhai v Ranchhodin*, 38 B 427 = 16 Bom L R 459 In delivering the judgment the Court made the observations 'As regards the first defendant, he does not raise these questions by his pleading, although he has made a common cause with the second defendant in his defence As regards the second defendant although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation That being so it appears to us that the first defendant has no defence to this suit

The fact that the defendants have been recorded as *patnidars* of all the land in the village implies a decision that they have no *darmal uran* right in respect of any of the lands included in that village The decision operates as a decree of Court under section 11 of Regulation III of 1872 It is open to the plaintiff to avoid the effect of such a decree by the method prescribed in section 25 A or sub section (1) of section 25 of the said Regulation The object of the procedure laid down in section 24 of Regulation III of 1872 is to enable persons interested to bring forward in the Settlement Court, within the prescribed period any objection they may desire to make to any part of such record If the defendants rely upon the record of rights as conclusive under section 25 of Regulation III of 1872 and urge that the entry therein operates as a decree under section 11, they should prove that the requirements of the statute have been fulfilled As soon as this has been accomplished, it becomes open to the plaintiffs to urge under section 44 of the Indian Evidence Act that the entry which operates as a decree was obtained by fraud It is not necessary that the plaintiff should institute a separate suit to set aside the record of rights on the ground of fraud *Mir Moruffor Ali v Kali Prosad*, 19 C L J 29 see also *Nadian Chand v Chander Sihin*, 15 C 765

Section 283 of the Civil Procedure Code (Act XIV of 1882) can only contemplate a suit based upon facts known to the party against whom an order was passed under s 282 within a year from the date of the order If he was aware of the fraudulent nature of the mortgage it was part of the cause of action he would have to allege in such a suit filed within a year, if however he was not aware of the fraud, and became aware of it afterwards he can under s 44 of the Indian Evidence Act, assert the fraudulent nature of the plaintiff's application and the consequent invalidity of the order passed upon it in any proceeding instituted by the plaintiff on the strength of that order *Chumma v Ram Dayal* 16 Bom L R 648

Judgment vitiated by fraud, whether the same should be set aside Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite-party may show the fraud, and thus avoid the judgment *Whart Ev* § 797 Now the question is whether fraud can be collaterally set up by a party to a judgment in any case in which he is either directly or constructively, either by action or by want of vigilance a party to the fraud *Wharton says* "When a party has the opportunity of applying to the Court entering the judgment, to open it, he must do so, and cannot resort to a collateral attack" *Whart Ev* §§ 797, 798 So according to *Burr Jones* also a "domestic judgments

**S 44** cannot be collaterally attacked by extrinsic evidence of fraud or collusion, when rendered by a Court having competent jurisdiction, except by those who are not parties or privies *Burn Jones* § 619 But in construing this section in *Rajab v Choudhury* 3 C. W. N. 660, *Danerjee J* said "I find that section 41 provides that a party to a suit or other proceeding may shew that a judgment, order or decree which is relevant under section 40, that is which would as a judgment *inter partes* operate as *res judicata* or which is relevant under s 41, that is which is evidence as a judgment *in rem* or which is relevant under section 42, that is, which is evidence as a judgment relating to a public matter, and which is proved by the adverse party, was passed by a Court, which had no jurisdiction to pass it or was obtained by fraud or collusion. Or in other words (confining our attention to so much of the section as bears upon the present case) a party to a suit may shew that a judgment or decree which is conclusive as a judgment or decree *inter partes* and which has been proved against him by his adversary in that suit, was obtained by fraud. And when may the party shew that the judgment or decree was obtained by fraud? The context evidently shews that the answer must be in the suit in which the judgment is proved against him by his adversary. The language of the section clearly shows that it is very different from a provision such as the plaintiffs contend it is intended to be merely declaring that a judgment which is conclusive or admissible in evidence against any party may be impeached by such party on the ground of fraud or collusion. If that had been the object of the section the words 'to a suit or other proceeding and which has been proved by the adverse party' would have been wholly unnecessary. To accept the plaintiffs' contention, would be to hold that the portions of the section are matters of elaborate surplusage intended to serve no purpose and needlessly introduced into the section notwithstanding that they are calculated to mislead. The section makes the same provision for impeaching on the ground of fraud judgments *inter partes* and judgments *in rem* or judgments relating to public matters. Now it is not disputed nor can it be disputed (*vide* Taylor on Evidence § 1715) that a stranger to a judgment *in rem* or a judgment relating to a public matter against whom such judgment is used in evidence under section 41 can impeach it on the ground of fraud in the suit in which it is so used. And it is not reasonable to suppose that the same words are used in a different sense when applied to judgments *inter partes*, that is judgments relevant under s 40. Then, again the section makes the same provision for impeaching a judgment on the ground of fraud that it does for avoiding a judgment on the ground of want of jurisdiction. Now there can be no question that in the latter case the objection may be substantiated in the case in which the judgment is used as evidence. It would therefore not be reasonable to hold that the provision in the former case which is expressed in the same words should have a different meaning. See also *Banshi Lal v Dhapo* 21 A 242 = A W N 1902, 58, *Bholanath v Nagendra Bala* A I R 1928 Cal 810.

So it is that the language of section 44 is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist though the judgment stands unimpeached. *Ahmedbhai v Fullerbhai* 6 B 703, *Manchha v Kalidas*, 19 B 826, *Prayag v Sitapasad*, 92 Ind Cas 385, *Ilme Krishna v Lamesh* (1921) Pat 209 = 6 Pat. L J 373, *Sib Suan v Rameshwar*, 60 Ind Cas 640 = 1920 Pat 363 = 2 P L J 40, *Kwararam v Banomali* 29 Ind C 838. The case of *Bansilal v Rampi Lal* 20 A 370 cannot be regarded as an authority against this proposition because in that case section 44 was not even mentioned. In *Queen v Saddlers Company* 10 H L C 404 *Hills J* said:

"A judgment or decree obtained by fraud upon a Court binds not such Court, nor any other, and its nullity upon this ground though it has not been set aside or reversed may be alleged in a collateral proceeding. 'In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the Highest Court of Judicature in the realm in all cases alike it is competent for every Court, whether superior or inferior to treat as nullity any judgment which can be clearly shown to have been obtained by manifest fraud' (*Shedden v Patrick*, 1 Mich H L C 607) *Fabula non judicium*

*non est in scena* Nistaram v Aundo Lal, 26 C 891, per Stanley J. In the case of Bandon v Beeher, 3 Cl & Fin 479, where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland obtained by collusion between the tenant for life, the mortgagor, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been probated the Court of Chancery in Ireland on the tenant in remainder coming into possession granted him relief on a bill filed to redeem. The House of Lords affirmed that decree and held that though the Court of Chancery cannot review or correct a decree of the Court of Exchequer yet where such decree has been obtained collusively and fraudulently a party whose interests are affected by it may raise in the Court of Chancery either as actor or defender a question as to its validity. In this case the remainder man was not a party to the collusive proceedings, the tenant for life repented the estate of mortgagor Nistaram v Aundo Lal *ubi supra*, see also *Haré Krishna v Ramesh Chandra*, 2 Pat L T 528=62 Ind Cas 962=(1921) Pat 209. It is competent for every Court whether superior or inferior to treat as nullity any judgment which can be clearly shown to have been obtained by manifest fraud *Mang Kyau v Annul* 62 Ind Cas 53=13 Bur L T 198 *Manchha ram v Kalidas* 19 B 821, *Krishnabhupati v Ramamurti*, 16 M 198 *Nilmoney v Annunissa* 12 C 156.

S 44

**Compromise decree—Fraud** Where a decree is alleged to have been obtained by fraud and misrepresentation it is competent to a party to show under section 41 of the Evidence Act that this amount was obtained by fraud and misrepresentation, and a separate suit is not necessary to set aside the compromise decree *Bamareddi v Bamareddi*, 30 Ind Cas 639. Where a plaintiff is not a party to the consent decree he can attack it in his suit by virtue of this section and it is not necessary for him to have it set aside *Abdul Hakim v Panchn Dasi*, 32 Ind Cas 849.

**Foreign judgment, induced by fraud** If the fraud or collusion of the parties induces the Divorce Court of a foreign country to believe that it has jurisdiction where, according to the doctrine maintained by English tribunals, it has no jurisdiction, the judgment or sentence is rendered invalid, in England, by such fraud or collusion. But if the fraud or collusion does not go to the root of the foreign Court's jurisdiction but merely by the pretence of facts which do not exist, or the suppression of the facts which do exist induces the foreign Court to grant a divorce which it would not otherwise have granted, then as long as such divorce continues in force in the country where it is granted it cannot be invalidated in England merely on account of such fraud or collusion *Bates v Bates*, (1906) P 209, *Dicey, conflict of Law* 426. But according to section 41 of the Evidence Act the decree of divorce can be assailed by defendant on the grounds set out in that section. So it is clear that the law in India goes further than the English law and definitely allows even a decree *in rem* which is relevant under s 41 to be contested also on the ground of fraud or collusion which does not go to the jurisdiction of the Court *Sita Devi v Gopal Saran*, A I R 1928 Pat 375=9 P L T 375. Foreign judgments *in personam* obtained by the fraud of a party to the suit in foreign Court can not be enforced by him in an action brought in an English Court *Nistaram v Aundo Lal*, 26 C 591 (910), see also *Abouloff v Oppenheimer* L R 10 Q B D 295, *Talda v Laues* L R 25 Q B D 310.

In *Abouloff v Oppenheimer & Co* L R 10 Q B D 295 it was held that even although the question whether the fraud had been perpetrated was investigated in the foreign Court, and it was then decided that the fraud had not been committed the judgment would not be enforced in England. In that case to an action claiming the value of goods and brought upon a foreign judgment whereby the defendants were ordered to return to the plaintiff the goods or to pay to her their value, the defence was that the judgment was obtained by a false representation to the foreign Court by the plaintiff that the goods were not then in her possession and by fraudulent concealment by the plaintiff from the Court that the goods then were in her possession. Lord Coleridge, C J commenting on argument, that upon the pleading in that case it must be taken

**S 44.** that the allegations of fraud were brought before the foreign Court and that the foreign Court came to a conclusion against the defendants and whether this conclusion was right or wrong on the matters of fact the question of the plaintiff's alleged fraud could not be tried in the Courts of England, says "I may take the arguments for the plaintiff also in somewhat different words, namely, that although the Russian Courts at *Siflis* were led to decide against the defendants through believing a false state of facts to exist owing to the fraud of the plaintiff nevertheless the defendants are not now at liberty to say that the judgments against them were procured by that fraud. Certainly this contention seems unreasonable." *Brett L J* in the same case said "I cannot help thinking that the same doctrine which is now asserted with regard to a foreign judgment would be applicable to an action brought on a judgment obtained in an English Court other than the Court in which the action is brought. There may be a difference where it is sought to enforce by the process of a Court a judgment of that very Court because if that judgment has been obtained by improper means the objection does not arise in a new action brought on that judgment but it arises with regard to the process of the Court to enforce a judgment of its own. In a case of that kind it was perhaps formerly necessary to proceed in a Court of Equity in order to get rid of the judgment but I doubt whether it was necessary because, at least in my opinion a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception."

In the case of *Tadala v. Laues* 1 R 25 Q B D 310 in which an action was brought by the plaintiff in the English Court upon a judgment obtained in the Court of Palermo the Italian action was brought upon certain Bills of Exchange and the defence raised in the Italian action was that the Bills were given in respect of gambling transactions by an agent of the defendant without his authority. It was held that the defendant might raise the defence that the judgment was obtained by the fraud of the plaintiff even though the fraud alleged was such that it could not be proved without trying the question adjudicated upon by the foreign Court. *Lindley L J* in the course of judgment says "But we now come to another and a more difficult question, and that is whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind and the joint operation of which gives rise to the difficulty. First of all there is the rule which is perfectly well established and well known that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter using general language, that is a general proposition unconditional and undisputed. Another general proposition which speaking in equally general language is perfectly well settled, is that when you bring an action on a foreign judgment you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits."

**Foreign judgment—how impeached under Indian law.** In India a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) Where it has not been pronounced by a Court of competent jurisdiction,
- (b) Where it has not been given on the merits of the case,
- (c) Where it appears on the face of the proceedings to be founded on the incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable,
- (d) Where the proceedings in which the judgment was obtained are opposed to natural justice,
- (e) Where it has been obtained by fraud,
- (f) Where it sustains a claim founded on a breach of any law in force in British India.—*Rule 13 of the Civil Procedure Code, (VIII of 1908)*

**Collusion.** No definition of the word 'collusion' is given in the Act. Collusion has been defined to be a deceitful agreement or compact between two

or more persons to do some act in order to prejudice a third person or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds—(1) when the facts put forward as the foundation of the judgment of the Court do not exist, (2) when they exist but have been corruptly preconcerted for the express purpose of obtaining the judgment." *Wharton Law Lexicon cited in Field Li 7th Ed p 170*. No doubt a decree can be avoided on the ground of fraud or collusion under this section. But there is a great difference between fraud and collusion. A party who has been made the victim of fraud can obviously avoid a decree on the ground that he has discovered the fraud subsequent to the decree which could not have been made a point of defence in the former litigation. On the other hand the fact of collusion is a matter which must have been well known to both the parties and is a point which could and might have been raised before the decree was passed on the last occasion. A third party can undoubtedly avoid a decree on the ground that it has been obtained collusively but it is clear that a party to a collusive decree can not avoid it on that ground. *Sahib Rai v Bahari Rai A I R (1927) All 494=101 Ind Cas 765; Chenai Appa v Puttappa 11 B 702, Varadarajulu v Sivasulu, 20 M 333, Kandetti v Ankamma 31 M 485=18 M L J 576, Venkataramanna v Vramma, 10 M 17*. That such a decree is binding on a representative is shown by the case of *Rangammal v Venkatarani 18 M 378; Darbari v Mahabul Ali, A I R 1927 All 528=101 Ind Cas 513*. An application for execution of a mortgage decree was made more than three years after the decree was made absolute. After the decree absolute was made and before the said application, the judgment debtor transferred his equity of redemption to A. The mortgagee's judgment debtors though served with notice did not put in appearance nor made any objection to the application. The mortgaged property was put up to sale and purchased by the decree holder. The sale was confirmed and possession given to the purchaser. Shortly after the delivery of possession, an application for setting aside the sale was made by A on the ground that the decree could not be executed as it was satisfied that the execution of the decree was barred and that the execution proceedings were irregular and had been carried on by fraud and collusion between the mortgagee's judgment debtors and the decree holder. Held that it was quite competent to the applicant under the provisions of section 41 of the Evidence Act to raise the questions and adduce evidence to prove the facts stated. *Ramdhani v Topi Bibi 18 C L J 261*.

**Who can plead fraud or collusion.** The language of this section is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist though the judgment stands unreversed. It is also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment. *Anglo Indian Code Vol II p 882, Ahmedbhoj v Vullubhoj, 6 B 703 (715 716)*. Both under the English and the Indian Law a stranger to the judgment against whom such judgment is used as evidence, may impeach it on the ground of fraud in the suit in which it is used. *Asum v Banamali 21 C W N 594, Taylor § 1713*. In England a party to a suit would not be allowed to defeat a judgment by showing that it has procured an imposition upon the Court. *Whately Stokes Anglo Ind Code Vol II p 829*. In India also a party may be precluded from avoiding a decree on the ground of his own fraud but this is not based on any rule of evidence but on the general principles of justice which prohibit a person to plead his own fraud. *Rajib v Lakkan 27 C 11 (22, 23)=3 C W N 660*. A third party can always plead fraud against a judgment. *West v Ship, 1 Ves Sen 244, Ahmedbhoj v Vullubhoj 6 B 703, Prudham v Phillips, 2 Amb 763*.

**Party cannot plead his own collusion or fraud.** Section 44 of the Indian Evidence Act, no doubt allows a judgment or decree, otherwise relevant, to be shown to have been obtained by fraud or collusion. But the wholesome doctrine that a party cannot plead his own collusion to avoid a decree is supported by numerous cases. *Tukaram v Sonaji, 6 N L R 177=8 Ind Cas.*



- S 44. 1179 *Bhauabal v Rajendra* 5 B L R 321 (329)=13 W R 157, *Astarini v Nundo Lal*, 26 C 591, *Chanuappa v Puttlappa* 11B 708 *Varadarajulu v Srimasulu* 20 M 133 (338) *Kondati v Aulamma*, 31 M 485 (487)=4 M L 1 331 A party cannot ask for relief against a fraudulent conveyance made by him and which has been successfully used by him to defraud a creditor *Baidu Behary v Raj Kumar*, 1 C W N 289=27 C 231, *Gobordhan Singh v Ritu Roy* 23 C 962, *Kali Charan v Rasal Lal*, 23 C 962 N "The maxim *inter pari delicto potior est conditio possidentis* is as thoroughly settled as any proposition of law can be. It is a maxim of law established not for the benefit of plaintiffs or defendants, but is founded on the principle of public policy which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back for the Courts will not assist an illegal transaction in any respect." *Bloom Leg Mar 7th Ed* 547 *Vilayat v Misran* 72 Ind Ca 92, see also *Kishorbai v Ranchodia* 38 B 427. Once it is established that the parties are *pari delicto* the Court will not assist an illegal transaction in any respect, that is to say, the person who has asked the Court to do some thing in his favour will fail. This result will follow not on account of any rule of evidence but on general principles of law which forbid a party to plead his own fraud. *Rajib v Lakhau*, 27C 11 (22, 23) see also *Raghupati Chatterjee v Narsingha Hari Das*, 71 Ind Ca 1=36 C L J 491. In *Montifiori v Montifiori* 1 Black W 363 *Lord Mansfield C J* said 'No man shall set up his own inequity, as a defence any more than as a cause of action. So it is a general rule that a Court of Justice will not interpose actively in favour of a party who has been *particeps criminis* in an illegal or fraudulent transaction, and this rule ordinarily applies to per on who are privies in estate. *Barlat v Earl Hug* 26A 272 (282). In *Prudham v Phillips*, 2 Ambler 763 *Willis C J* said 'If both parties collude, it was never known that one of them could vacate it.' "The same rule I think argued *Solicitor Wedderburn* in the *Duchess of Kingston's Case* 20 How St Tr 375, "though I can find no express authority on the point, applies as between the privies of these parties except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. For instance I think that the heir would be allowed to show that a decree was obtained by his ancestor collusively in fraud of the Mortmain Act, indeed the effect of the provision of law is that the heir as regards it is made the antagonist of his executor (ancestor?) and *cessante ratione legis cessat ipsa lex*'. So also where by means of a fraud practised on the Court the owner of considerable property, both moveable and immoveable caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *Wagfnamah* by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *Waqif* to the exclusion of his collateral heirs it was held on suit by such heirs to recover possession of their share by inheritance of the property so dealt with, (1) that a Court which was otherwise competent to entertain the suit had jurisdiction, on the finding that it had been obtained by means of fraud to treat the previous decree as a nullity, and (2) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person who practised such fraud was their predecessor in title. *Barlatunis a v Earl Hug* 26 A 272. The principle that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as fraud contem- plated has not been carried into effect is not applicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme. *Rajab v Hadayat* 19 C W N 1151=22 C L J 197=29 Ind Cas 699.

Suit to set aside judgment obtained by fraud etc. Apart from this section where a judgment has been obtained by fraud the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside. *Colv v Langford* (1895) 2 Q B 30, see also *Flower v Floyd*, 10 Ch D 327. *Priestman v Thomas* (1834) 9 P D 210. It is well settled that a decree cannot be challenged on the ground of its being erroneous by a fresh suit. *Jagannath v Aida Chaul*, 41 C L J 209=86 Ind Ca 1019=29 C W N 771. So where

no question of jurisdiction to pass a decree arises and there is no allegation of fraud but only of irregularity or illegality in the conduct of proceedings, a suit does not lie to declare a decree null and void. The proper remedy in such a case is by way of appeal, review or revision. *Sitarani v Laxman Rao*, 87 Ind Cas 820. It may be taken as settled law that a decree whether it be a consent decree or an *ex parte* decree or a decree passed after contest, is liable to be vacated on account of fraud. *M A Maistry v Abdul Aziz*, 3 Rang 46=101 Ind Cas 134=A I R 1927 Rang 130, *Raman Venou v Madhava*, 98 Ind Cas 176=A I R 1927 Mad 96. To set aside a decree on the ground of fraud it is not sufficient to prove constructive fraud but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance. *Busham Singh v Basana Singh*, 92 Ind Cas 317=A I R 1926 Lah 177, *Ram Narayan v Tohi*, 5 P L J 259. A decree which is fictitious does not require to be set aside for a collusive and fraudulent proceeding in a Court is not a judicial proceeding and is to be treated as availing nothing to the party who sets it up. *Soshi Kumar v Chandu Kumar*, A I R 1923 Cal 204=11 C L J 348—see also *Surenda v Kaligopal*, 22 C W N 367. A decree can be set aside on the ground of fraud if fraud is extraneous to the suit. *Mustan v Mohendranath* 1 Rang 300, *Jaganmuth v Buhmani* 62 Ind Cas 594. The test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in Court by which the defendant in the original suit was prevented from placing his case before the Court. *Damodar v Ram Sarup* 4 Pat L J 162=71 Ind Cas 843=192 P 327. Suppression of evidence does amount to fraud. *Sarje Rao v Narayan Rao*, A I R 192, Bom 379. *Jogesh Chandra v Prosonna Kumar*, 71 Ind Cas 962, *Islandu v C I Sripamboriam*, 74 Ind Cas 278. *Balavishna v Sammath*, 16 L W 132=(1921) M W N 462=(1922) Mad 104=69 Ind Cas 12. The degree of fraud necessary to justify a Court setting aside a decree on the ground of fraud varies according to the method and manner in which the fraudulent decree is obtained: (i) whether the decree is (i) by consent (ii) *ex parte* or (iii) after contest. *Chattu v Radha Krishen*, 1 Pat L J 184=50 Ind Cas 451. Where in an event after his adjudication obtains a decree on a debt concerning the fact of his insolvency and adjudication the decree is liable to be vacated in a subsequent suit for the purpose. *Andreu v Mahomed* 26 Bom L R 695=A I R 1924 Bom 460. False evidence in a suit would not be fraud vitiating a decree unless the effect of that false evidence was to prevent the other party from putting his case before the Court. *Goludas v Odharji*, 25 Bom L R 893. The mere fact that a decree has been obtained by false evidence is not sufficient ground for setting aside a decree. *Kasissar v Aminuddin*, 23 C W N 133=47 Ind Cas 84, *Baidantha v Prahlad* 30 C W N 760, *Manindra v Han Mandal*, 24 C W N 133=54 Ind Cas 626. *Jangol v Tajit*, 1 P J 1 735=60 Ind Cas 124, *Kripa v Nandu* 1 P J 239=36 Ind Cas 615. But a decree can be set aside which has been obtained in a suit which is in its very foundation false which has been obtained directly by false allegations of fact constituting the very cause of action deliberately put forward for the purpose of deceiving the Court and defrauding the defence. *Kucharam v Ghan shandas*, 8 S I R 91.

To sustain an action to set aside a decree on the ground that it was obtained by fraud, the fraud must be extrinsic to the proceedings before the Judge. It must be in the conduct of the suit by keeping the plaintiff out of Court by practising a fraud on him or by not serving a notice upon him or by a false declaration inducing the Court to believe that notice has been served and proceeded with the suit *ex parte* or by some other act by which the defendant is prevented from placing his case before the Court, as fully as he would do but for the act of the plaintiff. The fact that the plaintiff in the previous suit brought a suit false to his knowledge cannot sustain a suit for setting aside the decree obtained by him. *Madda Pedda v Kurnam*, 86 Ind Cas 498=21 L W 300, see also *Abdulla v Kishman*, 86 Ind Cas 537=4 Bur L J 18=3 Rang 65. *Muhammud Yusuf v Nur Jam* 101 Ind Cas 80. A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and was not binding on the plaintiff can be laid in a Court inferior to that which passed the decree, provided

**S 44** the subject matter is otherwise within the jurisdiction of that Court *Pilla Kahladu v Chandrayya* 24 M L J 254=(1918) M W N 562

**Suit to set aside an ex parte decree** A suit to set aside an *ex parte* decree on the ground that the claim was a false one and the decree was obtained by perjured evidence will not lie where the prior suit was a contested one or an *ex parte* decree was passed after service of summons *Nalin v Hari* 29 C W N 32=86 Ind Cas 779=41 C I J 281=A I R 1925 Cal 665, *Bailunta v Prohlad* 30 C W N 560. The mere fact that in *ex parte* decree has been passed does not show that there was no service of summons on the defendant and if anything the presumption is that the Court passing the decree was satisfied that there had been a proper service of summons. It is incumbent on a person seeking to set aside the *ex parte* decree in a subsequent case to prove that it was obtained by fraud *Harnaijan v Vand Keshwar*, 1 Pat L R 127=71 Ind Cas 573=A I R 1923 Pat 406, see also *Mahadeb v Mahabub*, A I R 1923 Cal 569, *The India Provident Co v Govinda* 27 C W N 359=1923 Cal 425. Where a decree is obtained *ex parte* after suppression of summons and on a misrepresentation of the facts to the Court, such a decree can be set aside by a separate suit and it stands on a different footing from a decree obtained by perjury *India Provident Company v Govinda* 65 Ind Cas 319; *Ram v Panda* 3 Pat L T 451, *Jangal v Lalaji*, 6 Pat L J 1. *Pannalal v Para Kaula*, 63 Ind Cas 728 *Maharam v Mahabub* 58 Ind Cas 317 *Krupa Sindhu v Nanda*, 1 P L J 239=(1920) Pat 209=56 Ind Cas 615, *Vagendia v Parbatty* 20 C W N 819 *Gendu v Sadhi* 44 Ind Cas 993.

## OPINIONS OF THIRD PERSON WHEN RELEVANT

**Opinions of third persons when relevant** An inference as to the existence or non-existence of a fact in issue based upon other facts presented directly to the sense of the witness is, in a legal sense 'opinion'. The statement of such inference by the witness is 'opinion evidence', generally speaking it may be said that opinion is the exclusive province of the jury, and that witnesses will not be allowed to invade such province. A witness is to testify to facts so that the jury may form an opinion as to such facts and render their verdict accordingly. *McKee v Le* §§ 129 130. 'The rules, roughly thus intimated,' says *Prof Bradley Thayer*, 'which forbid the giving of opinion evidence and of character evidence are leading and important. As to the former it is traceable easily to the same source as the Hearsay rule. It was for the jury to form opinions and draw inferences and conclusions and not for the witness. He was merely to bring in to the jury or the Judge the raw material of fact, on which their minds were to work. If the witness spoke directly to the very fact in issue, the jury were to consider whether to believe his statement or not, if to other facts of an evidential sort then the jury were to judge of their import and their tendency. The witness was not to say that he thought or believed so and so, it was for the jury to say what they thought and believed. The witness must say that he had seen and heard, he was an *opant et reant*. But then simple as this sounds the distinction could not serve in many nice and critical enquiries. In the loose and easy administration of the law of trials that existed as long as juries went on their own knowledge and needed no witnesses or evidence at all and at a time when even if they had witnesses they were at liberty to disregard them and to follow their own personal information it was possible to get along without nice discriminations so that the law of evidence had hardly any development at all until within the last two centuries and it was but slight before the present century. In a sense, all testimony to matter of fact is opinion evidence, for it is a conclusion formed from phenomena and mental impressions. Yet that is not the way we talk in Courts or in common life. Where shall the line be drawn? When does matter of fact first become matter of opinion? A difficult question, but some things are clear. There are questions which require special training and knowledge to answer them. A jury unless it be one of experts and as such ill adapted perhaps for the general purposes of trial cannot deal with them. On such questions then the ordinary jury may be assisted by skillful witnesses, who give their opinion

There are other questions, not requiring skill or training, but only special opportunities of observation like hand writing and the value of property, on which opinions of ordinary witnesses having such opportunities may be given. How far does this go? There is much apparent perplexity in the cases. In a very great degree it results from differences of practical judgment in applying an admitted rule—the admitted rule being that opinion evidence is not generally receivable, and the difference arising from differing judgments as to what is and is not really to be called opinion evidence in the sense of the rule. It has been said, judicially that there is, in truth, no general rule requiring the rejection of opinions as evidence (*Hardy v Merrill* 56 N H 227, 211). Without acceding quite literally to that, there is ground for saying that in the main, any rule excluding opinion evidence is limited to cases where in the judgment of the Court it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. It is obvious that such a principle must allow a very great range of permissible difference in judgment, and that conclusions of the character ought not usually to be regarded as subject to review by higher Courts. Unluckily the matter is often treated by the Courts with much too heavy a hand, and the quantity of decisions on the subject is most unreasonably swollen. *Thayer Pre Treat* pp 523 525. That opinion of a witness is not evidence was held in the English Courts long ago. In *Carter v Boehm* 3 Burr 1905 1918 Lord Mansfield L C J said "Great stress was held upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion which is not evidence. It is opinion after an event. It is the opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the case."

**Why opinion evidence is excluded.** The old objection to the opinion evidence was a matter of testimonial qualifications, requiring personal observations. In *Wright v Tatham* 5 Cl & F 690 Coleridge J said "I do not indeed, concede though, it is not, perhaps necessary to decide the point that the mere opinion of a witness even on oath is, as such, admissible evidence upon a question of competency. When you can bring the decision of that question, as you sometimes may, to depend upon deductions from scientific premises you may hear those deductions expressed as opinions by scientific men. The necessity of the case justifies the departure from the general rule, but the competency in the main is a question of fact, and the jury are to draw their conclusions from the evidence of facts before them, not from the opinions which others may have formed from facts not before the jury. I admit that, in practice, where the witness to fact is present, it is by no means uncommon to ask directly for his opinion, such a question it would be idle to object to for the objection would only lead to a detailed enquiry into particular facts, which the witness is there ready to go into. Nothing therefore would be gained by it. I am not however, aware that the question has ever, upon argument been decided to be correct in form." *Wigmore* § 1917. So under the old rule the opinion of a witness was rejected for want of testimonial knowledge. The principle of testimonial knowledge requires that a witness must speak as a knower not merely as a guesser. So when the witness speaking (for example) to a sale of goods, declares that he thinks or believes or is persuaded that the sale was not made, such a witness cannot be heard, so far as he means that he did not see the transactions in question but believes so on rumour alone or has otherwise reached by supposition, his conclusion. *Wigmore* § 1917. In this requirement, however there is no new principle no independent 'opinion rule' but merely a recognition of an otherwise established general principle of testimonial qualifications that the witness to be competent at all, must have personal observation. *Ibid*. But, at the same time that this principle is becoming recognized, or shortly after there occurs a general recognition of what seemed at the time as an exception to it—the use of skilled witness. *Wigmore* § 1917. "Though the witnesses can in general speak only as to facts yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other witnesses. Thus a physician who has not seen the particular patient, may

**S 44** after hearing the evidence of others be called to prove on his oath the general effects of a particular disease and its probable consequences in the particular case, for, though not a particular fact it is still general information which the rest of the man and stand in need of to enable them to form an accurate judgment on the subject in dispute" *Peale's Evidence*, 112

**Gradual growth of the opinion rule** We have stated in the previous topic that in the earlier English cases the scope of the opinion rule was confined only to the exclusion of evidence on the ground of want of testimonial qualifications. Third persons were not allowed to draw inference from facts supplied by others and to impute their belief thus derived to the tribunal. In other words the disparagement of opinion had always in mind the testimony of a person who had no facts of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary lay witness took the stand equipped with personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper. It would not occur to any Judge that this witness was doing a wrong thing. In short, it was only 'opinion' as a mere guess and a belief without observation which they rejected. In *Carter v Boehm*, 5 Burr 100, 1918 Lord Mansfield said "Mere opinion is not evidence. But opinion as an inference or conclusion from personally observed data they did not think of disparaging. That it is was the attitude towards the lay observer will appear from the following passages: 'There are also many cases in which witnesses speak from judgment and opinion, without reference to any technical knowledge, such, for instance, as evidence of character and all other testimony amounting to a general conclusion from particular facts.' *W & D Llan's Notes to Pollock* II, 216. "So also as to the value of goods sold it must always rest in opinion only, and the like as to the sanity of a party, and all other matters of proof which from their nature can only be given from the opinion which the witness may form." *Mr Espinasse Law Prices* 411, *Wigmore* § 1917. *Forbes v Caruthers* 3 Yeates 527 (Am.) *Harrison v Rouan* 3 Wash C C 387. So it is clear that when the early English writers and Judges disparaged "mere opinion" they never had in mind the case of the lay witness who having a 'fact knowledge' included in his testimony an opinion or inference based on these data—as in the leading instances (used by those writers and Judges) of handwriting, character, and sanity. But when by careless usage the phrase came to be passed along that 'opinion is not evidence' the distinction just before established for skilled witnesses not having 'fact knowledge' was readily enlarged, and was made to apply to the lay witness who had a 'fact knowledge', and to support the new and broad idea that opinion in general was not evidence. Now if a lay witness having a 'fact knowledge' had put those facts before the jury and then proposed to add his own inference or conclusion or opinion upon those facts as made at the time it is apparent that the same test might be applied to exclude this opinion or inference of him since the facts had already been laid by him before the jury and they were as competent as he to draw an inference. It must be noted too that this extension—logical enough it is true and correct in theory but pernicious (as it has proved) in practice—is a peculiarly American doctrine. It has apparently not taken in England to an important degree. There appear to be no English rulings which indicate that the opinion rule has there been thought to exclude the inferences which a 'fact witness' has made from the data he lays before the jury. Certainly no such broad logical extension of the test to lay witnesses is the familiar possession of the English bar as it is of the American bar. *Wigmore* § 1917.

**Principle underlying the newly grown up "Opinion rule"** It has already been stated that the old objection to the original opinion rule was on the ground of want of testimonial qualifications on the part of the witness while giving his opinion. But no such objection can be raised in the case of a 'fact witness'. His testimonial qualifications can not be questioned and on that ground no objection can be raised. "The true theory, then of the Opinion rule,

in the same way as here to us, is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression, but simply that his testimony, otherwise objectionable, is not needed as superfluous. Thus the principle of exclusion is in no sense one of Testimonial Qualification, but one of Auxiliary Policy. The delay and waste avoided might be in a single instance trifling, but its seriousness and its unhealableness can be appreciated if we suppose that there were no evidential limits whatever of the above nature. The time taken in the trial of an interminable multitude of opinions, the confusion of the main issues by an additional mass of testimonial differences and impeachments, and the tendency for the jury now and then to decide simply according to the preponderance of numbers and of influential names—all these are possibilities in the absence of some limit of the present nature. It simply endeavours to save time and avoid confusing testimony by telling the witness 'The tribunal is on this subject in possession of the same materials of information as yourself, thus as you can add nothing to our materials for judgment, your further testimony is unnecessary and merely encumbers the proceedings.' It is this living principle which is (or ought to be) applied in each instance, nothing more definite than this is the test involved by the principle' *Higmore* § 1917. This principle is thus recommended by Lord Mansfield in *Carter v Boehm*, 3 Barr 1905, 1918. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness.

**Opinion and fact, how to distinguish.** Accurately to distinguish "matter of fact" from "matter of opinion" is not less difficult than to distinguish it from "matter of law." In all supposed statements of fact the witness really testifies to the opinion formed by the judgment upon the presentation of the senses. Statement of opinion is therefore necessarily involved in statement of fact. *What El* § 15. An instance, erroneously supposed to be simply an "opinion" is found in cases where the phenomena being too numerous or intangible to permit a correct or effective individual statement witnesses are permitted to state simply the impression, such phenomena produced in their mind. This apparently is simply another method of stating facts. *Best El 8th Ed* p 473. *Corn v Stuntuan*, 117 Mass 122, 133. So also if we look at the matter psychologically and with a nice regard for the process of the mind every statement resolves itself into a matter of opinion. The conclusions of the mind are all drawn from that which the senses perceive, the only difference being in the degree of removal from the immediate impression of the senses. Every statement is therefore really a statement of an inference, and in this sense all evidence is opinion evidence. Take the case where the question was as to why the plaintiff did not get into a street car and thus avoid the danger of riding upon the running board. He was asked for the reason, and answered that it was so crowded that it was impossible for him to get there before he was hurt. In one sense this may be said to be a statement of opinion—that is the conclusion of the witness's mind upon a state of facts presented to his senses—and in the case in question there was sufficient doubt as to the nature of the statement to cause the objection to be raised, yet the Court held, and quite properly, that legally speaking the statement was a statement of fact and not opinion. *Indianapolis Ct Ry Co v Harestick* 35 Ind App 281=74 N E 34 (*Am*). There are many cases which arise where the question raised is to some particular statement of the witness is a question of words rather than subject. One may state a fact in several ways and sometimes the use of one word will import an opinion where the use of another will accord more strictly with the language of the fact. In one case the witness testified that the defendant "acknowledged that he took the horse at a valuation of 50 £ per head." Under objection on the ground that the statement was an opinion, it was held that it was not. Probably the question would not even have been raised had the witness used instead of the word 'acknowledged' the word "said." *Haunter v Davis* 128 Iowa 216=103 N W 373. A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied

**S 44.** space in the car *Chicago Terminal Transport R Co v O'Donnell*, 114 Ill App 245, *McKelvey's Ex* § 130

Whatever is presented to the senses of a witness and of which he therefore receives direct knowledge he may state provided it is relevant to the issue and not excluded on some other ground. This is strictly a matter of fact. What he has seen or heard or felt, he knows in the sense in which the law requires knowledge on the part of the witness testifying. What he thinks in respect to the existence or non-existence of a fact in issue is matter of opinion, and he cannot state it. It is for him to put before the jury the facts as he has perceived them by his sense, and for the jury to form an opinion concerning the facts in proof of which the evidence is offered. *McKelvey's Ex* § 131. In *Ogden v People*, 134 Ill 599 = 25 N E 755 (Am) A was tried for robbery, and several witnesses testified that on the night of the robbery they recognized him by his voice, though they did not see him. The testimony was objected to as opinion. The Court treats the question as follows. The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion but the statement of a conclusion reached directly and primarily from an operation of the sense of hearing. A witness can learn and know facts by and through the exercise of his perceptive faculties—his five senses—and these facts he may state. But according to *Prof Wigmore* no such distinction is scientifically possible. If the above principle says the learned writer is the true one, it is obvious (leaving history out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between opinion and fact. Further more, an examination of the so-called opinion rule, as applied in its various instances shows that the opinion element is in the very law itself, a merely superficial and casual mark, and not the essential feature. *Wigmore* § 1919.

**Scope of the rule rejecting the opinion of witness.** "The opinions of any person other than the Judge by whom the fact is to be decided as to the existence of facts in issue or relevant facts, are as a rule irrelevant to the decision of the cases to which they relate for the most obvious reasons. To show that such and such a person thought that a crime had been committed or a contract made would either be to show nothing at all or would invest the person whose opinion was proved with the character of a Judge. In some few cases, the reasons for which are self evident, it is otherwise. *Steph Introduction* p 167. In this connection *Mr Justice Markby* says "The opinion of a competent person is always relevant and would be admissible under ss 7 and 11. But as in the case of hearing there is an unexpressed rule forbidding its admission the rule may be stated as follows. (1) No one called as a witness is allowed to express an opinion that a fact which is being enquired into exists, he can only give an account of his own sensations with regard to it. (2) There is not the least doubt that this rule though it nowhere appears in the Act exists in India and ss 45 50 are exceptions to it. *Markby* p 40. If his lordship meant that a third person is not allowed to express an opinion that a fact which is being enquired into exists (save and except in cases mentioned in 45 50) he is right in his statement of law. But if his lordship meant that a fact-witness is debarred from stating his opinion in any case when on the stand his statement of law is evidently erroneous. In this connection the observation of *Foster C J* in *Hardy v Merril* 56 N H 241 should be borne in mind. All evidence is opinion merely unless you choose to call it fact and knowledge as discovered by and manifested to the observation of the witness. And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence for referring to any exceptions (whether classified or isolated and arbitrary) to any supposed general rule according to the language of some books and the custom of some Judges. There is in truth no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist which is lost to sight in an enveloping mass of arbitrary exceptions. *Wigmore* § 1919. The Hearsay rule the Character rule and the Opinion rule are the product of jury system. All are founded on a peculiar cautiousness in English Law, and all have been developed with an equally peculiar rigidity.

and stolid disregard of practical consequences. All three are complex and far reaching in application as well as voluminous in detailed development. But a radically different future may be predicted to them. The Hearsay rule and the Character rule will always remain in our law, in a more or less relaxed form, while the Opinion rule will in substance disappear. An important difference between them is that the first two are the solid growth of experience, while the last rule, in its American development, is merely the logically technical development of a mis-understood term. The opinion rule day by day exhibits its unpractical subtlety and its useless requirement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispense with it. *Wigmore* § 1929

Proper scope of opinion rule debarring a "Fact witness" from stating his opinion. The opinion of a witness on the stand derived from facts observed by him is an inference from observed and communicable data. The objection to such an opinion evidence rests on consideration of policy as to the superfluity of the testimony. This evidence is attempted to be excluded not for want of testimonial qualifications on the part of the witness but on the principle of Auxiliary policy as *Prof. Wigmore* termed it. Two great disadvantages which the principle of Auxiliary Policy always guards against are, namely (1) confusion of issues and (2) undue prejudice. (a) If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal—the jurors—by diverting their attention from the real issue and fixing it upon a trivial or minor matter or by making the controversy so intricate that the disentanglement of it becomes difficult the evidence tends to the suppression of the truth and not to its discovery, and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable. (b) So also if certain evidential material having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose. *Wigmore* §§ 1564, 1913. So in cases where opinion evidence does not violate these two salutary principles or where it is so connected with the main issue that its consideration is inevitable or its reception is indispensable it should be received. The opinion rule is a rule based on the thought," says *Dr. Greenleaf* "that all the data for drawing an inference are before the jury, or can be placed before them, and it is superfluous to add by way of testimony, the inference which they can equally well draw for themselves. For example if a witness, A, testifying to the facts of a street accident in which the defendant's horse is said to have become unmanageable and run over the plaintiff has detailed the relative situation of the parties, the behaviour of the horse, the efforts of the defendant to check him and all other circumstances of the event and is then asked whether the defendant could have stopped the horse before it reached the plaintiff, or whether the plaintiff could have avoided it in season it would be natural to object that the data for his inference were fully before the jury, and that they were equally in a position with the witness to draw an inference from them. The witness's opinion is excluded, not because inferences as such are objectionable—for a witness's knowledge and all knowledge is made up of inference—but because the inference under the circumstances is superfluous and because if one person could be summoned and inquired of in this way then the opinion of a score could equally be led, all of them superfluous and calculated to encumber the trial, without adding anything to the essential data before the jury." *Greenleaf* § 441(b). But in certain cases the opinion of a witness may become not only helpful but also necessary. In the application of the rule, its principle should not be lost sight of and no arbitrary restrictions should be put forth. This consideration supplies a living test for the solution of the particular instances. Thus in *Cornell v. Green* 10 S. & R. 16 *Gibson J* said "It is good general rule that a witness is not to give his impressions, but to state the facts from which he received them and thus leave to the jury to draw their own conclusion. But I take it that wherever the facts from which a witness received an impression are too



**S 44.** evanescent in their nature to be recollected or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence. So in every case opinion evidence of non experts is admissible where the witness cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them equally well to draw the inference. *Correll v Green* 10 S & R 16, *Buffum v R Co* 4 R I 223. *Green v Li* § 411(b). It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the tribunal to form a conclusion without the opinion of the witness. Indeed the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself. *Lahn v Ottumwa* 60 Iowa 429 = 15 N W 207. From the many illustrations given below it will appear that from the necessity of the case the opinions of ordinary witnesses must often be received. The ground upon which opinions are admitted in such cases is that from the very nature of the subject in issue it cannot be stated or described in such language as will enable persons not eye witnesses to form one accurate judgment in regard to it. *Burr Jones* § 360. The opinions of non experts are admissible therefore provided they state, so far as practicable the facts on which the opinions are based on questions of identity as applied to persons thing, animal or hand writing, and of the size colour and weight of objects, of time and distances of the mental state or condition of another of insanity and intoxication, of the infection of one for the other of the physical condition of another as to the health or sickness (in which latter case however, the opinion of a non expert will not be heard upon the particular disease or the cause thereof) of value, of the soundness of animals and of all subjects where it is not practicable nor possible to put the tribunal in possession of all the primary facts upon which the opinions of the witnesses are grounded. *Burr Jones* § 360. Similarly a witness can testify as to whether a person appeared to be in love or seemed hostile friendly or the like or felt sad, or appeared intoxicated. They can testify as to who 'controlled' and or that a spot was flooded or that a person appeared rational. He can also depose as to a person's age or that a certain person looks excited. So also he can testify that certain things were done in a pleasant manner or that a wound was inflamed'. A witness cannot testify as to 'influence in community'. He may state that foot prints corresponded. *Busby v State* 77 Ala 66. *Best Li* p 474. He may also depose that he recognised a walk. *Beale v Percy*, 72 Ala 323. Opinion of a witness is admitted in the above case because a witness is not in a position to place before the tribunal all the facts and symptoms from which he had formed the opinion that a person was angry drunk sick in love or insane this would be to abandon himself to a hopeless attempt at mimicry and undignified descriptions and imitations is ludicrous as they would be vain and unprofitable. So in matters more within the common observation and experience of men non experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded state their opinion from such fact, where such opinions involve conclusions material to the subject of inquiry. In such cases the witnesses are required so far as may be to state the primary facts which support their opinions. Where it is practicable to place palpably before the tribunal the facts supporting their opinions the witnesses should be restricted in their testimony to such facts and the tribunal left to form its opinion from these facts unaided by the mere opinions of the witnesses. *Burr Jones* § 360.

**Identity testimony** Witnesses are allowed to testify when they can speak with reasonable certainty as to the identity of persons or things when if they were merely allowed to specify the details and facts on which their conclusion depended their testimony would be for no value. Hence the statements of witnesses as to identity are not necessarily rejected although they are unable to describe the features of the person in question or his clothing or other particulars in which the conclusion depends. *Burr Jones* § 361. Personal identity is a matter of opinion or belief founded on facts which may be and frequently are inexplicable and incommunicable to a stranger and therefore as to such fact, opinion is competent evidence. *Lauson Expert and Opinion* Ec 324. For

example the identification may be based upon the voice alone, and it would be obviously impossible for a witness to describe the tones of voice in such a manner that from the description alone the jury could arrive at any satisfactory conclusion. The testimony of the chemist who has analysed blood and that of the observer who has merely recognized it belong to the same legal grade of evidence and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal. It must not, however be lost sight of, that such an opinion as to identification of another to be admissible, must be based upon knowledge of the person identified and be the result of the witness's recollection of the person, and the facts connected with his seeing or hearing him. An opinion as to the identity of a person, based solely upon the statement of another, is not admissible to prove identity. *People v Gray*, 148 Cal 507=83 Pac 707. A person may be identified by photographs. *Frith v Frith* (1896) P 74, *Brooke v Brooke* 60 Md 529 533. *Marion v State*, 20 Neb 240, *Higmore* § 660. *vide* notes under s 9 at p 144. The same rule can well be applied in case of identification of things. *Fry v Guthercole* 13 Jur 542.

**Values.** Value may be proved by the opinion of any witness possessing knowledge on the subject. *Lawson's Expert & Opinion* Lr 463. To prove value, opinion evidence is resorted to as a general rule from necessity, not only where the subject of such testimony is a matter of common knowledge but also where it is of a kind requiring special skill to explain or appraise it. There are many things whose value any one may testify to it being a matter of common knowledge, and not one requiring special and peculiar study, observation or skill. Thus, every one may be presumed to have a somewhat correct idea of value of property which is in almost universal use. Thus, the question is as to the value of a cow or an article in common use in the household. *Ibid* p 466. In *Cooper v State*, 53 Miss 398, the question was as to the value of a gun and it was held that the opinion of an ordinary witness was competent. In the nature of things," said the Court, "the value of this sort of property in such common use can be estimated by almost every man in the community. It is not like painting, or precious stones, of which experts alone can form an intelligent judgment, but is rather like that class of merchandise and commodities of the value of which most persons have knowledge. So evidence as regards value can be well received from an ordinary witness where it does not require a knowledge of any particular science, art or skill to enable one to testify. *Chamness v Chamness* 53 Ind 301 (Am). "It is not necessary, in order to qualify one to give an opinion as to value that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify. *Hells J in Whitney v Thatcher*, 117 Mass 526. Therefore though as a general thing, a witness not an expert cannot be said to be qualified to express an opinion as to the value of a thing, unless he has seen it or has some personal knowledge of its value still there is no rule of law and there can be none defining how much a witness shall know of property before he can be permitted to give an opinion of its value. He must have some acquaintance with it, sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate. *Bedell v Long Island R Co*, 49 N Y 367, *Lawson's Exp & Op* Lr 467.

The market value of land is not a question of science and skill upon which only an expert can give an opinion. Persons living in the neighbourhood may be presumed to have a sufficient knowledge of the market value of property, from the location and character of the land in question. *Pennsylvania, etc R Co v Bunnell* 81 Pa St 426. The best and only legitimate evidence of the value of the land at the time of the sale would be the opinion of witnesses who had personal knowledge of the land and from their own observation had become acquainted with its value. *Crouse v Holman*, 19 Ind 30 (Am). *Lawson's Exp & Op* Lr 469. As has been well said "to describe to a jury a piece of ground however minutely, with its supposed adaptations to use, advantages and disadvan-

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tages and demand of them, upon this information alone, a verdict as to its value would merely be farcical, and thus indeed is all that can be done to enable them to arrive at a conclusion as to its value, unless the witnesses are allowed to state their judgment or opinion together with the facts upon which such opinion is founded *Illinois etc Ry Co v Von Horn* 18 Ill 257, *Burr Jones* § 363. So it is clear that the valuation of land must be arrived at by the tribunal by taking the opinion of a witness and that that witness need not be an expert. As regards the qualification of the witness, it is of course a question for the Court *Stuwell etc Alfry Co v Phelps*, 130 U S 520 (Am), *Alfonso v United States*, 2 Story, 421 (Am) *Lawson's Exp & Op* pp 463 501, *Wigmore* §§ 1910 1911 *Narain Chandra v Cohen* 10 C 56, but see *Duaria v Ladda*, 4 O C 247. As to how valuation is to be made under the Municipal and Land Acquisition Act vide *Manunda v Secretary of State* 41 C 967, *Harish v Secretary of State*, 11 C W N 875 *Henric v Secretary of State*, 13 C W N 1058, *Secretary of State v Shanmuganaya*, 16 M 369, *Government of Bombay v Meruani* 10 Bom L R 920 *Heysham v Bholanathi*, 11 B L R 236, *Secretary of State v Belchambers* 33 C 408, *Tulsi v Secretary of State*, 14 C W N 1xxx, *Ram Sahay Sha v Secretary of State*, 8 C W N 671, *In Fasal Salebhai*, 10 Bom L R 997, *Kailash v Secretary*, 17 C L J 34.

**Sanity** The reason for admission of non expert opinion evidence as regards sanity or otherwise is thus stated by *Doe J* in *Broadman v Woodman*, 47 N H 144. 'From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it. The opinion of an unprofessional witness is competent not because he can give no description of the appearances which indicate sanity or insanity but because ordinarily he cannot give an adequate description of them. 'The sanity or insanity of an individual may be a matter notorious and without doubt in a neighbourhood and yet few, if any of the neighbours may be able to lay before the jury distinct facts that would enable them to pronounce a decision thereon with reasonable assurance of its truth'. *Per Gaston J* in *Clary v Clary*, 2 Ind 80 (Am), *Wigmore* § 1934. 'To ask a witness on such a trial whether Miss B appeared peculiarly or strangely was substantially to ask whether in the witness's opinion she was insane'. *Per Doe J* in *Broadman v Woodman* *supra*. But the opinion of non professional witnesses are not admissible in such cases, unless such opinions are based upon their own knowledge and observation of the person's appearance. *Burr Jones* § 364. Opinions of witnesses from observations are admissible in evidence when from the nature of the subject under investigation, no evidence can be obtained. *Ibid* § 366. But it is a well settled rule that non experts can not give their opinions as to the existence, nature and extent of disease in any one. *Lush v Mc Daniel & Ired* L 455 (Am). While a non expert witness is deemed capable of judging the general question whether a person is sick or well, he is not competent to go further and give an opinion upon the nature of a disease or the extent of the ravages it has made upon the system of a patient'. *Smith v Smith* 117 N C 326. The law from the early days, however has permitted the subscribing witnesses to a Will to be called upon for their opinion as to sanity or insanity of the testator. *Kaufman v Caughman* 26 S I R 16 (S C). *Lawson Exp & Op* 2nd Ed 532, *Wigmore* § 1936. The theory that the law had provided this preappointed testimony for the express purpose of securing witnesses to the testator's capacity as well as to his signature, as well as the unquestioned practice prevailed over any theory that the Judges might have as to the bearing of the opinion rule. *Wigmore* § 1936. But opinion as to sanity and opinion as to general testamentary or criminal capacity are entirely distinct. The latter sort of opinion is inadmissible (when it is) because a question of law may be involved, and witnesses conclusions are not needed on such points. *Wigmore* § 1937.

**Opinion from necessity** The opinions of ordinary witnesses derived from observation are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained or the facts can not otherwise be presented to the tribunal e.g. questions relating to time, quantity, number, dimensions, height, speed, distance or the like. *Lawson Exp & Op*

*Li 505* 'The indications themselves ought to be proved, and it is quite true that the jury are authorized to draw their own deductions from them, but no witnesses can fully prevent the appearances as they were before his eyes, and to take the testimony of what he saw without his opinion would seldom prove fully satisfactory, and would often be misleading. Indeed, in many cases it is difficult to separate a description of the indications from an opinion upon them, nor is a witness always expected to do so. If a man were to come upon the track of a recent rain or snow storm he would hardly be stopped in giving an account of it as a witness, if he were to say, among other things, that the storm appeared to have come from a particular direction because such a storm, as every one knows, must usually for a time leave behind it some very conclusive indications of the direction it had taken. Of course in any such case, it should appear that the witness had some basis of observation on which to justify his opinion, but when he has stated the particular facts his opinion may properly be called for. (*Cooley v Underwood & Waldren*, 33 Mich 232) The general rule certainly is that witnesses are to testify to facts, and not to give their individual opinions. This rule, however, has its exceptions some of which are as familiar and as well settled as the rule itself. When all the pertinent facts can be sufficiently detailed and described and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But cases occur where the affirmative of these propositions cannot be assumed. The facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself and it often happens that the trier are not qualified, from experience in the ordinary affairs of life duly to appreciate all the material facts when proved. Under these circumstances the opinions of witnesses must, of necessity be received'. *Per Royce J in Clifford v Richardson*, 18 Vt 626. So expert evidence by way of opinion of business is not admissible on the question as to whether a mark, or a combination of marks, resembles that of other goods and is likely to deceive purchasers. *Macdonald v Holland*, 10 S L R 175=41 Ind Cas 539, *Sundishi Mills v Juggi Lal*, 24 A L J 975.

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**45** When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting \* [or finger impression], the opinion upon that point of persons specially skilled in such foreign law, science or art, † [or in questions as to identity of handwriting] \* [or finger impressions] is relevant facts. Such persons are called experts.

#### Illustrations

- (a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.
- (b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law are relevant.

\* The words "or finger impressions" in both places where they occur in s 45, were added by the Indian Evidence Act, 1899 (5 of 1899). For discussion in Council as to whether 'finger impressions' include 'thumb impressions' see Gazette of India, 1898, Pt VI p 24.

† These words in s 45 were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 4.

**S 45.** (c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of expert on the question whether the two documents were written by the same person or by different persons, are relevant.

**Origin of the rule** The original character of the jury was that of witnesses to the facts, which they were called upon to decide from their own knowledge. They were expected to draw their conclusions and give their opinion as to the facts in issue. As has been seen, the development of the jury system eliminated from it that feature which required the jurymen to be persons who had original knowledge of the facts, and, in the final outcome, withdrew from their consideration any facts of which they had original knowledge, confining them to such facts only as should be presented to them at the trial. This left to the jury simply the duty of drawing conclusions from facts presented. In many cases it was impossible to present to the minds of the jury, who were supposed to have no previous knowledge, the facts in such detail as to furnish grounds for intelligent opinion. Sometimes this was due to the facts being so numerous, uncertain, or incapable of description, as to be difficult to present. At other times it happened that the matters about which it was necessary for the jury to form an opinion were of such a technical or scientific nature that, even were the facts presented to the jury, they would be incapable of forming an intelligent opinion. *Fowler v Chadd*, (1782) 3 Doug 157, was a case in which an engineer was called to show the effect of an embankment upon the filling up of a harbour. *Lord Mansfield* says "*Mr Smeaton* (the witness) understands the construction of harbours, the cause of their construction and how remedied. In matters of science no other witness can be called." *Thornton v Assurance Co* (1790) Peak 37, *Beckwith v Sydebotham*, (1807) 1 Camp 116. In such a case often juries had to be assisted by skilled persons. The furnishing of such assistance to the Court was a very ancient thing. It is probable that for a good while after witnesses were regularly allowed before the jury, experts were thought of in the old way, as being helpers of the Court, and the Court instructed the jury upon the points on which such aid was furnished. But at last the modern conception came in, which regards the experts as testifying like other witnesses directly to the jury. *Thayer Cas Ev* (2nd Ed) p 672. So the final development of the practice as to the admission of opinion evidence was that in the class of cases mentioned it was allowed as an aid to the jury in making up their minds upon matters about which without it they might with difficulty come to an intelligent understanding. *McKelvey's Ev* § 134.

**Principle** An expert is a person having special skill in a particular subject—will by hypothesis usually be better able than the jury to draw inferences on such matters, so it occurs in practice that experts usually are able to be helpful with their opinions and are therefore usually—but not necessarily—allowed to state them. Thus, in practice opinions are receivable, from persons having special skill (whether the data in question have been personally observed by them or are stated to them), whenever that special skill enables them better than the jury, to draw inferences on the subject. *Greenl Et* § 441(b).

**When Opinion evidence of expert is admissible** The principle underlying this section is clear enough, but in its application it often leads to what seem to be inconsistent results. All that can be said is that in each case the Court must decide the question on a careful consideration of the particular circumstances under which it arises, and if, in the judgment of the Court, the jury would be materially helped by the admission of the evidence, it is to be received. This does not mean that the jury are to receive opinion evidence merely because a witness can be produced who is better educated, has a wider range of knowledge and more acute reasoning powers, and who might therefore express opinions with more accuracy than the jurymen themselves. It is the nature of the subject matter under examination rather than the particular facts put before the jury, which must be looked to. The particular facts may be clear and undisputed, and yet the jury be utterly unable to draw any intelligent conclusion from them without the aid of outside opinion. Issues in respect to a disease, its causes and effects, which frequently arise in the cases, present

instances of this sort. A skilled physician, qualified by education and experience, can arrive at an opinion where men in the ordinary walks of life would be utterly at a loss. Opinion in such cases is, by the nature of the subject made not only proper but necessary. In such a case there is no difficulty. It is in those cases which are nearer the line of practical everyday matter that the difficulties arise. When a witness, for example, is put before the jury to give his opinion as to whether a certain time of year was a proper time to set fire to fallow lands, whether a stable is an unsafe stable for horses, whether a fight is a 'prize fight' or whether the keeping of cows in connection with a hotel is unprofitable, the Court is presented with the question whether, because some men know more about the matters than others and more, it may appear that the jury is likely to know even after all the testimony is in, and their opinions may be submitted to aid the jury in arriving at a conclusion. All that need be said is that it rests in a sound discretion of the Court as to whether the subject is one which permits of opinion testimony being given. *McKelvey's Et* § 134. In *Ferguson v Hubbell* 97 N Y 507, 513-49 Am Rep 544, the rule in regard to the admission of expert testimony is thus well stated by *Earl J*: "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of enquiry, and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of the enquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions, and do justice between the parties. When the facts can be placed before a jury, and they are of such a nature that jurors, generally are just as competent to form opinions in reference to them and draw inference from them as witnesses, then there is no occasion to resort to expert or opinion evidence." "The opinions of experts are in general, admissible whenever the subject is one a knowledge of which can only be acquired by special training or experience. When, however it is one upon which the jury are as competent to form an opinion as the witness or when the Court is assisted by assessors, (*The Kestrel* 1881, 6 P D 182, *The Assyrian* (1890) 63 L T 91 C A), such evidence will be rejected. Under the first head are included matters of science, art, and trade the genuineness of handwriting and foreign law." *Halsbury* Vol XIII, p 480.

**Expert.** An expert witness is one who has devoted time and study to a special branch of learning and thus is especially skilled on the points on which he is asked to state his opinion. His evidence on such points is admissible to enable the tribunal to come to a satisfactory conclusion. *Pouell Et* 41. In *Ardesco Oil Co v Gilson*, 63 Pa St 146, the Court defined the term "expert" as follows: "An expert as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked." Experts, in the strict sense of the word are "persons instructed by experience." *Bouvier's Law Diet*. "An expert is from derivation of the word one instructed by experience, and to become one requires a course of previous habit or practice, or of study so as to be familiar with the subject." *Nelson v Sun Mutual Ins Co* 71 N Y 453. These are "men who have made the subject matter of enquiry the object of their particular attention or study." *Per Fowler J in Page v Parker* 40 N H 59. But more generally speaking the term includes all "men of science" as it was used by *Lord Mansfield* in *Folkes v Chadd*, 3 Doug 157, or "persons professionally acquainted with the science or practice." *Strickland on Evidence* p 48, or "conversant with the subject matter on questions of science, skill trade, and others of the like kind." *Best Principles of Evidence* § 346. The rule on the subject is stated by *Mr Smith* in his note to *Carier v Boehm*, 1 Sm L C 286 "on the one hand," he observes, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words when it so far partakes of the nature

**S 45** of science, is to require a course of previous habit, or study, in order to the attainment of a knowledge of it. See *Toller v Chadd* 3 Doug. 157, *R v Searle*, 2 M & W 75 *Thornton v R I Insur Co* Peake 2, *Chauwand v Ingerstein* Peake 11. While on the other hand it does not seem to be contended that the opinion of the witness can be received when the enquiry is into a subject matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it. It has been held unnecessary that the witness should be engaged in the practice of his profession or science, it being sufficient that he has studied it. Thus, the fact that the witness though he had studied medicine was not then a practising physician, was held to go merely to his credit. *H v Shierlocke* (1891) 2 Q B 766. *Tullis v Kidd* 12 Ala 618 (1m) 5 Cent Lr § 419. The term expert comes to imply both superior knowledge and practical experience in the art or profession but generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular art or profession. *Rochester v Chester* 3 N H 355. *Faulder v Holliston* 8 C B 812, per Maule J. The Asst. Mint Master of Calcutta is an expert witness. *Gill v Emperor*, 88 Ind Cas 848 = 1 I R 1925 Oudh 616. Thus hospital students dressers and unqualified practitioners may be permitted to testify as medical experts. *Best, Law of Evidence*, 10th Ed § 716 and accountants who are conversant with the business of life insurance as actuaries. *Kentley v London and North Western Rail Co* (1872) L R 8 Exch 221. So foreign law has frequently been proved by witnesses who, though not professional lawyers followed some occupation which gave them peculiar means of knowing the law in question. *Faulder Dought v Thelluson* 8 C B 819, *Re Whiteleggs* (1899) P 257, *Halsbury* Vol XIII p 481.

**Pre requisites of opinion—evidence by expert.** ‘Matter of opinion is entitled to no weight with a Court or jury unless it comes from persons who first gave satisfactory evidence that they are possessed of such experience, skill or science in such matters as entitles their opinions to pass for scientific truth. *Carr v Northern Liberties* 35 Pat & Ct 321 (Am). Therefore to render the opinion of a witness admissible on the ground that it is the opinion of an expert, the witness must have special skill in the subject concerning which his opinion is sought to be given. *Lauson Exp & Op Lr* 231. It is the duty of the Court to decide whether the expert is a competent witness or not. *Bristol v Sequelville*, 5 Ex R 275 = 19 L J Lx 269. *R v Suerlock*, (1891) 2 Q B 766. The house of A was destroyed by the orders of the officers of a municipality to prevent the spreading of a conflagration. A brings an action against the city for its value. The opinions of mere bystanders that the house would have taken fire and been consumed had it not been blown up by the authorities are inadmissible. The opinions of fire men and persons having particular knowledge and experience in reference to fires are admissible. *Mayor of New York v Pent* 24 Wend 668 (Am). In delivering the judgment the Court said. The broad rule to which the ancient law scarcely knew an exception is that testimony can relate merely to facts, and that the inferences from them are to be made by the jury. In ordinary cases the issues being strictly on the existence of facts capable of being proved or disproved by direct evidence opinion as well as hearsay must be excluded. But this general rule has been broken in upon by the admission of various classes of exceptions all resting upon the common grounds of necessity. Such necessity is allowed to exist when the facts in issue are not themselves accessible by evidence being either future probabilities or mere contingencies or else actual facts but not within positive knowledge. All of these must of necessity, be judged of only from other proved facts known generally to accompany or to indicate those in question, as for instance where the facts to be ascertained are inferred from some rule of art or science, or observed law of nature thus proved, the knowledge by which the existence of the unknown fact is inferred from the one proved may not fall within the range of ordinary information, but may be proved by professional or experienced witnesses having peculiar skill in some art trade or science relating to the subject. Thus the fact of certain appearances in a dead body having been proved, the subsequent question whether such appearances indicate poison is

wholly out of the power of the best informed men to determine, unless they had made such subject a previous study. Again, the market value of an article at a given time, upon the allowance of the damages on which a jury has to pass, is frequently a question such as deists in that article can alone decide. There it is a matter of necessity to call in the experienced or instructed opinion of such witnesses. No proof of the naked state of facts as to ship after a storm could perhaps enable a land-man, however intelligent, to judge of those necessities which are often to be enquired into in marine contracts. Thus also in an action for negligently steering a ship, as in *Malton v Nesbit*, 1 Cr & P 76, mere proof of the naked facts could not enable a jury of landmen to draw any inference, and experienced nautical men are called to prove whether facts of that kind amount to unjustifiable negligence. Opinion is admitted when a jury is incompetent to infer, without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained, or the likelihood of their occurring from the facts actually proved before them. Indeed, it would be more logically accurate to say that mere opinions even of men, professional or expert are not admissible as such, but facts having been proved, men skilled in such matters may be admitted to prove the existence of mere general facts or laws of nature or the course of business as the case may be so as to enable the jury to form an inference for themselves. Thus the existence of certain appearances in the dead body having been proved the chemist testifies that such appearances invariably or generally indicate the operation of some powerful chemical agent. His scientific opinion is, in fact his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and which, when proved, afford them the means of drawing their own conclusions from the whole mass of testimony taken together. The same reason of absolute necessity has compelled the admission of evidence of opinion in certain cases where the poverty of human language makes it absolutely impossible to separate in words the minute and transient facts observed by the witnesses from the inference as to some other facts, irresistibly connected with the former in his own mind. *Lauson Exp & Op Ev* 236

But the opinion of an expert is inadmissible where the subject is one not of special skill or knowledge, but of general observation or experience or which can be better answered by persons in another calling or is upon a question which the Court or jury can themselves decide on the facts. *Lauson Exp & Op Ev* 238, see also, *Sheo Tahal v Arjun*, 56 Ind Cas 879 = 1 P L 1 136. Therefore it is apparent that before expert testimony can be admitted two things, must be proved namely (1) that the subject is such that expert testimony is necessary and (2) that the witness in question is really an expert. In deciding the second question the Court is to decide further what are the qualifications necessary to entitle a witness to depose as an expert. *Chicago v Springfield*, 67 Ill 142 (Am) *Burr Jones* § 369

**Qualification of an expert** While it is clear that the witness, in order to be competent as an expert must show himself to be skilled in the business or profession to which the subject relates there is no precise rule as to the mode in which such skill or experience must be acquired. Thus, the witness may have become qualified by actual experience or long observation without having made a study of the subject. On the other hand, he may be an expert although his knowledge has been derived from the study of the subject, and not from actual experience or practice in the business or profession. Thus, it has sometimes been held that a physician may give opinions as to matters connected with his profession or with medical science although in its own practice he may not have had experience as to such matters, and his knowledge in respect thereto is derived from study only even though he may not have made the disease under enquiry a specialty. *Hathaway v Natural Life Ins Co* 48 Vt 335. On the same principle one who is familiar with the diseases of men may be allowed to testify as an expert concerning the diseases of animals. *State v Sheets*, 89 N C 513. Courts will take notice that certain pursuits are so intimately connected with others as to give the following one of such pursuits unusual facilities for becoming acquainted with the other and if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the



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subject he may be competent as an expert, although engaged in some other occupation (*Detroit v Van Steinburg*, 17 Mich 99), or even if he has abandoned the business to which the enquiry relates *Bearss v Copley*, 10 N Y 93. It is necessary that the witness should possess the requisite skill either from actual study, experience or observation. The mere opportunity of obtaining such skill does not suffice. It must be shown that he is skilled or scientific or at least that he has superior actual skill or knowledge in relation to the question to that possessed by ordinary witnesses or observers. *Page v Parker*, 40 H N 47. To entitle a witness to answer as an expert, it is true "he must in the opinion of the Court have special acquaintance with the immediate line of inquiry, yet he need not be thoroughly acquainted with the differentia of the specific specialty under consideration. If this were necessary, few experts could be admitted to testify certainly no Courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be sufficient." *Washington v Cole* 6 Ala 212. The value of the testimony is enhanced or depreciated according to the experience or study of the witness. *Wells v Leek* 151 Pa 431, *Burr Jones* § 368.

**Expert testimony—whether preliminary question for the Court.** In America when a witness is offered as an expert it becomes a preliminary question for the Court to determine whether he has the requisite qualifications (*Scott v State* 141 Ala 1) and for the purpose of determining this question, the witness himself may be examined as to his opportunities and means of knowledge of the subject under enquiry. *Broadman v Woodman*, 47 N H 120. Other witnesses may be called upon this preliminary question, and those who are qualified may give their opinions thereon. *Mendum v Commonwealth*, 6 Rand (Va) 704. But the expert cannot give his own opinion as to his own qualifications. *Broadman v Woodman* 47 N H 120. *Braham v State*, 143 Ala 28. It is clear that the Court must decide the question of the qualification of the witness and when it is made to appear *prima facie* that the witness possesses the requisite qualification the Court may admit the testimony, and is not bound to allow a preliminary cross-examination. *Sarle v Arnold*, 7 R I 582, *Burr Jones* § 369. In India this practice does not obtain. In the examination in chief the competency of the expert must be shown, otherwise his testimony will be excluded. *Woodroffe Esq Sil Ed* 426. For this purpose he should be examined as to his opportunities and means of knowledge. But it seems that he cannot give his opinion as regards his own qualification. No exact standard by which to determine the competency of the witness exists and much is necessarily left to the discretion of the trial Court. *Forgey v First National Bank*, 66 Ind 123 (1m). It is generally held by the American Courts that the regular cross-examination may fully go into the question of the competency of the witness and if it appear that he is not a qualified expert witness his testimony will be weakened or entirely destroyed. *Davis v State* 35 Ind 496, *Burr Jones* § 369. When a witness has been adjudged competent upon the preliminary examination, opposing proof to his incompetency is to be addressed to the jury to affect the value of his testimony and not to the Court for the purpose of excluding his testimony. *Rog Exp Test* 50. The right to a full cross-examination is thus secured, and if it turns out the witness is not qualified the Court should take no notice of his evidence. This preliminary right of cross-examination affords full opportunity to discover the extent of the qualifications of the witness and prevents material harm to the party against whom he testifies. *Burr Jones* § 369.

**Mode of examination of experts—Hypothetical questions.** It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is not confined to facts within their own personal knowledge but that they may give their opinions upon an assumed state of facts. Indeed it is probably true that in the majority of cases in which experts are examined their testimony is based upon hypothetical questions, or upon facts assumed for the purpose of the trial and presented in some other form. *Inde Raghu v Empress* 11 C L R 69=9 C 455. *Empress v Meher Ali* 15 C

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The substance of a hypothetical question must have a direct and intimate connection with the testimony in the case, otherwise the attention of the jury would be distracted from the issue and the very object of hearing the evidence defeated. If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be proved or offered to be proved. *Turnbull v Richardson*, 69 Mich 400. Where there is no evidence to prove such facts or if the facts assumed in the interrogatory are wholly irrelevant to the issue, the question should be excluded. *People v Angsbury* 97 N Y 501. If the foundation for the evidence is removed there is of course no basis for the super structure. *Burr Jones* § 371.

In *Lord Melville's Trial*, 29 How St Tr 1065, Lord Erskine L C said: If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the super-structure. All that the witness has done is to establish by calculation that such a stock from such a time will produce so much. He does not himself prove any fact, and the calculations he has made must therefore depend upon the facts which are proved by other." In *R v W Naghten* 10 Cl & F 200, 201, the question for the Judges was "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, etc?" *Maule J* said: "In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the enquiry." *Higmore* § 672. The question is not necessarily to be rejected by the Court although the facts assumed by counsel to be true are not proved or although the question does not state the facts as they actually exist. The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory. *Burr Jones* § 371.

**Form of Questions.** Policy as well as principle, require the form of the question to be expressly hypothetical because otherwise the jury, and perhaps the witness, may be misled by the statement as a proved or admitted fact, of that which is as yet only an assertion of counsel or of witnesses. *Chalmers v My Co* 164 Mass 532, *Higmore* § 683. A classical form as suggested by *Shaw C J* in *Woodbury v Obear*, 7 Gray 471, was this "If certain facts, assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion, upon the facts thus found true, on question at issue?" A question should not involve the necessity of the witness finding a controverted fact in order to reconcile conflicting evidence to give

**S 45** his opinion. It should be put to the witness hypothetically, whether, if certain facts testified are true he can form an opinion, and what that opinion is. In *State v Windsor*, 5 HUN (Del) 512, the form of the question was very fully considered, and the following form of question was adopted. 'You have all the evidence in the case—supposing the jury to be satisfied that the facts and the circumstances testified to by the other witnesses, are true, what is your opinion as a medical man of the state of the prisoner's mind, at the time of the commission of the alleged crime? Was the prisoner in your opinion, at the time of doing the act, under any and what kind of insanity or delusion, and what would you expect would be the conduct of a person under such circumstances? In *Commonwealth v Rogers*, 7 Met (Mass) 500=41 Am Dec 458, *Shaw, C J* adopted the following form. 'If the symptoms and indications testified to by other witnesses are proved and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane, and what was the nature and character of that insanity, what state of mind did they indicate, and what they would expect would be the conduct of such a person in any supposed circumstances.' But there is no exclusive formula. *Hunt v Louell Gas Light Co* 8 Allen (Mass) 169, for the mode of stating the assumed premises, there is no fixed rule. *Wigmore* § 683. The object is to obtain the opinion of the expert as to the matter of skill or science which is in controversy, and at the same time to exclude their opinion as to the effect of the evidence in establishing controverted facts. Questions adopted to this end may assume a great variety of form. In *McCarthy v Boston Durl Co*, 165 Mass 165=42 N E 668, there are several useful guides for framing the question. (1) It is important that the form of the question should be such as not to require or permit the witness to draw conclusions of fact from the evidence in the case and to give an opinion based wholly or in part upon such conclusions. (2) A witness ought never to be permitted to give an opinion upon the effect of evidence in establishing facts which do not depend upon his knowledge as an expert. (3) Where the evidence is conflicting or relates to many details or where inferences of facts must be drawn from the evidence in order to be reasonably certain of the grounds on which an opinion is based it is usually necessary that the facts should be stated hypothetically. (4) It is impossible to lay down an absolute rule for all cases, and some discretion must undoubtedly be left to the Justice presiding at the trial. Objection to the form of the question must be specific or it will be held to have been waived. Since the facts sought to be presented in a hypothetical question may be very numerous, it sometimes happens that objection is made to the length of the question. But this is a matter to be regulated largely by the discretion of the trial Judge. *Burr Jones* § 377.

**Hypothetical Questions on cross examinations.** Just as the cross examination of an ordinary witness may involve questions which test his memory observation and bias, so in cross-examining one who takes the stand as a skilled witness, his judgment upon germane matters may be tested by assuming premises and asking his conclusions. *Wigmore* § 684.

**Expert evidence and personal knowledge.** If a physician visits a person and from actual examination or observation becomes acquainted with his mental condition, he may give an opinion respecting such mental condition at that time. There is no more reason why he may not do this than why he might not testify that he saw a certain person at a certain time and that he was then labouring under an epileptic fit or an attack of typhus fever or had been stricken down and rendered unconscious by an apoplectic stroke. *State v Feller* 25 Ia 75, per *Dillon C J*, *Wigmore* § 675. Similarly in *Bellafontaine & I R Co v Bailey*, 11 Oh St 337 *Brinkerhoff J* said 'Undoubtedly if the witness had been a stranger to the actual facts it would then have been necessary to assume a state of facts as the foundation of any opinion he might give but no such assumption it seems to us is necessary when the witness is or is properly presumed to be himself personally acquainted with the material facts of the case. If an expert may give his opinion on facts testified to by others we see no reason why he may not do so on facts presumably within his personal knowledge, and if his knowledge of any material fact be wanting or

defective, the parties have ample opportunity to show it by cross examination and by testimony *aliunde*" *Ibid*

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**An expert witness may be witness of both the parties** There is no reason why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man it matters not which party calls him as a witness. What is of concern to such a witness is the accuracy of the scientific opinion which he expresses, not the party by which such evidence is tendered. *Lila Singh v Bejoy Pratap*, 41 C L J 300=87 Ind C 15 534=A I R 1925 Cal 768

**Foreign law** Under the English law as well as under the Indian Evidence Act the Court cannot take judicial notice of foreign law. "The laws of other nations" says *Di Greenleaf* and states—not being laws of the forum at all except by adoption—will not be (judicially) noticed. *Greenleaf* § 6 (b), *R v Governor* (1907) 1 K B 696, see section 57 *infra*. According to both English and Indian law, foreign laws must be proved as facts. *Khody v Suamibadha* 22 L W 679. But in India when the Court has to form an opinion as regards foreign law, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country is relevant. *Vide* section 38 *supra*, *Palniappa v Nagappa* A I R 1930 Mad 146. An expert in foreign law is no doubt called to state what the law of a foreign country on a particular point is, but where the law is laid down in a particularly elaborate manner in any code of a foreign country, the Court should interpret the Code as best as it can and it should not rely on the outside opinion however eminent, as to the interpretation of that Code. *Ibid*. But in England foreign law cannot be proved by production of such books. There it should be proved as matters of fact. *Mostyn v Fabrigas* 1 Cowp 161, 174, *Sussex Peerage Case* 11 Cl & F 81, *Brenan's Case* 10 Q B 492 (498), *Prouse v E d A S S Co*, 13 Moo P C 484. So foreign law must be proved on an oath and not by mere certificates of experts. Previous decisions upon the same point are admissible, for being a question of fact it must be decided on evidence and not on authority. *McCormac v Gannett*, 5 D M & G 278. Another reason for this is that the law is continually liable to change. *Phup Er 3rd Ed* 342. So foreign law is to be proved by expert testimony. The main controversy is whether a witness to foreign law must be by profession an advocate, attorney or Judge or whether a layman, if he claims knowledge may be trusted to speak as to this state of the law. The earlier practice in England seems to have been very liberal. *Vide* *Sussex Peerage Case* 11 Cl & F 117 134, *Vanderdunet v Thelluson*, 8 C B 812 824 R v *Dent*, 1 C & K 97. But in *Richardson v Anderson*, 1 Camp 66, Lord Ellenborough insisted on the necessity of a professional character in the witness: see also *Wilson v Wilson* (1903) P 157, *R v Naguib*, (1917) 1 K B 359. *Bradford v Bradford* (1918) McLeod Pro 140, *Wignoble* § 564. But the decision is not uniform on this point. The following have been held competent—A foreign Judge barrister or solicitor practising in the Courts of his own country (*Pay* § 1425. *Bristow v Sequerville* 5 Ex 276). A Governor General of Hongkong though a non lawyer, as to the marriage law there (*Cooper King v O K* 1900 P 65). A colonial Attorney General, although a non lawyer as to the law of his colony (*Sussex Peerage Case*). A Roman Catholic bishop holding the office of coadjutor to a vicar apostolic in England as to Roman marriage law. A French Vice-Consul in England as to the commercial law of France (*Lacon v Higgins*, 3 Strk 178). A Persian ambassador, or secretary of embassy as to Persian law (*Re Dost Ali Khan* 6 P D 6). A Belgian merchant and commissioner of stocks and bills of exchange as to the Belgian law affecting such bills (*Vanderdunet v Thelluson supra*). Similarly a Chilean notary public can give opinion as regards Chilean testamentary law, so also an English merchant trading in Chile can give evidence as regards marriage registers to be kept by the Chilean law. *Abbott v Abbott*, 29 L J P M & A 57. *Phup Er 3rd Ed* 341. But Colonial law cannot be proved by a barrister practising before the Privy Council. *Cartwright v Cartwright* 26 W R 682. A Roman Catholic priest was held not competent to prove Scotch marriage law. *R v Savage*, 10 East, 281. But a

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mere tradesman in a foreign country can prove the law of that country *R v Brampton*, 10 East 247 *R v Naguib* (1917) 1 K B 59 C C v A person to become competent to give opinion on foreign law must be one who is expected to know the law from training *Petroleum v Deen*, (1921) 1 K B 111 Foreign law on particular topic is a question of fact *Khoday v Suammadha*, A I R 1926 M 218 A Shia marriage law is not foreign law *Ait v Ibrahim*, 47A 823

**Justice Story on Proof of Foreign law** 'In general, foreign laws are required to be verified by the sanction of an oath unless they can be verified by some high authority such as the law respects not less than it respects the oath of an individual (*Church v Hubbard*, 2 Cranch 237) The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments) is by an exemplification of a copy under the Great Seal of a State or by a copy proved to be a true copy by a witness who has examined and compared it with the original or by the certificate of an officer properly authorized by law to give the copy which certificate must itself also be duly authenticated (*Church v Hubbard* 2 Cranch 238, *Poeland v Hill*, 2 Wend 411 But foreign unwritten laws, customs and usages may be proved and indeed must ordinarily be proved by parol evidence The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs and usages under oath *Church v Hubbard* 2 Cranch 237, *Dalrymple v Dalrymple* 2 Hagg Consist App pp 115-144, *Brush v Wilkins* 4 Johns Ch 220 *Moslyn v Laing* 5 Comp 171 Sometimes, however certificates of persons in high authority have been allowed as evidence without other proof' *Story on Conf of Law* § 611 617 *Green v Li* § 486 *Jure Dormoy* 3 Hagg Lccl 767, *h v Pictou* 30 Howells State Tr 515-673 When foreign law is allowed to be proved by oath of experts, he is allowed to refer to accredited authorities on the subject for refreshing memory *Nelson v Lord*, 8 Berrv 527

As regards proof of foreign law *Jude Gangadhar v Suammadha*, 92 Ind Cas 112=A I R 1926 Mad 218

**Science or Art** Expert testimony is usually thought of in connection with enquiry as to technical or abstruse scientific question—questions requiring as an essential to intelligent judgment, a special training of the mind—and this is the field in which the usefulness of such testimony is most often felt The physiology of human body and the condition and operation of any of its functions have been a fruit field for this class of testimony *Young v Malepeace*, 103 Mass 50 *McKelvey v Tr* § 138 So on questions of science or skill or relating to some art or trade persons instructed therein by study or experience may give their opinions The question is whether a certain blow was sufficient to cause death, the opinion of a surgeon is admissible *State v Powell* 7 N J L 249 So also where the question is whether two pieces of wood are parts of the same stick of natural growth the opinions of workmen in wood are admissible *Com v Choate* 105 Mass 456 'Art in its legal significance embraces every operation of human intelligence, whereby something is produced out of nature and the term science includes all human knowledge which has been generalised and systematized and has obtained method, relations and the forms of law' *Per Davis J in Atchison & Co v U S* 15 Ct Cl 140

**Physicians and Surgeons** While it would be impracticable to deal with every department of science or art in which expert testimony might be given we purpose selecting those classes which in number and range of decisions may be said to cover practically the entire field Foremost among these is the expert testimony called for from medical and surgical practitioners and the following details of the various branches, upon which such evidence has been called for and received will disclose only portion of the area covered by the number of cases which increases with every discovery in either medicine or surgery The opinions of physicians and surgeons may be admitted to show the physical condition of a person, the nature of the disease, whether temporary or permanent the effect of disease or physical injuries upon the body or mind as well as in what manner or by what kind of instrument they were made, or at what time

wounds or injuries of a given character might have been inflicted whether they would probably be fatal or actually did produce death the cause symptoms, nature and peculiarities of a disease, and whether it would be likely to cause death, the probable future consequences of injury, when the consequences anticipated are such as in the ordinary course of events may be reasonably expected to happen, and not merely speculative or possible. While it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury, he may be asked by what kinds of weapons wounds of a given description might be caused or whether wounds of a given character were caused before death (*Enell, Med Juris* 31), and after having made a *post mortem* examination, a physician may testify whether a woman was pregnant at the time of her death (*State v Smith*, 33 Me 369=54 Am Dec 478), or whether the conditions disclosed indicated the cause of death (*Manufacturers Assn v Dorcan*, 58 Fed 945). He may also testify as to the probable effect of a given course of treatment or medicines (*Matteson v New York C R Co*, 35 N Y 487), what would be proper treatment under a given state of facts (*Wright v Hardy*, 22 Wis 348), the probabilities of recovery from the effects of an injury (*Wilt v Lukers*, 8 Watts (Pa) 227), what under certain circumstances might cause death or a physical condition of a given character (*State v Pouell*, 7 N J L 244) and as to questions of sanity or insanity (*Gardner Peerage*, Le Maich R, *Davis v State*, 35 Ind 496) also under a given state of facts insanity is real or feigned (*State v Hayden*, 51 Vt 296), and whether or not great mental anxiety and suffering would tend to develop insanity where there is an hereditary predisposition (*Dearnette v Commonwealth*, 75 Va 867). Upon the question of the general medical practitioner testifying in mental cases, there is a diversity of decision, in American Courts, the preponderance of authority being in favour of accepting, all educated and practising physicians as experts whether they have given special attention to the disease of insanity or not (*Blup C Lau* § 514). If they are practising physicians and have studied medical jurisprudence, the Courts are inclined to accept them, more especially as to the extent of the witness's acquaintance with the subject may always be inquired into, to enable the jury to estimate the weight of his evidence. It has frequently been held that the training and experience of physicians are such as to give them knowledge superior to that possessed by ordinary witnesses concerning the disease of animals, and partly on this ground and partly because of the difficulty of procuring other expert testimony upon the subject ordinary physicians are allowed to give opinions as to the causes, nature and effects of disease among animals (*State v Sheets*, 89 N C 543). As a preliminary question as to his qualification as an expert a medical witness may be asked whether the examination made by him was careful or merely superficial (*Northern Pac R Co v Urtin*, 158 U S 271). The evidence of an expert veterinary surgeon is admissible as to the proper treatment for a sick horse its condition and the cause of such condition (*Welch v Francholi*, 46 Wash 530, *Burr Jones* 378). It is not the business of a medical officer to state whether the injuries he is speaking of amount to grievous hurt or not, but only to describe the nature of the injuries (*Empress v Balwant*, A W N 1885, 296). The evidence of a medical man, who has seen a corpse and made a *post mortem* examination, is admissible in an enquiry regarding the death to prove the nature of the injuries observed by him and as expert evidence as to the manner of the infliction of the injuries and as to the cause of death, whereas a medical man that has not seen the corpse can give only expert evidence (*Roghun Singh v Empress*, 9 C 455=11 C L R 369). So a medical man who has not seen the body and who had not been present at the *post mortem* could be asked to give his opinion about the cause of death, after placing before him the appearance of the body as spoken to by the medical man who made the *post mortem* examination, together with the signs spoken to by him as having been noticed by him when making the *post mortem* examination (*Queen Empress v Meher Ali*, 15 C 789). Where the general condition and state of health of a person in issue and it is sought to prove that owing to a particular disease from which he was suffering he was unable to write, isolated extracts from medical works ought not to be preferred to evidence of a medical

**S 45** man who should be examined with reference to the symptoms deposed to by the witnesses and to whom extracts might be put *Sheo Bahadur v Beni Bahadur*, 6 O L J 178=51 Ind Cas 419

**Testimony of physicians and others as to poisons** Toxicology is regarded in some jurisdiction as part of scientific knowledge of physicians, and to a certain extent this is justified by the course of education of medical men. Thus it is that chemists and physicians, who are qualified by proper study and experience, may testify as to the nature of poisons and their effect on the system and the symptoms which they produce. But the fact that the witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poison in the human system since he may be wholly lacking in the requisite knowledge of chemical science. Although it is usual for experts to subject compounds to a chemical analysis before testifying whether they are poisonous or as to their ingredients and although this has sometimes been held indispensable, the better rule is that the opinion may be received, although this test has been omitted, it being a matter which affects the weight rather than the competency of the testimony *State v Stagle* 83 N C 630, *Burr Jones* § 379

**Mechanics and machinists as experts** When a witness shows himself expert in any particular art or craft to admit of an examination properly addressed to persons of skill in that department of industry, he is competent to give an opinion upon matters of which the jury could not be expected to judge accurately from the mere detail of facts *Cole v Clark* 3 Wis 323. Hence it is that the opinions of machinists and artisans may be received as evidence when they have by their experience gained an acquaintance with the subject not common to others and which may aid the Court or jury in coming to a conclusion *Huggins v Southern R Co* 148 Ala 153. Thus their opinions are admissible as to the proper mode of doing work, as in the erection of buildings (*Haver v Fenney* 36 Iowa 80) the proper mode of constructing machinery (*Sheldon v Booth* 50 Iowa 209) and the comparative merits of different machines (*James v Hodson* 47 Vt 127). So they may give their opinions as to the value of labour, services or materials necessary for a specific work (*Hough v Cool*, 69 Ill 581) or as to the time necessary to complete or perform it (*Suau v Angley* 17 Cal 416 (4m)) or as to the proper mode of measuring or estimating such work (*Shuttle v Amessey*, 40 Iowa) or as to the mode of doing work in such manner as to comply with a certain contract (*Ogden v Parsons*, 2 How (U S) 167), or as to the amount or kind of work done or capable of being done by certain machinery (*People v Golsworthy*) 130 Cal 600) or that which a certain force of men could do (*Salvo v Duncan* 49 Wis 151) or whether a certain mode of operating a given machine would be safe as well as whether the machine itself was safe (*Gilbert v Guild* 144 Mass 601) *Burr Jones* § 380

**Experts in agriculture** As illustrations of the same principle, the opinions of those skilled in farming and agriculture may be received as to the proper mode of cultivating and fertilizing land as well as to the qualities of soil the probable amount and value of the products or crops of land under given circumstances or the yield of a certain crop of the values of land, and of its use the probable amount of injury to crops occasioned by trespass or other causes also as to value age and weight of domestic animals, and as to the diseases and proper management of stock. Milk experts are competent to testify whether certain liquid exhibited to them looked and tasted like milk and water or not *Burr Jones* § 382

**Insurers and insurance** The opinions of persons specially skilled therein are admissible on questions arising out of the contract of insurance *Law Expert & Op Fr* 31 *Thornton v Royal Exchange Ins Co* Peake N P 26 *Beckwith v Sybletham* 1 Camp 116. In the last case Lord Ellenborough in admitting the evidence said 'It was like examining a physician or surgeon to say whether upon such and such symptoms a person whose life was insured could at the time of the insurance have been in good state of health'

**Other artists and scientists** "Upon questions relating to arts or sciences the opinions of persons who have made the subject matter of inquiry the object

of particular study and attention are admissible. The following have been held admissible —

"*Architects*—As to the construction, strength and sufficiency of buildings *Furber v. Hoar*, 114 Mo 336

"*Assayers*—That blood on shirt of prisoner is not that of a sheep *State v. Knight*, 43 Me 27

"*Book keepers*—As to the meaning of an entry in a bank book manifestly difficult to decipher *Knox v. Savings Bank*, 93 Mich 80

"*Botanists*—As to whether the working of coke ovens near a park damaged the trees in the neighbourhood *Salvin v. Coal Co.* L R 9 Ch App 708

"*Chemists*—As to the effect of a particular poison *Hasting v. People* 4 Park 319

"*Engineers, Civil—Engineer*, v *Hodges*, 37 Pac R 1037

"*Engineers, Electrical*—As to the imperfections of contrivances by which electric lamps were suspended *Excelsior El Co v. Sucet* 57 N L J 224

"*Engineers Mechanical*—As to whether a certain grease tank was safe or unsafe for the purpose for which it was used

"*Engineers, Mining*—As to the continuity of vein *Kapu v. Mining Co* 2 Utah 174

"*Engineers Railroad*—As to when a rail road was finished *Hilton v. Mason*, 92 Inn Cas 157

"*Geologist*—That coal of a certain quality or quantity exists on the lands in question

"*Inventors*—As to the value of the case of certain inventions relating to stock cars *Bulton v. Bulton, Steel Car Co* 50 N E R 1029

"*Photographers*—As to the genuineness of a signature to a note *Marcey v. Barnes* 16 Gray 161

"*Post office—Inspectors*—As to whether a document is written in a feigned or natural hand *A v. Cutor*, 4 Esp 187 *Revelt v. Braham*, 4 T R 497

"*Surveyors—Grand Rapid S R Co v. Chesboro*, 74 Mich 766

"*Veterinary Surgeons*—That a horse has blind saggers *People v. Loun*, 85 Mich 453" *Faulson Op & Exp Ec* pp 7—9

**Handwriting** Opinion evidence is admissible to prove handwriting. The reason for the exception is plain. Unless a signature or writing has been made in the presence of witnesses who can afterwards identify it, the only possible proof of handwriting is opinion evidence, and opinion evidence of persons specially qualified to testify. *McKelvey's Ev* § 144. An opinion of an expert, based upon careful comparison by him of the disputed writing with a genuine specimen is generally held admissible. The English common law doctrine with regard to the subject will be found discussed fully in *Doe v. Sucker*, 5 Ad & L 703. The Judges in that case were evenly divided (*Lord Denman* and *Mr Justice Willes* favouring, and *Justices Coleridge* and *Patteson* opposing) upon the question of admitting the testimony of an expert who had made an examination of admittedly genuine specimens on the first day of the trial, and was called to testify on the second, and at that time stated that he thought he had acquired a knowledge of the handwriting in question sufficient to enable him to tell whether the particular specimen was genuine. The Judges, however, recognize with unanimity the well established English common law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used; press copies will not do. *Lord Denman*, in this case speaks thus of this class of evidence: "On the question whether handwriting, looked at by itself is genuine or forged the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion. I do not indeed understand how such evidence could be rejected if a witness should swear that his habits gave him the requisite skill but I do not think that either Court or jury would believe him, or place the least reliance on his opinion. Practically therefore this chapter may be considered as expunged from the book of evidence." "But where," says *Mr H. D. Fries*, "in point of reason, is the objection to a proof by comparison of hands as founded upon an inspection at the trial?" It will surely be admitted that the



**S 45** real object is the investigation of truth, and by the indiscriminate rejection of a means of establishing the truth, which in many instances must be more convincing than the evidence actually received, there is a frequent risk of the failure of justice. Every danger which may result from the case of forgery must operate at least with equal force when the deception is aided by the comparison being made, not with the immediate object of the senses, where the erroneous impressions of one person may be corrected by the more accurate inspection of another but with the traces in the memory errors and imperfections of which are beyond the reach of scrutiny. What is the common evidence of knowledge but an act of comparison—a comparison of the object presented to the sight with the object imprinted by memory in the mind with the image and copy of supposed reality? And when the comparison is made, not with this imperfect and fallacious copy, but with an undisputed original applied with the skill and experience of persons habitually devoted to similar enquiries, it is deemed not only a matter of technical caution but an essential point of constitutional liberty, to reject the assistance which it may naturally be expected to afford. An expert of the most accurate talents comparing the characters of admitted writings of an individual through a continued series of years with the character of a disputed piece can not be held to offer his opinion, whilst the knowledge and familiarity that the mind may be supposed to have acquired from the previous perusal of the very writings or even from the casual inspection of a single act is received and acted upon without objection'. *Mr H D Evans, Notes to Polhes II, 159* But note was written by *Mr Evans* in 1806. But even in 1836, we find that the scientific aspects of such testimony did not commend themselves even to a great Judge like *Lord Coleridge*. In *Doe v. Suckermore* 5 A & E 705 (1836) the learned Judge said: 'The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is imputed on it as the involuntary and unconscious result of constitution, habit or other permanent cause and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question or by engaging with him in correspondence either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. Assuming that no dispute exists as to the genuineness of the standard or the fairness with which it has been selected (still) such a comparison leads to no inference as to the general character of the handwriting. *Wigmore* § 1999. 'Though the opinion rule' says *Prof Wigmore* then, would admit expert testimony, yet there is further urged an objection resting mainly on the inactive version of the earlier Judges to a novel method of testimony—an objection which the more explicitly it is framed the weaker its legitimate influence appears, namely the objection that the opinion of a handwriting expert is in general inferior to that of an ordinary person who has seen the party write or his correspondence with him. *Wigmore* § 1998.

**Objection based on unfair selection of specimen.** An expert has no personal knowledge as regards the handwriting of a person in question. He is to give his opinion as regards the genuineness of handwriting by making comparison with an admitted specimen placed before him. Therefore in determining whether the witness's source of knowledge or opinion is adequate it has to be considered whether the specimens taken as indicating the type of writing are fair ones. *Wigmore* § 1999. That that was also a ground of objection against expert testimony in *Common Law Courts* will be proved from the observation of *Dallas J* in *Burr v. Harper* Holt N P 421 where he said: 'Comparison of handwriting has been rejected upon the ground that the specimens may be unfairly selected (and as such it may be) calculated to serve the party producing them and therefore not exhibiting a fair example of general character of the handwriting. See also the observation of *Coleridge J* in *Doe v. Suckermore*, 5 A & E 705. But this objection raised by the great Judges can be met by two different ways, namely (1) only admittedly genuine documents should be placed before the handwriting expert for comparison (*vide Doe v. Suckermore*, per *Williams J*) or (2) the documents to be placed before the expert should be limited to the documents which are already in the case. The effect of this is to

determine the selection usually by the chance requirements of the litigation and not to leave it to a prejudiced choice from all sources. *Iude v Bolland* B, in *R v Morgan*, 1 Moo & R 134. *Wigmore* § 1999. In *Lyon v Lyman*, 9 Conn 61, *Dagget J*, further points out that this objection if valid, is equally applicable to the case of other handwriting testimony and indeed to all testimony whatever. In that case he observed: "It is said by *Starkie* that an unfair selection of specimens be made for the purpose of comparison. It is not suggested however, that any advantage would thereby be given to one party over the other. The same objection lies against the introduction of witnesses who are to testify to their knowledge of the handwriting. In both cases proof may be expected favourable to the party introducing it, and it will always be selected with that view." *Wigmore* § 1999.

**Objection on the principle of confusion of Issues.** The last though not the least objection is based on the principle of confusion of the issues. The expert has got no personal knowledge of the specimen in question, so that the genuineness of the specimen must be proved like all other evidence. This additional proof of genuineness would so complicate and confuse the issues as to be undesirable and that therefore the expert's testimony, to which it is the essential foundation must fall with it. *Wigmore* § 2000. This is thus forcefully stated by *Lord Coleridge J* in *Doedem Hudd v Snelmore* 5 A & E 706. If the points which I have just supposed to be conceded (genuineness of specimens and fairness of selection) be brought into question, other and more serious objections arise to this mode of proof. If the genuineness be disputed a collateral issue is raised, and that upon every paper used as a standard,—an issue too in which the proof may be exactly of the same nature as that used in the principal cause, namely, merely comparison, with the additional disadvantage that the former standard is not produced and that the opposing party can avail himself of no counter proof.

If the fairness with which the standard has been selected is disputed this again must lead to a collateral inquiry in which the parties meet on unequal terms if no notice has been given (and no notice is required by our law) and which must tend to distract the jury, if notice be given and the discussion on the circumstances under which each specimen was written be fully gone into. It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury and that we have no provision for limiting the standard of comparison or regulating the manner of conducting the enquiry, both of which it seems, have been found necessary where such a mode of proof has been admitted. *Wigmore Case Lx, Case No 430*.

"In observing how this argument is to be disposed of," says *Prof Wigmore* "it must be remembered that there are three conceivable ways of supplying the fact of genuineness on the hypothesis of which the expert forms his opinion. (1) By testimony directed to the jury's consideration like all ordinary evidence—the jury, on retiring to consider the witnesses' opinion if the hypothesis of genuineness is proved and to ignore it like other hypothetical testimony, if the hypothesis is not proved, (2) By testimony directed to the Judge in the nature of proof preliminary to the admission of any piece of evidence and calling for the Judge's decision only, (3) By an admission of the opponent in the pleadings or for the purpose of the trial. *Wigmore* § 2000. It seems that the objection of *Lord Coleridge* is based on the assumption that the first of these modes as indicated by *Prof Wigmore* is the only one which is proper and possible and as such there is sufficient force in his *Lordship's* argument. But 'it is not a conclusive one because it proceeds on the old fallacy so common in our law of evidence that for the sake of avoiding a possible danger, or a harm likely to appear on one occasion in ten, a real and present good is to be rejected in every instance whatever.' *Wigmore* § 2000. But the better way to avoid this inconvenience is to choose the second mode of evidencing genuineness and proving it to the Judge. In *University of Illinois v Spalding* 71 N H 163=51 Att 731 *hemick J* thus said. The third objection—that to permit comparison with specimens not otherwise in evidence and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury—is when applied to specimens neither admitted by the parties

**S 45.** nor found by the Court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in its use with disputed specimens would not be comparison in any proper sense. When the identity of anything is fully and certainly established you may compare other things with it which are doubtful to a certain whether they belong to the same class or not but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to be bewildering than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard and proof upon this enquiry would be comparison again, which would only lead to an endless series of issues each more unsatisfactory than the first and the case would thus be filled with issues aside from the real question before the jury. The true rule is that when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute whether the latter is susceptible of or supported by direct proof or not, but before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding Judge upon clear and undoubted evidence. This involves indeed a marked departure from the common law. It does away with the common law limitation of comparison to standards otherwise in the case and hence with its exceptions and the controversy and confusion which have grown out of them. The value of comparison as a method of proof being now generally conceded juries being no longer too ignorant to derive benefit from the source and the danger of spurious specimens and the objections to collateral issues being fully met by requiring the genuineness of the standard to be determined as a preliminary fact by the trial Judge there remains it would seem, no satisfactory reason for the old limitations and exceptions. *Wigmore* § 2000.

Thus stood the law in England down to 1854 when the Common Law Procedure Act of that year (17 & 18 Vict C 12) S 27) enacted that comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall in civil cases be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and the jury as evidence of the genuineness or otherwise of the writing in dispute. A few years later a section in precisely the same terms was incorporated into the Criminal Evidence Act 1865 (28 & 29 Vict C 18, S 8) so that the anomaly of a difference between the rules governing the admissibility of such evidence in civil and criminal cases no longer exists. *Hills On Ev* p 233.

**Basis of expert testimony for proving handwriting** Manifest as are the points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting, and when a man comes forward and says 'you believe that such a man is dead and gone he is not, I am the man' if I know the handwriting of the man supposed to be dead, the first thing I would do would be to say, sit down and write, that I may judge whether your handwriting is that of the man you assert yourself to be, if I know handwriting of the man with whom identity was claimed, I should proceed at once to compare with it the handwriting of the party claiming it. For that reason I shall ask you carefully to look at and consider the handwriting of the defendant, and to compare it with that of the undoubted *Roger Tichborne*, and with that of *Arthur Orton Tichborne* Trial (*Rex v Castro*) charge of *Chief Justice Cockburn* (London Ed) p 762, *Buller's Nisi Prius* 326 *Peake's Ev* 102 2 *Evans Pothier on Obligations* (3rd Am Ed) 156. Men are distinguished by their handwriting as well as by their faces, for it is seldom that the shape of their letters agree, any more than the shape of their bodies. Therefore the likeness induces the presumption that they are the same. *Buller's Nisi Prius* 236 2 *Evans Pothier on Obligations* (3rd Am Ed) 136. The general rule which admits proof of handwriting of a party is founded on the reason that in every person's manner of handwriting there is a peculiar prevailing character which distinguishes it from the handwriting of every other

person" *Strong v Breuer* 17 Ala 706, 710 'The handwriting of every man has something peculiar and distinct from that of every other man, and is easily known by those who have been accustomed to see it' *Peake's Et* 102 S 45

"Caligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the Courts have consequently admitted such persons to testify in cases of disputed handwriting. It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance it is asserted that in every person's manner of writing, there is a certain distinct prevailing character which can be discovered by observation, and being once known, can be afterwards applied as a standard to try other specimens of writing the genuineness of which is disputed. Handwriting, notwithstanding it may be artificial, is always, in some degree the reflex of the nervous organisation of the writer. There is in each person's handwriting some distinctive characteristic, which as being the reflex of his nervous organisation, is necessarily independent of his own will and unconscious forces the writer to stamp the writing as his own. Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship." *Rogers Op Ct* 291 (292)

**Who are experts in handwriting.** The determination of this skill must of course depend on the discretion of the trial Courts as applied to the circumstances of each case. *Forgery v Bank*, 66 Ind 125. Various forms of test have been offered, no test should be regarded as absolute. In *Doe v Sucker* more, 5 A & F 749, *Deman L C J* said 'The witness must be conversant with the handwriting—a banker a printer, the officer of a Court of Justice to be entitled to any degree of authority' *Wigmore* § 2012. The following persons have been allowed to testify as experts in matters of handwriting—(1) Post Office officials (*R v Coleman*, 6 Cox 163, *Philp Et 4th Ed* p 356, *Best Ev* § 246), (2) Bank clerks, and (3) Lithographers. A solicitor can also give opinion as an expert if he has made a special study of the subject. *R v Silverlock*, (1894) 2 Q B 66. But police constables and police inspectors are not competent witnesses as experts. *R v Crouch*, 4 Cox 163, *R v Hiltman*, 9 Cox 448. *R v Harvey* 11 Cox 546.

**When expert evidence to prove handwriting is admissible.** The one thing required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond question of doubt to be that of the person alleged. The evidence of an expert in handwriting is inadmissible, if there is no comparison with proved or admitted handwriting in open Court in the presence of party affected. *Suresh Chandra v The King Emperor*, 16 C W N 812=39 C 606=13 Cr L J 289=14 Ind Cas 753. It is the duty of the prosecution to adduce very satisfactory evidence to show that the documents given to the expert for comparison were in the handwriting of the person whose writing they purport to be. If the standard writings and the disputed writings were grouped separately before submission to the expert, and the expert knew what the prosecution wished to be proved, this circumstance would detract from the weight to be attached to the expert's testimony. *Basrur Verkat Row v Emperor*, 1912 M W N 125=11 M L T 93=14 Ind Cas 418=36 M 159. The report of the Government expert who never came into the witness box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. *Pearylal v Kedarnath*, A I R 1923 All 601. Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and

- S 45** A signature admitted to be genuine does not carry great weight. If a signature is denied the onus of proving it is on the party relying on its genuineness. *Bathayer v Parmeshwar*, 64 Ind Cas 274.

**Value of expert testimony as regards handwriting.** Some of the American Courts place very little value on such evidence. In a *Michigan case*, it was said: "Every one knows how unsafe it is to rely upon any one's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it and the results of litigation have shown that there are often the merest pretenders to knowledge whose notions are pure speculation. Opinions are necessarily received and may be valuable but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion, is a step toward greater uncertainty and the science which is so generally diffused is of very moderate value." *Per Campbell J in Foster's Will*, 34 Mich 21. Similarly in *Turner v Hand*, 3 Wall Jr 115, *Mr Justice Grier* said: "Opinions with regard to handwriting are the weakest and least reliable of all evidence as against direct proof of the execution of an instrument." *Turner v Hand*, 3 Wall Jr 115. "The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed however that it is of the lowest order of evidence or of the most unsatisfactory character." *Bosland v Wabath* 33 Iowa 131, see also *Whitaker v Parler* 42 Iowa 555. *Cowan v Beall*, McArthur 221. So it is not safe to base conviction upon the opinion of an expert in handwriting where there is no corroboration. *Sultan v King Emperor* 2 A L J 444, *Kalicharan v King Emperor*, 6 A L J 184, *Lalla v Emperor*, 11 Cr L J 114. *In re Jankata Rou* 36 M 159. *Gudhari v Emperor* 86 Ind Cas 693 see also *Sarojini v Haridas*, 26 C W N 113. *Jalal v Crown* 18 P W R 1912 C1=15 Ind Cas 979. "Evidence of this kind" says *Sir Alfred Hills* "requires the most careful scrutiny. It is necessarily most often given by experts in handwriting. Experience shows that expert evidence of all kinds is so far apt to be biased as to require a great deal of watching, and much depends upon the mental characteristics of the witness—often not easy to ascertain. The great value of expert evidence as to handwriting is that the experience of an expert makes him quick to detect points both of likeness and of dissimilarity, which might easily escape an untrained observer. If these be substantial it is seldom that the Judge and jury especially with the aid of photography cannot follow the evidence and see for themselves how far it affords safe material for a conclusion. The experience of the editor as a Judge has certainly been that where this cannot be done the mere evidence of expert opinion is of little value." *Hills On Lit* p 233. To base a conviction on the evidence of an expert in handwriting as a general rule is very unsafe. There may be cases in which the handwriting is of such a peculiar character that the conclusion as to the identity of the writer is irresistible. *Kali Charan v King Emperor*, 6 A L J 184=9 Cr L J 493=2 Ind Cas 154. Comparison of handwriting is permissible in criminal no less than in civil cases. 2 Weir 759. But comparison of handwriting is a very hazardous test. *Ambica v Vareswar* 85 Ind Cas 72=A I R 1925 Cal 145. A Judge should not himself compare signature without the help of other evidence. *J C Galstaun v Sanatan Pal* A I R 1925 Cal 485.

**Finger impressions.** Identification by finger prints has become a most important branch of criminal investigation and has proved to be of signal service both in the detection of crime and the identification of the offender. The system is new and had only just been introduced into this country when the last edition of this work was published and it is only quite lately that the conclusive nature of the evidence it affords has been appreciated in the Courts. It may be said now to have established its claim to admission and to trustworthiness. The process and especially the admirable system of classification

make it perfectly simple to those who understands its technology. De-pite an appearance of complication, the system appears to be easily mastered by any person of intelligence in the course of a few months or even weeks' *Wills Cir Ex 191*. The reason for the identity of the finger prints is thus stated by the learned author "The surface of a finger or thumb, however delicate is never even. It presents a series of tiny ridges separated by equally minute hollows. The ridges are dotted from end to end, at intervals by little pits which are the open ends of the ducts from sweat glands. The ridges are arranged with an infinite variety of detail, and two cardinal facts lie at the root of the process. The ridges and hollows are congenital, and from the cradle to the grave their arrangements—their patterns—never change" *Wills Cir Ex 6th Ed pp 192 193*. *Inde the Indian Edition at pp 261 262*, see also *Henry on Finger Prints 11th Ed, pp 16 19*. A witness expert in the subject must state that the system of interpretation used by him in inferring identity of marks was a system accepted in the profession. There are several such systems they differ chiefly in practical convenience only. The witness must further be able to state that the particular marks used as the basis of inference were distinct and numerous enough to afford an inference under the system which he employs, and also that the marks thus used for study were reproduced or transferred by some reliable process from the original object on which they were impressed. *Wignmore § 114*. The papillary ridges on the bulbs of the fingers and thumb—by means of which the finger impressions are made, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of the fingers of any other person, and they therefore furnish a surer test of identity, than any other comparable bodily feature. Where two prints made on different occasions, resemble one another in the minutiae and contain no points of disagreement an irresistible conclusion arises that they were made by the same finger. The evidence of identification is thus both positive and negative and confirmation from other sources is superfluous. Under section 45 of the Evidence Act, as amended by Act V of 1899, expert evidence may be given on finger impressions, while s 73 has been applied to them with necessary modifications, so as to permit of comparison being made for arriving at a finding on the basis of their decipherment. An expert may give his opinion on the point on which he is called upon to give his evidence. But he cannot go on and assert his mere opinion or belief, as if it were a fact within his knowledge. In this respect an expert witness is in a different position from a direct witness of fact. The value of ordinary or non expert oral evidence mainly rests on the credibility of the witness—his inclination and capacity, for telling the truth the value of expert evidence rests on the skill of the witness—the extent of his competency for forming a reliable opinion. *Emperor v Sahdeo*, 3 N L R 1—5 Cr L J 220.

The accused was convicted of theft. He had three previous convictions. The previous convictions were denied by the accused and in order to prove them the prosecution produced certain finger impression slips and the finger print instructor at Rangoon was called. He took impressions of the accused's finger in Court and after having compared them with the finger impressions on sheets he produced from the finger impression bureau he declared that the accused must be the man whose finger impressions were on the sheets he produced and whose previous convictions were entered on the sheets. He did not personally know the accused and had not himself taken the impression on the sheets he produced. *Held* the previous convictions of the accused stated on the slips were not proved by the mere production of such slips. *Hulbert v King Emperor*, 4 L B R 125—7 Cr L J 406. Where the thumb impressions on a document were blurred, and many of the characteristic marks were far from clear rendering it difficult to trace the marks enumerated by an expert witness as demonstrating the correspondence between the thumb impressions in the document and those made by the accused in Court, *held* that, under the circumstances of the case, the evidence was not reliable and the jury were right in not accepting the evidence of the expert as conclusive. *Emperor v Adani Hamid*, 32 C 759—9 C W N 520—2 Cr L J 259. A jury is not bound to accept the opinion of an expert upon thumb impressions without corroboration of their own intelligence as to the reasons which guided them to this conclusion.

**S. 45.** *Per Gault J* in *Ibid* see also *Basgit v Emperor*, A I R 1928 Pat 129 Where the evidence to corroborate the testimony of an expert witness is of an unreliable character it is not proper to accept his evidence. Though the evidence afforded by the correspondence of thumb impressions is ordinarily of great value, it would be unsafe to convict on the mere result of a critical examination of the thumb impressions made by an expert. *Per Henderson J* in *Ibid*. The question as to the identity of thumb impressions on two or more documents, for the purpose of ascertaining whether the thumb impressions are of one and the same person, is eminently a matter for the jury, and not for the Judge. *Panchu Mandal v Emperor*, 1 C L J 385=2 Cr L J 311. The deliberate opinion of an expert that two thumb marks exactly agree is on quite a different plane from an opinion as to handwriting. It is reasonable deduction from experience that no two human beings have the same thumb markings and, if no differences whatever can after the most careful examination, be found between one thumb mark and another, the conclusion is irresistible that the same thumb made both. *Umaday Crown* 9 P R 1914 Cr. *Dibbad v Emperor*, A I R 1929 Lah 210. A comparison of thumb impressions is admissible under s 9 of the Evidence Act if the similarity of those impressions can establish the identity of a person, who is charged with having forged a document purporting to have been executed by another, with the latter, or under Cl (2) of section 11 of the Act, if their dissimilarity makes such identification improbable. *Queen Empress v Fakir Muhammad*, 1 C W N 33. If a finger print expert has not been cross-examined as to the grounds of his opinion and as to the test to which he had put a particular finger impression submitted for his consideration, the value and weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. *Sauvar v Emperor* 55 Ind Cas 273=21 Cr L J 257. The report of a finger print expert is inadmissible in evidence unless he is called in as a witness and subjected to cross-examination in open Court. *Pitain v Baboo Singh*, A I R 1924 Nag 183. A Court should be very chary in accepting an opinion of Finger Print Expert as to the age of a thumb mark as fixing the date of the document when such date is markedly opposed to the date which appears upon the document itself so long as no serious extraneous testimony controverts the date which appears on the document. *Ramlakhan v Dharamdeo* 97 Ind Cas 335=A I R 1926 Pat 375. Under this section the opinion of an expert formed by comparison of the thumb impression of an accused taken in Court under Act XXXIII of 1920, s 5 with his thumb impression on deeds is admissible in evidence. *Superintendent v Kiran Bala* 30 C W N 373=43 Cr L J 79=93 Ind Cas 73=A I R 1926 Cal 531. There is no objection in law at all to the taking of accused's thumb mark if the Judge thinks it relevant at any time and a conviction for offence under s 409 of the Indian Penal Code based on a comparison of the thumb mark of the accused with his thumb mark in a document is not objectionable. *Public Prosecutor v Kandasami*, 50 M 162=98 Ind Cas 99=A I R 1927 Mad 696.

**Value of expert evidence generally.** Evidence of expert should be approached with considerable caution especially where much depends upon such evidence. *Panchu Mandal v Emperor*, 1 C L J 385=2 Cr L J 311. The opinions of experts are not binding on the jury for it is with the jury, and not with the experts, that the determination of the case rests. The weights due to their testimony is a matter to be determined by the jury, and it will be proportionate to the soundness of the reasons adduced in the support. *Emperor v Ali Prasanna*, 1 C W N 465. The evidence of a skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstance, however confidentially he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect. An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side who calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one simply and solely because

it may be ascertained that he holds views favourable to his interest *Hari Singh v Lachmi Devi*, 3 Lah L J 110=59 Ind Cas 220. An opinion of an expert witness not based on any well defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it *Mansel v Emperor*, 96 Ind Cas 641=27 Cr L J 977=A I R 1926 Lah 313

**Expert evidence and commission** Every witness must be produced at a trial, unless and until it is proved either to be actually impossible to produce him or to be so difficult to do so that it is under the circumstances unreasonable to insist on his production. But petty inconveniences such as those to which a witness may be subjected by being summoned as a witness in a criminal case would not justify the issue of a commission especially when a previous conviction depended for its proof solely and entirely upon expert evidence *Emperor v Kasim* 15 C P L R 66 Cr. The Assistant Mint Master of the Calcutta Mint is an expert witness, and the Court does not act illegally in allowing him to be examined on commission instead of insisting on his personal attendance *Must Gill v Emperor* 20 W N 377=12 O L J 497=88 Ind Cas 848=26 Cr L J 1232=A I R 1925 Oudh 616. But it is not satisfactory to examine an expert witness on commission and not in the presence of the accused. The evidence of an expert has always to be carefully weighed but when given on commission its value is considerably reduced *Nur Din v Emperor* 10 Lah F J 235=108 Ind Cas 369=29 Cr L J 377=A I R 1928 Lah 533

**Medical Evidence** It is irregular to find that an accused person is of unsound mind merely upon the report of Medical Officer *Kumud v Ramoo* 49 P R 1866 Cr. The letter of a Medical Officer expressing an opinion is not evidence under ss 369 and 370 of the Code of Criminal Procedure *Queen v Kammees*, 12 W R Cr 25, *In re Chintamonee*, 11 W R Cr 2. In a Sessions case, depending almost entirely on the medical evidence the examination of the Surgeon before the Magistrate should not be tendered or accepted as sufficient *In re Mantapampalla*, 2 Weir 660. The examination of a medical witness taken and duly attested by a Magistrate though it may be given in evidence in any criminal trial under s 323 of the Criminal Procedure Code must in order to be admissible against any individual accused person have been taken in the presence of the accused persons *Empress v Jhubboo* 8 C 739=12 C L R 233. The certificate of a Medical Officer as to the cause of the death of a person and of the fatal character of the wounds is no evidence. He should be examined regarding these points, and some evidence should be taken to identify the wounded body with that of the person whose murder is the subject of charge. Where the deposition of the medical witness who has given a certificate did little more than attest its accuracy as to the nature of the wounds held, that such deposition would not be sufficient *In re K Venkatarayadu*, 2 Weir 659. Section 323 of the Criminal Procedure Code does not preclude a Sessions Judge from calling and examining the medical witness that has been examined before the Magistrate, as especially where the deposition before the Magistrate, is difficult or calls for further elucidation, such witness should be re-called and examined by the Sessions Judge *Rogham Singh v Empress*, 9 C 455=11 C L R 769. Where in a criminal case the prosecution tenders in evidence a certificate granted by the Professor of Anatomy in a Medical College as regards the bones submitted to him for examination, the certificate by itself is not admissible in evidence. It must be proved by the person who gave it as a witness in the case *Emperor v Ahilya Manaji*, 24 Bom L R 803=47 B 74=A I R 1923 Bom 183 on appeal 84 Ind Cas 643=26 C L J 339.

**Palm impressions** Palm impressions are akin to finger impressions and expert evidence relating thereto should on the whole be admitted rather than excluded to be weighed by the Court and the jury for whatever it is worth *Emperor v Babu Lal* 52 B 223=29 Cr L J 410=30 Bom L R 321=108 Ind Cas 503=A I R 1928 Bom 158.

**46** Facts, not otherwise relevant, are relevant if they

Facts bearing upon support or are inconsistent with the opinions of experts of experts, when such opinions are relevant



## S. 47

## Illustrations

(a) The question is whether A was poisoned by a certain poison

The fact that other persons who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison is relevant

(b) The question is whether an obstruction to a harbour is caused by a certain sea wall

The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant

**Scope of the section** This is but the round about way of stating that the opinion of an expert is open to corroboration or rebuttal. The illustrations sufficiently exemplify the position that for this purpose *res inter alios acta* is receivable. *Not Ex p 22*. So this section embodies a general rule which lays down that evidence of collateral facts cannot be received. *Idem Taylor Ex § 337*. If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that after proof by a medical man, or in a civil case in admission by counsel, that madness is often of an hereditary character evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition, and on a question of disputed paternity, after proving as a matter of science that children are apt to inherit the features or general appearance of their parents evidence will be received of personal resemblance between the party in question and his alleged father. *Payot v Bayot* 1 L R 11 308 *Tay Ex* (9th Ed) § 337. An expert who is himself paralysed in the arm and leg may support his opinion as to the effect of such paralysis by testifying to its effect on himself. *Chicago R Co v Lambert*, 119 Ill 255 (Am).

**Illustration (b)** This illustration is based on *Folkes v Chadd*, 3 Doug 157 where the point in dispute was whether a sea wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments had begun to be choked about the same time as the harbour in question was admitted as such evidence served to elucidate the reasoning of the witness (s. *Taylor* § 337). In delivering the judgment Lord Mansfield said "As to the evidence respecting the situation of other harbours on the same coast we think that if there were no embankments it was admissible in illustration of Mr Smeaton's (the expert) opinion but as to harbours in which there were embankments we think it was improper since *idem liti resolutum*"

**47** When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact

**Explanation**—A person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him

## Illustration

The question is whether a given letter is in the handwriting of A, a merchant in London.

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B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

**Principle** In proving a document or a signature to have been written, two distinct kinds of evidence offer themselves, first, testimony by a person who saw the act of writing or some circumstances leading up or pointing back to that act, secondly, evidence of the kind of handwriting. The difference is that in any and in all ways of the second mode there is involved the establishment of a personal type or character of writing, and an estimate based on comparison, that the disputed writing belongs to the type and this is so whether we employ witnesses who know the type and examine the disputed writing (*vide* s. 43 and 47) or whether the tribunal is given the means of knowing the type and making the examination (s. 73). By the first mode we are not in any way concerned with the character of the person's writing: the witness testifies directly to seeing the act done, just as he would testify to seeing a blow struck. By the second mode there is always an inference from the type to the genuineness of the disputed instance. *Wigmore* § 1991. So when the question is whether a particular document is written by A or not by the second mode there is merely a resort to A's type or character or habit of handwriting and an inference from the type to the genuineness of the disputed writing. This evidential facts the type of the handwriting involves an inference from a kind of habit or skill (of handwriting) to an act done (the specific writing). Just as we think, of a deed of violence, 'this man's character, his plan, his emotions would be likely to lead him to this deed' so we argue 'this man's handwriting would result in his penning such a signature as the one in issue. It is commoner to evidence the authorship of a signature by the direct testimony of those who declare it to resemble the general qualities of the alleged person's handwriting as known to them, there the style of writing is not expressly offered in evidence but is merely the ground of their competency to testify. When handwriting is offered circumstantially in evidence, it is expressly described or shown to the jury as the source of their inference (*vide* s. 73) for this only does the trait of handwriting become available for them as the basis of an inference. The difficulty that has arisen over handwriting evidence has not been over the relevancy of handwriting traits to show the authorship of writing but over the mode of evidencing them by circumstantial evidence, and that is by examining one or more specimens of writing of the person in question and drawing inferences as to its particular traits. *Wigmore* §§ 991, 983.

'For handwriting in manuscript the fundamental proposition of English law is that the general experience of an ordinary person is sufficient, in other words any person able to read and write is competent to form and to express a judgment as to the genuineness of handwriting. Where the witness is sufficiently qualified as to knowledge, *i.e.*, where he has seen the person write or the like, no dispute is ever raised as to his experimental competency. Proper familiarity with the standard of comparison is all that is asked for, and no special skill in judging of writings is required. It is accepted law that the general experience of the ordinary person is sufficient, so far as experiential qualification goes. Why, then, does the question of expert qualifications in handwriting ever arise? Because when the specimens to be used are themselves before the jury, they may examine them to form an opinion as to the standard or type of writing, and hence the opinion of a person of ordinary experience only, based upon these specimens bring no better than that of the jury themselves, is not needed and is excluded by the opinion rule, and hence the only persons whose aid need be asked in studying the standards are those who have some special experience over and above that of the jury. Thus under the opinion rule, the question arises whether the person whose aid is offered is such a one as can contribute some skill not possessed by the jury.' *Wigmore* § 570.

'The rule as to the proof of handwriting, where the witness has not seen the party to write the document in question may be stated generally

**S 47** thus. Either the witness has seen the party write on some former occasions or he has corresponded with him and the transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been written or signed, on either supposition the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances as of the general character of his handwriting, and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree, but the principle appears to be sound both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence, either supposition giving reason to believe that he writes at the time not constrainedly but in his natural manner. *Per Coleridge J in Doedem Mudd v Surkermore* 5 A & E 703

**Scope of the section.** The identification of handwriting as genuine involves the double testimonial knowledge already spoken of—an acquaintance by the witness with the type of handwriting in question, and an observation of the disputed specimen the witness comparing the two in his mind and stating whether the latter is to be regarded as genuinely an instance of the type in question. How to evidence the type of handwriting circumstantially—i.e. by individual specimens—is a different matter (*vide* ss 45, 73). The inquiry here concerns the mode of proving it by testimonial evidence, i.e. by a witness who declares that he is acquainted with the type of handwriting in question. To satisfy this situation the witness (1) must observe the specimen in dispute, and (2) must bring to this examination a knowledge of the type of writing with which it is desired to affirm or deny a connection. It is the adequacy of this knowledge which is here to be examined. When may the witness properly claim that his opportunities of observation have been such as to give him a fair knowledge of the general type or character of the person's hand? *Wigmore* § 693. The ordinary methods of proving handwritings are (1) calling as a witness a person, who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act, (2) by a comparison of handwriting as provided in section 73 of the Evidence Act and (3) by the admission of the person against whom the evidence is tendered. *Barindra v Emperor* 14 C W N 1114 (1138)=37 C 467. *Sarojini v Haidas* 26 C W N 113=34 C I J 373. *Balaham v Md Said* 77 Ind Cas 872 (L), *Khayyuddin v Emperor*, 53 C 372. As regards the first method when a witness, saw the very disputed document being written, he made no comparison. He saw the very act of writing as he might have seen the very act of ploughing a field and he needs no knowledge of the general character of the writer's hand. This section deals with opinion evidence of non expert witnesses to prove handwriting. A person is considered qualified to testify to handwriting when he has seen the person whose handwriting is in question (1) with, or (2) in the ordinary course of business, has become familiar with such person's handwriting through the receipt of communications purporting to be written by him, or (3) when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. *McKellen's Ft* § 145. This section lays down another real exception to the rule excluding hearsay evidence. The reason for the exception is plain. Unless a signature or writing has been made in the presence of a witness who can afterwards identify it, the only possible proof of handwriting is opinion evidence and opinion evidence of person specially qualified to testify. We have thus in proof of handwriting the same two classes of expert testimony which have been before referred to—that which is based on observation and that which is based on special training or education upon a particular subject.



- S 47.** knowledge they say they believe the letters and papers are of his handwriting. That, gentlemen is the only evidence that can be given of handwriting, except it happens that there be a person who saw the prisoner actually write the papers." *Hensley's Case*, 19 How St Tr 1341. In *Hoper v Ashley* 15 Ala 463, it was said "When the knowledge of the handwriting of a party is acquired by having seen him write, the usual enquiry of the witness is whether he has seen the party write and afterwards whether he believes the paper in dispute to be his handwriting. The course of examination involves two questions. First, whether the supposed writer is the person of whom the witness speaks secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity, the second a question of judgment, or a comparison in the mind of the witness between the general standard and the writing produced. This kind of evidence, it is said, like probable evidence admits of every possible degree from the lowest presumption to the highest moral evidence. It may be so weak as to be unsafe to act upon or so strong as in the mind of every reasonable man, to produce conviction. But whatever degree of weight his testimony may deserve,—which is a question exclusively for the jury,—it is an established rule that if he has seen the person write he will be competent to speak to handwriting, and this, although the impression in the mind of the witness may be faint and inaccurate." Whether one could obtain a sufficient notion of the general character of a person's hand by seeing him write once only might well have been doubted. Tradition, however has handed down a fixed rule that seeing the person write once only is as a matter of law sufficient. *Wigmore* § 694. *Gariells v Alexander*, 4 Esp 37. *Pouell v Lord*, 2 Stark 164, *William v Marshall*, 8 C & P 381. *Doe v Sudermore*, 5 A & E 719 (730), *Warren v Anderson*, 8 Scott 384. The question is whether a certain document is in the handwriting of A. B has seen A write but twice. His opinion is admissible. *De la Motte's Case* 21 How St Tr 810. In an action on a foreign bill of exchange, the only evidence of the handwriting of the defendant was that of his attorney's clerk who was called by the plaintiff and who testified that he had seen the defendant sign the bill of exchange in the cause, but had never seen him write on any other occasion. The Court admitted his evidence. *Gariells v Alexander* 4 Esp 37. The question is whether a paper is in B's hand. C has seen him write only once. His opinion is admitted. *Hoine Toke's Case* 25 How St Tr 71, *Wellman v Worrall* 8 C & P 380. *Warren v Anderson* 8 Scott 384. A was sued on a note which he denied ever having signed. To prove his signature, B who has seen A write but once and then only to receipt a bill which B had paid to him, was admitted. *Redout v Newton* 17 N H 71. In that case the Court observed "There is no rule of law that requires a witness called to prove the handwriting of a party should have seen the party write a large number of times. Handwriting like the countenance, form, gait and gesture of a party is recognized by some more readily than by other witnesses, and is in some person marked by more decisive and obvious peculiarities than in others. All that is requisite is to ascertain whether the witness has seen handwriting which by an infallible test he knows to be that of the party, and then he must upon his oath, declare if the writing exhibited appears to him to be that of the same party. The weight to be attached to such testimony must depend upon the ordinary tests of knowledge, the capacity of the witness and his disposition to tell the truth and the means that have been afforded him, whether from the intrinsic nature of the subject itself or the familiarity of the witness with it, to require the information he assumes to have. The witness to the genuineness of the defendant's signature to the note was therefore properly admitted." See also *Hartung v People* 4 Park C C 319. *Dono Ghoe v People* 6 Park C C 120. *Lauson Expt & Op Ev* p 336. Mr *Elans* said "I have known the admission of this evidence carried so far as for an attorney after the failure of other attempts to stand up and swear to a knowledge of the writing of the opposite party from having once looked over his shoulder when writing a letter at an ale house. *Elans Potheiv*, Vol II, 160 see also *Derrick's Case* 5 Cr App 162. "It is true" says *Prof Wigmore* that one may even now be deemed incompetent if though he saw the act of writing done he in fact formed no idea of its character (*De la Motte's Fr* 21 How St Tr 810).

that a tendency is perhaps growing to leave the matter to the discretion of the trial Court, and that Judges have sometimes expressed dissatisfaction with a rule of such blind and unqualifying dogmatism. Nevertheless, the rule is a settled one." *Higmore* § 694

In *Pouell v Ford*, 2 Stark 164 where the witness had seen the party sign his name only once, on which occasion he did not write it at length, but used the initial of his christian name *Lord Ellenborough* said that, 'if the witness had seen the defendant write his name at full length although but once, it might have been sufficient if, from the exemplar lodged in his mind he could have sworn to a belief that the handwriting was the same, but that the evidence given was insufficient since the witness had never seen the defendant write his Christian name and that it was as necessary to prove the Christian name as well as the surname to be in the defendant's handwriting and that the one was not to be inferred from the other, any more than the rest of the name itself could be inferred, from proof that one or two letters were in his handwriting.' But ten years later in *Leuis v Sapio*, M & M 39, Chief Justice Abbott refused to be bound by this ruling. In this case, to prove the defendant to be the drawer of a bill signed *L B Sapio*, a witness testified that he had seen him write his name several times, but always thus, "*Mr Sapio*", and that he had never seen him write his usual signature or full name. The defendant's counsel objected citing *Lord Ellenborough's* ruling. But Abbott, C J said "I will not abide by any such decision as that. The witness has seen the defendant write his surname he believes the surname in the defendant's signature on the bill written by him. It is quite enough."

The law has defined no limit of time within which the handwriting, which is the foundation of the witness's belief, must have been seen by the witness. "When I first came into the profession," said *Lord Eldon* in *Eagleton v Kingston*, 8 Ves 424 (473) the rule as to handwriting in *Westminster Hall*, in all the Courts, was this. You called a witness and asked whether he had ever seen the party write. If he said he had whether more or less frequently, if ever, that was enough to introduce the subsequent question, whether he believed the paper to be his handwriting. If he answered that he believed it to be so, that was evidence to go to the jury. If he refused to answer to his belief, he was pressed perhaps too much, to form a belief but if he would not go to the length of belief his evidence went for nothing. Or you might ask a witness who had not seen him write for a length of time if you could not get a witness of a subsequent date you might call one who had not seen him write for twenty years, and if he said he believed it was the writing of the person that evidence might go to the jury, but to be affected by all the rest of the evidence, as it is the nature of all evidence to be more or less convincing." In *Doc v Surlemore*, 5 A & E 703, *Patteson J* said "All evidence of handwriting except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. The knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and period and other circumstances under which the witness has seen the party write but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname."

The question is whether a certain paper was written by P W, who has not seen I write for nineteen years is called and his testimony is received. *Horne v Toole's Case*, 25 How St Tr 71, see also *Warren v Anderson*, 8 Scott 354 where the witness has seen the writer to write ten years before. So in *Smith v Walton*, 8 Gill 18 (Am) a witness is allowed to depose after six years. In that case the Court observes "The impression made on the mind of a witness who has seen a party write his name only in a single instance may be exceedingly faint and imperfect, but it is nevertheless testimony, provided the witness can declare, as he has done in the present case that from his knowledge of the character of the defendant's handwriting thus acquired he believes it to be genuine. This evidence, like all evidence founded on probability will"

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every conceivable degree from highest to the lower order of presumptive proof. It is therefore a proper subject for consideration of a jury, who must determine what influence and weight is to be given under all the circumstances of the case to the opinion of a witness who places his belief upon a single instance.' But in this connection it must also be borne in mind that 'some men may receive a creditable and lasting impression from the examination of a single signature, than others receive from a large number. Some too may retain the impression thus received after a lapse of years, while in others it would be obliterated after a lapse of days. In such case the law has fixed no limit to the measure of human capacity.' *Per Spencer J in Branchman v Hall* 1 Disney 39. The quantity of writing that was seen is wholly immaterial. *Higmore* § 696. It is obvious that one who denies the genuineness of a writing, which an opponent affirms or, *vice versa*, will be tempted to form his writing to suit his claim if he writes after controversy for the purpose of showing the type of his writing. It is true that one cannot vary his handwriting entirely at his pleasure, but it is safe as a rule to accept no testimony founded on such specimen, though the matter should be left to the trial Court's discretion. But no such objection attaches to specimens thus written at the opponent's request for here the opponent in effect takes the risk of the handwriting, feigned and waives the objection. There is moreover no objection to testimony based on an act of writing subsequent to the date of the disputed writing (if no controversy had arisen) the type of writing is always assumed to have been substantially the same, — an assumption forced but practically necessary. So too, the knowledge may be acquired after the witness saw the disputed writing — a question which becomes important when the original is lost. *Higmore* § 697.

**When he has received documents etc — Ex Scriptis Olim Visis.** A person is acquainted with the handwriting of another when he has received documents (e.g. letters) purporting to be written by that person in answer to documents written by himself or under his authority, and addressed to that person. *Lauson Esq d Op Lx Rule 48 Thomas v State* 103 Ind 419 (1m) *State v Hussey*, 131 Mo 337. A witness who testifies that he never saw A write, but who narrates occasions when he received papers from A under circumstances which left no doubt that they were written by him, is competent to express his opinion as to the genuineness of A's signature to the note in suit. *Sprague v Sprague* 30 N Y S 162 (1m). But a witness does not know sufficient knowledge to testify as to the genuineness of a signature where his knowledge was derived from the signature attached to a notice addressed to him, purporting to be signed by the person, but he did not see it signed, never saw her write, and it did not appear that she had acknowledged the signature to be hers or that witness acted on it. *Falbot v Hedge* 5 Ind App 555 (Am). The question is whether a given letter is in the handwriting of A a merchant in London. B is a merchant in New York who has written letters addressed to A and received letters purporting to be written by him. The opinion of B on the question whether the letter is in the handwriting of A is admissible though he never saw A write. *Thorpe v Gisborne* 2 C & P 21. *Lord Ferrars v Spireley* Fitz 195. *Harrington v Fry* 1 C & P 289, *Middleton v Sanford* 4 Camp 34. *Gould v Jones*, 1 W Bl 254, *Murieta v Wolfhagen* 2 C & K 744. *Southern Lx Co v Thornton*, 41 Miss 216, *Parsons v McDaniel* 62 Gr 100, *Lauson Esq d Op Ex* 339. The question was whether a document was in A's handwriting. B had received letter purporting to come from A, and had answered one of them but had received no reply thereto. B was held not qualified to prove A's handwriting. *Webb v Hama Morris* (Iowa) 411. The witness in the present instance and the Court in the above case had received two letters purporting to come from the defendant, to one of which he had replied. Had the correspondence been continued the probabilities of imposition would have been so far rebutted as to render him a competent witness to prove the fact in question but if the receipt of two letters, and an answer by the witness before any reply has been made to the undelivered letter, is sufficient to enable the witness to swear to the signature it will be a very easy matter to manufacture testimony of that nature. In some cases the rule as above is laid down with the qualification that the witness must have acted on the letters received by him. *Sitor v Bolinger* 39 Tex 411. In *Mudd*

*v. Sufermore*, 5 Ad & Ell 703, the leading English case on the legal mode of proving handwriting *Williams J* said "When speaking of the facts necessary to introduce knowledge of handwriting not from actual inspection, but from correspondence I adverted to an expression in frequent use, and which indeed, has almost grown into the currency of a proverb upon this subject, that the letter or letters must have been acted upon. If however, by this expression it be meant to imply that any business must be transacted or in any sense of the word yet done the observation is without foundation for nothing of the sort is necessary. Any thing from which the identity of the writer is established may suffice." In *Cunningham v. Hudson River Rail* 21 Wend 559, *Banson J* referred to this expression, objecting that the mere fact that a person had received a letter from a stranger on which he acted was no ground for presuming that it was genuine. Some acknowledgment on the part of the writer or other evidence going to show that the letter was really written by him he very properly thought, should also be required. "Standing alone," said he "the fact that the witness acted on the letters has no tendency to prove them genuine. It merely proves and that merely by inference that the witness believe<sup>d</sup> the letters authentic. His belief is of no importance, unless it is founded upon some good reason such a reason as will satisfy the jury as well as the witness. Although the fact that the witness has acted on the letters when standing alone is of no importance it may be of great value in a chain of circumstantial evidence. The act done in pursuance of the letters may be followed by such acts of approval or acknowledgment on the part of the supposed author as can only be accounted for on the supposition that he was in truth the writer of the letters."

The law in *America* on this point is thus laid down in a recent *West Virginia* Case. "The mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient unless there has been some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer other than the letters themselves, that the said letters are genuine and in the handwriting of the person from whom they purport to come. A person who has heard business correspondence with another, acted upon by both parties is competent to testify as to the handwriting of his correspondent although he may never have seen him write. But when the letters have no relation to business transactions but are letters of merely friendly or polite intercourse some acknowledgment of handwriting in some way other than the letters themselves on the part of the supposed writer, must be shown. The knowledge of one witness must be founded on some other means than the receipt and contents of the letters. The testimony of the witness *Johnson* was to the effect that he had known the plaintiff for fourteen or fifteen years, did not know whether he had ever seen her write, corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them had received no letters recently had some of the letters with her. The question was then propounded to him. From your knowledge of her handwriting, derived from having received letters from her, would you know the plaintiff's signature? The Court refused to allow this question to be asked, and rightly so for the law answers this question that the witness could not know her handwriting from the mere fact that he had received letters purporting to come from her. His knowledge must be extraneous to the letters sufficient to raise a presumption that the letters were not only from, but written by the person whose name was signed to them. But according to this section the mere fact that he has received letters purporting to be from the person whose signature is in controversy is sufficient to make his opinion relevant. [Vide illustration to the section.] Some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer that the said letters are genuine and in the handwriting of the person whom they purport to come will only add weight to the evidence. According to this mere exchange of correspondence alone is sufficient to justify belief in genuineness. This is also in accordance with the orthodox doctrine obtained in England. *Ford Maguire Trial* 4 How St Tr 653 685 *Gould v. Jones* 1 W Bl 381 per *Lord Mansfield* *Earnes v. Fromposky* 7 T R 263; *Owenston v. Wilson*, 2 C & K 1 *Murieta v. Wolpham*, 2 C & K 744 *Tanner v. Case*,



**S 47** 3 Cr App 103, 155=(1910) 1 K B 346 In the last mentioned case a document of consent signed by the Director of Public Prosecutions was put in. In admitting the document the Court said "It is sufficient if some body, for instance who has been in correspondence with the Director of Public Prosecutions says (I received this in ordinary course, and I believe it to be signed by the Director of Public Prosecutions)." All that the Court says is, that there must be some kind of proof of it, but it must not necessarily be proof of some body, who says, 'I have seen the gentlemen write which in the old fashioned days, at any rate, was the technical way of proving the signature.' Similarly in *Batchelor Honeywood* 2 Esp 715, Lord Kenyon said "If persons are in the habit of corresponding, and letters are received from one to the other, upon which any transaction takes place that may enable the party to swear to his correspondent's handwriting." The use of this class of testimony is comparatively new, its orthodoxy was not established until the last century. *Wigmore* § 699 For the earliest discussion on this point vide *Lord Fevers v Spuley*, 114 Gibson 195, which was decided in 1731. That one is not acquainted with another's general writing does not disqualify him from proving his signature. *McKenley v Gaylord* 1 Jones L 94. The Court observed in that case "The testimony of K was clearly competent. The witness testified that he had corresponded with the merchant in New York whose signature was to be proved, by writing to him and receiving letters from him and in this way he had acquired a knowledge of his signature. The objection was 'the witness had not shown himself qualified to speak of it. It is written one of the above modes stated whereby the competent knowledge may be acquired and the witness professed that in that way he had acquired his knowledge of his operations.'"

When in the ordinary course of business, documents purporting to be written etc.—*Ex Scriptio Olim Visis*. A person is acquainted with the hand writing of another when in the ordinary course of business, writings purporting to be written by that person have passed through his hands. *Berg v Peterson*, 49 Minn 420 (Am). *Tuttle v Raven* 98 N C 513 (Am). The clerk, as Lord Denman remarked in *Mudd v Sacchore* 5 Ad & El 703, "who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write nor received a letter from me. A clerk comes from a merchant's counting house and proves the handwriting of a party by his knowledge of it acquired by his seeing the letters of the party which have been received at his master's counting house. It is frequently done. *Rex v Stanley* 5 C & P 218. *Overton v Wilson* 2 C & K 1, *Reyburn v Belotti*, 10 Mo 597. *Tidford v Knott* 2 Johns Ct 311. *Rend v Hodgson* 1 Cranch C Ct 491. In *Johnson v Davene* 19 Johns 134=10 Am Dec 198 the Court observed 'To prove a party's signature it is not indispensably necessary that the witness should have seen him write. *Phillips* gives the true rule. The admission of the evidence must depend upon whether there is good reason to believe that the specimens from which the witness derived his knowledge were written by the supposed writer of the paper in question. In *Tidford v Knott*, (2 Johns Ct 214) it was held that the signature of the indorser was well proved by a person who had been in the habit of seeing his correspondence and from that believed the signature to be his. The witness in this case had received the plaintiff's notes all of which except one had been paid, the payment of the notes with his signature to them unexplained was a full admission that he had made and subscribed them. If then the witness had sufficiently observed to ascertain the distinction and prevailing character of the handwriting he was in a situation to identify the plaintiff's signature and he ought to have asked if he believed the plaintiff's name to the receipts to be his handwriting. If he had answered that question affirmatively then the receipts should have been received in evidence. *Larson Expt & Op* Pt 313. Where the genuineness of signatures to bank bills is disputed the evidence of bank officers through who handle similar bills pass daily, is obviously of highest value. *Larson Expt & Op* Pt 313. "I think that a person who receives and pays away

hundreds of bank notes has as good an opportunity of judging of the signatures upon them as if he had received a few letters from the persons whose signatures they are" *Hall J in State v Chandler*, 3 Hawks 390. Similarly, all persons not connected with the bank, but who have frequently received and paid out bills purporting to be issued by it, and who have cashed such bills at the bank, are competent to testify to the signatures of the cashier and president on similar bills alleged to be forgeries although they have never seen either cashier or president write. *Com v Carey* 2 Pick 47. 'The objection' it was said in one *American case*, "that no one shall speak as to the handwriting of the President and cashier of the bank but one who has seen them write or has been in the habit of receiving letters from them in the course of correspondence is not a sound one. These signatures are known to the public, and persons who have been in the habit of distinguishing genuine from the counterfeit signature, and conversant in dealings in bank bills are as well qualified to determine their genuineness as persons who, in private correspondence have received letters from the person whose handwriting is in question." So also a person is said to be acquainted with the handwriting of another when holding at the time in official position, signatures or writing of that person have come before him. It is settled every where that if a person has seen another write his name but once, he can testify and that he is equally competent if he has personally communicated with him by letter although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another besides having seen him write or correspond with him. There is no good reason for excluding any of these modes of getting information, and if the Court on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which enable him to judge of its genuineness he should be permitted to give to the jury his opinion on the subject." Thus the signature of a justice of the peace may be proved by a recorder of deeds or his clerks who have seen it as a certificate on other papers in the office (*Rogers v Rutter*, 12 Wall 317), the clerks in a land office may become acquainted with the signatures attached to papers filed there (*Goddard v Geomunger*, 5 Walls 209) the handwriting of an officer of the treasury department may be proved by a person who had corresponded with that officer, remitted money to him, and received his receipts (*United States v Smson* 3 P & W 437), or the handwriting of a surveyor by one who has seen many official plans signed and verified with his signature (*Jones v Huggins*, 1 Dev L 223), a notary public or a justice of the peace who has come across a person's writing in an official way may testify to its genuineness when found on other papers (*Dungan v Beard*, 2 N & M 400), and so may a clerk of the Court (*Lates v Lates* 76 N C 142), a jailer through whose hands letters signed by a prisoner were received from him to parties outside have passed, may, from this circumstance alone, form a sufficient knowledge of the prisoner's handwriting. *State v Hastings* 53 N H 450, *Lauson Expt & Op Et* 399. In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. *Mt Jasoda v Janal* 4 Pat 394=A I R 1925 Pat 787. The evidence of a record keeper who examines and files all English papers that come to the office in the ordinary course of his official business about the handwriting of a person whose papers he has so filed on files 7 or 8 occasions is relevant under this section. The word "habitually" means "usually," "generally" or "according to custom." It does not refer to the frequency of the occasions but rather to the invariability of the practice. *Emperor v Fande*, 27 Bom L R 1031=89 Ind Cas 1042=26 Cr L J 1474=A I R 1925 Bom 429.

**Other means of acquaintance with a person's handwriting.** A person is also acquainted with the handwriting of another when he has seen handwriting which that person has acknowledged to be his. *Redd v State*, 47 S W R 119. *Lauson Expt & Op Et* Rule 51, *Smith v Sanisbury*, 5 C & P 196. There can be no question that an express acknowledgment by the purporting writer affords an adequate ground of belief in the authenticity of the writing received.

**S 47** and this is generally accepted. *Wignior* § 700. A holder B's note, which he has acknowledged A is qualified to testify to B's signature when attached to another note, or to testify his handwriting generally. *Hammond v. Varian* 51 N. Y. 398.

**Signature of a Partnership firm.** A witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner. *Gordon v. Price*, 10 Ired 385. It is of no consequence that the witness had no knowledge of the writing of the partner M, derived in any manner as would enable him to say with precision that he believed that M personally put the name of the firm to the bill for whether that person or any other duly authorised signed the bill the firm was in law the drawer, and the witness states his belief that as far as could be judged from the handwriting, this bill was signed by the same person who habitually made notes on the house of G. P. & Co., which the firm habitually took from the witness. The substance of the testimony is that whoever generally gave securities in the name of G. P. & Co.—whether as partner or a clerk—must have drawn the bill in question. This, we think, was sufficient to let the bill go to the jury, whose province it was to determine how much credit ought to be allowed to the judgment and integrity of the witness.

**Belief of a witness as regards handwriting.** A witness may testify to his belief that a writing shown him is in the hand of another person, though he cannot swear positively thereto. *Lauzon Expert & Op. Fr. Rule 13, Com. v. Andrews* 143 Mass. 23. In *Garrels v. Alexander* 4 F. & P. 210 decided in 1810 a person who was called to prove the signature of the defendant to a foreign bill said that he had seen the defendant write out once, that the signature on the bill was like what he had seen him write, but that he could form no belief on the subject. *Lord Kenyon* held that this was evidence to go to the jury and the plaintiff had a verdict. But this ruling was criticized by *Lord Eldon* in *Eagleston v. Kingston*, 8 Ves. 474 who laid down that it was necessary that the witness should form a belief. Most of the American Courts have required more of the witness than did *Lord Kenyon*, but less than *Lord Eldon*. "Belief is stronger than opinion" and in the majority of the cases in America it is sufficient if the witness can say that he believes the writing in question to be or not to be in the hand of the supposed writer though he is not able to swear positively on the subject. In *Hopkins v. Meggwire* 35 Me. 78 (Am.) the Court observed: "All that a witness called in such a case can be compelled to testify is that the handwriting in question resembles that of the person whose it purports to be in other words that it looks like it. From the resemblance between the signature before him as compared with those of the same person previously observed the witness has drawn the inference that they were made by one and the same individual. The strength of his belief will depend on the greater or less degree of similarity. He can only testify to his own state of mind on this question. The language used is indicative of the strength of his belief was properly before the jury for their consideration and it was for them to determine its sufficiency to establish the fact which it was offered to prove. When the witness stated that he could not swear to the handwriting and the endorsement he was probably understood by the jury as referring to his own knowledge, and not as intending thereby to limit or restrain the testimony previously given and it is not for us to say that they misunderstood him. Though it may be proper to receive the testimony of a person who declines to express a decided belief will yet declare that he is of opinion or that he *thinks* the paper is genuine yet it is going a step further when the witness will only state that the handwriting is like a statement which may be perfectly true, but yet within the knowledge of the witness the paper might have been written by an utter stranger." *Taylor Fr.* § 1868.

**Knowledge of handwriting acquired for the purpose of testifying.** Knowledge of handwriting acquired for the purpose of testifying will qualify only where it is clear that there was no motive either in the writer or in the witness to manufacture testimony. *Reese v. Peese* 90 Pa. St. 91, *Fueller v. Hyatt* 114 Ind. 63; (Am.) *Lauzon Expert & Op. Fr. Rule 51*. The question arising on

a trial was as to the handwriting of A, B was offered as a witness. It appeared that previous to the trial, A had written his name for the purpose of showing B his manner of writing it. B's evidence was rejected. *Stranger v Searle*, 1 E-p 15. In that case Lord Kenyon refused to allow the witness to testify, because he said the party might through design, write differently from his common mode of writing his name. On an indictment for sending a threatening letter, the only witness called to prove that the letter was in the prisoner's handwriting was a police officer, who, after the letter had been received and suspicions aroused was sent by his inspector to the accused to pay him some money and obtain a receipt, in order thus to get a knowledge of his writing. This evidence was rejected. *R v Crouch* 4 Cox C C 163. In delivering the judgment the Court observed: 'Knowledge so obtained that is to say for such a thin purpose and under such a bias—is not such as to make a man admissible as quasi expert witness. He does not come to speak to a fact, but as a witness of skill to give his judgment upon a particular question. The only means he has had of acquiring a capability to favour such judgment are not such as to make him a competent witness in that particular.'

**Witness's acquaintance with handwriting whether shifts the burden of proof**—Where a witness swears that he is acquainted with the handwriting the burden is on the opposite party to show that his sources of information were insufficient to qualify him. *Henderson v Baul of Montgomery* 11 Ala 855, *Lauzon Expert & Op Fr* rule 56. In proof of a document a witness stated that he was acquainted with the handwriting of the writer but he was not asked in examination in chief any question which would elicit any of the several matters indicated in the explanation to section 47 of the Indian Evidence Act (I of 1872). The witness was not cross examined in the point neither any objection was taken at that time. Held that his evidence was admissible. *Sanlario v Ramji* 28 B 58. The witness need not state in the first instance how he knows the handwriting since it is the duty of the opposite party to explore on cross examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. *Taylor* § 1863. 'It appears to us that this is a correct exposition of the law in this country also though it is permissible and may often be expedient that the matters referred to in the explanation should be elicited on the examination in chief. We may here further point out that it is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to interfere and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting.' *Per Jenkins C J* in *Sanlario v Ramji* supra at p 62. Therefore, where the witness has not been questioned on the trial as to his means of knowing a certain handwriting, no objection to the want of qualifications to so testify can be made on appeal. *Ibid*, *Berryman v Dahlgren*, 6 Rob 188, *Smith v Walton*, 8 Gill 81. So the evidence of a witness contained in a deposition that he knows a certain paper to be in the handwriting of a party is sufficient, on appeal where the opposite party has declined to cross-examine as to his means of knowledge. *Whitler v Gould* 8 Wall 485. So where the witness had stated that a certain letter was written by the prisoner but on cross-examination said "It looks like his handwriting, but I could not swear to his handwriting unless I saw him write" the evidence was held admissible on appeal. *Gross v State* 62 Md 180. When a witness has sworn that he knows the handwriting of the alleged signer of a note and that the note is signed by him, the defendant, he may on cross-examination be asked when he first saw the note and who showed him the note the questions tending to elicit from him the opportunities he had of examining the signature. *Lauzon Expert & Op Fr* 382.

**Quantum and weight of evidence** The testimony of one witness to a signature who swears he saw the party sign the instrument, and whose credibility is not impeached will not be invalidated by the negative statement on oath of two witnesses, made after a comparison of the disputed writing with others on file in the suit (*Ell v Norwood* 7 La 163) nor is it held in Louisiana,

**S. 48.** can the oath of a party that a certain signature alleged to be his, is a forgery, be overcome by the testimony to the contrary of witnesses who had never seen the party write or even sign his name, but who express their opinion solely from the similarity and likeness to signatures of his which they have seen. Such evidence, it is very well said may just as well show the accuracy of the counterfeiter as the genuineness of the signature in dispute. *Robinson v. Arnel*, 15 L.R. 261. In *Murphy v. Hagerman* Wright 292, the defendant's signature to a promissory note was alleged to be a forgery. Twelve witnesses testified to their knowledge of his handwriting, and gave their opinion that the signature to the note was his. Three witnesses, one a bank cashier, were of a contrary opinion. In charging the jury, Wright J. said: "The greatest number of those who give you an opinion upon the signature think it that of the defendant, but counsel claims that superior skill and opportunity of the witnesses for the defendant entitle them to the most weight and particularly that the experience acquired by the cashier of the bank enables him to judge with the greatest certainty, of handwriting. It is true that experience and practice in judging of writing, as well as experience and practice in anything else will enable a witness more readily to form an opinion upon the subject of his experience, but the knowledge is not confined to particular stations—any person may acquire it. It appears to us involved in no mystery. The same powers of discrimination and of memory which enable us to distinguish faces and the difference between plants and trees is all that is required. We know with certainty the faces of our acquaintances though we have not always the power to describe particularly the points in the faces of different individuals or the minute particularities of any one. This skill is not limited to a knowledge of the face, while all the features or their expression remain as we have been accustomed to see them. We know the face, though derangement has imparted to it a new appearance, or when distorted by pain or disfigured by wounds and presented in an entire new light. It is the image of the whole face that impresses the memory. The faculties enable us to discriminate upon different plants and trees and to distinguish their varieties and the different species of the same general class. We duly meet those who with a single glance of the eye upon a tree can tell the precise kind of fruit it will bear, and we would implicitly rely upon their opinion, although if questioned, they were unable to describe accurately the difference between the several species. We judge of writings, as of other things by its individual character as a whole. We must take the opinion of those witnesses altogether and judge of their testimony as under all the circumstances they shall appear entitled to weight, from their opportunity of knowing the defendants' handwriting, and your estimate of their skill and judgment. A cashier of a bank is entitled to no more credit than any other person of equal skill. The jury found for the plaintiff." *Lawson, Taper & Op. Fv* 380.

**48** When the Court has to form an opinion as to the existence of any general custom or right, the opinion as to existence of right or custom, when relevant, is to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, is relevant.

**Explanation**—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

#### Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

**Principle** The opinions of ordinary witnesses derived from the observation are admissible in evidence, when from the nature of the subject under investi-

gation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal. *Lauzon, Op of Expert Pl.* Rule 63 "Facts are frequently collective, where a combination of the known elements may be expressed in the form of a conclusion or inference. Such inference is received, not as founded on the judgment of a witness but as the result of his personal observation and knowledge, as an equivalent to a specification of facts, because necessarily involved." It is not the statement of mere opinion but of the result of personal observation and knowledge as to the collective fact. *Ala, etc. A Co v Jarborough*, 83 Ala 238 (10). So far as customs are concerned such persons are, so to speak, the depositories of the customary law just as the text books are the depositories of the general law. *Jag Mohan Das v Mangal Das*, 10 B 528 (543).

**Scope of the section.** In *Bu Baiji v Bu Santol*, 20 B 53 (59) *Ranade J* said: "Mere opinion evidence is entitled to no weight in such matters and the custom must be proved by specific instances which plaintiff's witnesses have failed to adduce (*Rahmat Bai v Hirbai* 3 B 34). See also *Lachman Bai v Ubar Khan*, 1 A 441. But in a latest Privy Council case it has been held that a tribal or family custom excluding a daughter or sister from inheritance in favour of a collateral may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. No specific instances need be proved. *Amad Khan v Mt Channi Bibi*, L R 6 P C 190 = 3 O W N 93 = 6 Lah 502 = 52 I A 379 = A I R 1925 P C 267. A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government would not be admissible under section 15 in a case where a specific right claimed by a particular individual and not a general right is being dealt with. *Sanfucharya v Manah*, 51 Ind Cas 876. A general custom or general right may be proved by evidence, under this section by the opinions of persons who would be likely to know of its existence if it existed. Such opinions are relevant, but such opinions must be given by witnesses who give evidence. *Maung On v Maung Shue Bum*, 1 L B L 50. So the statements made by persons who are in a position to know of the existence of a custom or usage in their locality, are admissible under this section. *Saniatullah v Pian Nath* 26 C 184. It is admissible evidence for a witness to give his opinion on the existence of a family custom, and to state as the grounds of that opinion information derived from deceased persons. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay. The weight of opinion evidence on the existence of a family custom would depend upon the position and character of the witness, and of the persons on whose statements he has formed his opinion. *Per Lord Dary in Gururudhary v Supaiandhuaja*, 10 M L J 267 (P C) = 23 A 37 = 5 C W N 33 = 27 I A 238 = 2 Bom L R 831. On a question of the existence of a special custom in the *Bahmula* clan in Oudh excluding daughters from inheritance the village-ulars or village administration papers directed to be made by Reg. VII of 1822 and ascertaining and recording usages of this kind of the clan in question, were properly received in evidence under s 35 of the Evidence Act though they had been prepared by the settlement officers. *Do not state* and not by himself as required by the Regulation. Even if such papers were to be treated only as the recorded opinions of those likely to know the custom, they would be admissible in evidence under s 48 of the Act. *Lothray Kuar v Mahpal Singh* 5 C 744 = 6 C L R 599 = 7 I A 53 P C. In *Murammatt Lal v Murdhhar* 3 A L J 415 (P C) = 19 C W N 2 = 2 L 392 = 3 C L J 594 = 23 A 238. *Su Andreu Sobbe says*: "The village-ulars in the North Western Provinces is applied to what is not the most important document contained in the official records of the village administration. Entries therein properly made and maintained by the settlement officers who made them, have been held to be admissible in the case of *Kuar v Mahpal Singh* 7 I A 53 P C. It is held that such evidence is admissible under section 35 of the Indian Evidence Act as evidence of a fact in issue, or inheritance, or, under section 48 as evidence of a fact in issue, or of such custom by persons likely to know of its existence."

**S 48** that this section does not require that the person who holds that opinion should be called as a witness. Such opinion may be based on hearsay. *Vide Per Lord Dary in Guadalupe v Suparandhuaya*, 23 A 37=27 I A 238 *supra*. So according to their Lordships' opinion, recorded opinion based on hearsay is admissible in evidence. It is submitted with great deference that this interpretation of the section can neither be supported on principle nor on the proper construction of the wordings of the section. Sections 45 to 51 of Evidence Act lay down certain well known exceptions, where opinion evidence of a witness is admissible. But these sections are not in any way exceptions to section 60 of the Evidence Act which lays down that if it refers to an opinion or to the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. So "this section when read with section 60, *post*, requires that the person who holds the opinion should be called as a witness." (*Vide Woodroffe Ev. 8th Ed p 411*) Where any question of right or custom is to be decided, opinion of persons, who would be likely to know of its existence are, under this section admissible in evidence. *Dalglish v Gu a ffa Hossain* 23 C 427 followed in *Sariatulla v Pian* 6 C 184. The custom or right thus to be evidenced must relate to a considerable class of persons. *Bayron v Manolomula* 12 C W N 74=9 Bom L R 1348=6 C L J 766=3 M L J 1=5 A L J 1=30 I A 1. Section 13 applies to all rights and customs, public and general, and refers to specific facts which may be given in evidence. Section 32 clause 4 refers to the reception of second hand evidence in cases in which the declarant cannot be brought before the Court whether in consequence of death or from other cause. This section refers only to general rights or customs not public. It refers only to the evidence of a living witness produced before the Court, sworn and subject to cross examination. Ordinarily speaking such a witness must in his examination in chief, speak to facts only, but under this section he will be allowed to give opinion as to the existence of the general right or custom. He will not be confined to instances in which he has personally known the right or custom exercised as a matter of fact. Custom is not a matter to be submitted to the senses. It is made up of an aggregated repetition of the same fact whenever similar conditions arise, and though a bare opinion is worth nothing, without which we can ascertain the data on which it is founded. Yet it is always to be remembered that section 51 is to be read with this section and that the grounds for the witness's opinions, are sure to be elicited in cross-examination even if they should not be elicited in the examination in chief or demanded by the Judge. A boundary between village, the limits of a village or town, a right to collect tolls, a right to trade to the exclusion of others a right to pasturage of waste lands, liability to repair roads, or plant trees, rights to water-courses, tanks, ghats for washing, rights of common and the like will be found the most ordinary in Mofussil practice. *Nort F 227*.

**Customs.** A custom is a particular rule which had existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality although contrary to and not inconsistent with the general common law of the realm. *Tookwood v Wood* 6 Q B 30, *Halsbury's L of L* p 218. A custom must be confined to a definite limited locality. It may import a general right in a district. *Muller v Taylor & Barr* 2305. For further annotations *vide p 181*.

**Right.** "It may be difficult perhaps to define precisely the scope of the word right, but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called 'rights' more especially as it is used in conjunction with the word 'custom'." It is certainly used in that sense in subsequent parts of the Act (see section 18 and sub-section 4 of s 32) which deal with matters of public or general 'rights' or custom and in section 13 the word is probably intended to include, both public and private right of that nature. *Per Garth C J in Gunga Lal v Lath Lal* 6 C 171 (H B) at p 186. In the same case *Jackson J* said: "It seems to me a clear as anything can be that the right here spoken of is something quite distinct from ownership." What is referred to in the section cited is evidently

a right which attaches either to some property or to *status* in short, incorporeal rights which though transmissible are not tangible or objects of the bodily senses." But in the same case *Mitter J* in dissenting from the Full Bench gave a very wide interpretation to the word right. At page 180 he said "Then it has been said that in section 13 of the Evidence Act, the legislature intended to refer to incorporeal rights only, because in other parts of the Act, for example in ss 32 and 48, where the same word occurs in conjunction with the word 'custom' it has been used in that sense. In the first place, it is by no means clear that ss 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that in the generality of cases, such rights are incorporeal, but it is by no means confined to that class only." See also *Pippu Khan v Rajon*, 2 C W N 501 (F B). *Collector of Goralhpur v Palalghari*, 13 A 1 (F B). *Ranchodas v Bapu* 10 B 439, *Lakshman v Anant* 24 B 591, *Ramdas v Apparu* 12 M 14, *Venkataram v Venkatarreddi*, 15 M 12, *Typhulunga v Venkatarama* 16 M 194.

**Person who would be likely to know** The opinion must be of the persons who are likely to know of its existence if it existed. *Jugmobandas v Mangaldas* 10 B 528 (542). In *Sariatullah v Priannath Nandi*, 26 C 184, the question was whether occupancy right was transferable by custom. In deciding who are competent to prove customs under this section the Court observed "We think in the present case also the statements made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible. For example a person, who had been in the habit of writing on deeds of sale, or one who had seen transfers frequently made would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality, and I think that the opinion of such persons would be admissible as pointed out by the learned Judges under section 48 of the Evidence Act."

**Explanation** The Explanation excludes private rights from the operation of this section. "Opinion or reputation evidence is not receivable to prove such rights. They must be proved by facts such as acts of ownership. This kind of evidence is admissible to disprove as well as to prove a general right or custom. *Nott F* 227. In *Hught v Fatham* 7 A & E 358 on appeal in 5 Cl & F 720 *Coltman J* asked "Where boundary is proved by reputation what is the guarantee for sincerity?" *Mr Stirling* replied "The publicity of the transaction and the general interest in the fact being rightly ascertained." *Coltman J* said "The principle on which I conceive the exception (of reputation as to public rights) rests in this—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject and such concurrence is the presumptive evidence of the existence of an ancient right of which in most cases direct proof can no longer be given. So "a reputation is admitted where public interest is concerned. *Denman L C J* in *R v Antioch* 2 A & E 793. The terms 'public' and 'general' are sometimes used as synonymous merely with that which concerns a multitude of persons. *Wells v Sparle* 1 M & S 690 per *Baley J*."

Opinions as to usages tenets etc, 49 When the Court has to form an opinion as to—

- the usages and tenets of any body of men or family,
- the constitution and government of any religious or charitable foundation, or
- the meaning of words or terms used in particular districts or by particular classes of people,
- the opinions of persons having special means of knowledge thereon, the relevant facts

**Principle** The matters mentioned in this section can only be proved by persons having special means of knowledge



**S 49.** Scope of the section The kind of evidence contemplated by this section must be the expression of independent opinion based on hearsay and not repetition of hearsay. It is admissible for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons. *Grundhucaya v Suparandhucaya* 23 A 37 = 5 C W N 33 (P C) = 27 I A 235 = 10 M L J 267 (P C) = 2 Bom L R 831. Where a certain member of a family accepted a certain interpretation of a clause in *Wajid ul az* the fact is admissible in evidence as to how a custom applying to the family is interpreted by members of that family. *Shafuddin v Niamul Ali*, 57 Ind Cas 8 = A I R 1925 Oudh 688. Opinion of dead persons cannot be proved save under s 32. *Protap Chandra v Jagadish Chandra* A I R 1925 Cal 116. To prove a custom, opinion of persons having special means of knowledge is relevant under section 49 of the Evidence Act. *Baynath v Rayu* 12 O L J 571 = 2 O W N 872 = L R 6, O 101.

**Usages of trade, agriculture etc.** When a trade usage is material to the issue the witness to prove it is apt to state it by declaring that usage attributes a certain right or liability in certain circumstances. This of course is a violation of the opinion rule: the witness should state the tenor of the usage or practice, omitting any reference to the legal effect. *Wigmore* § 1951. But the mere assertion of a custom does not involve opinion. *Comer v R. Co* 146 Ind 430. Usage is a matter of fact, not of opinion so the conclusions or inferences of a witness as to its effect, either upon the contract or the legal title or rights of the parties are not competent to show the character or force of the usage. The effect is to be determined by the Court. *Hoskins v Warren*, 115 Mass 514 535. The inquiry is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact to wit the usage or practice in the course of mercantile business. *Allen v Merchants Bank*, 15 Wend N Y 482, 488. So a party may examine witnesses to prove a particular course of trade or other matters in the nature of facts but not to show what the law is. *Ruan v Gardner* 1 Wash C C 145 (149). It is sometimes said that a witness to trade usage may state only specific instances, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks of Lord Mansfield and later Judges which do not justify it. *Wigmore* § 1951. In *Edie v East India Co* 1 W Bl 295 (297), 2 Burr 1216 (1222), Mansfield L C J said 'Many witnesses were examined by defendants to prove this usage but it did not appear that in any one fact the endorsee of such special endorsement ever lost the money by such omission [of the words or order] the evidence was only matter of opinion. So also in *Cunningham v Fonblanque*, 6 C & P 43. *Parl J* said "An usage of trade must be proved by instances" and cannot be supported by evidence of opinion merely." Similarly in *Hall v Benson* 7 C & P 711 (714), Tindal C J observed 'Is there any general course of business? Let your mind revolve over instances. I am not asking you whether it is just and proper, but whether there is any prevailing course of business.' But says *Prof Wigmore* 'there is no rule of exclusion. The usage is itself a fact and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference.' *Wigmore* § 1951. This view is in accord with the opinion of Lord Mansfield, in *Camden v Coutley*, 1 W Bl 417, where he ruled that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in trade though they knew no particular instance in the fact upon which such opinion was found. So the evidence of a well qualified witness as regards a trade usage who could not state individual cases is admitted inasmuch as the *factum probandum* is not a single isolated act or occurrence but the result or conclusion derived from a series of similar acts or circumstances creating and establishing in the mind of the witness a conviction or belief of the complex whole or comprehensive fact. *Hamilton v Nickerson* 13 All Mr 351, *Wigmore* § 1951. Under this section opinion of a witness as regards trade usage is made explicitly admissible. Under section 13 specific instances of usage can be given in evidence. So under

this section all usages of trade and agriculture can be proved by evidence of persons having special means of knowledge thereon *Wigglesworth v Dallison* 1 Sm L C 546

**Family usage** A custom is a rule which in a particular family, has from long usage obtained the force of law which must be ancient, certain and reasonable *Hur Poshad v Shoodyal*, 31 A 259 (285), *Huria v Burien*, 17 W R 316, *Debendra v Putambar*, 98 Ind C 43 A family custom must be established by clear and unambiguous evidence *Abdul v Sona*, 45 C 450 = 27 C L J 240 *Lal Gajendra v Lal Mathura*, 20 C W N 876, *Nagendra v Raghu*, W R (1864) 20 It may be proved under s 13 by specific instances. Under this section it can be proved by the opinion evidence of persons who have got competent knowledge of the same. Family custom includes the custom of primogeniture, custom of peculiar descent in a family and other customary rights peculiar to a family.

**Tenants of any body of men** This will include any opinion principle dogma or doctrine which is held or maintained as truth. It will apply to religion, politics, science etc *Nort Ex* p 228

**The constitution and government of any religious or charitable foundation** The opinions of persons having special means of knowledge as regards the constitution and government of any religious or charitable foundation are relevant under this section when the Court has to form an opinion as to the same. Thus in *Shore v Wilson*, 9 Cl & F 355, where the founder of a charity in the early part of the eighteenth century, had in the deed of grant, described the objects of her munificence as 'Godly preachers of Christ's Holy Gospel' and it became necessary to determine a few years ago what persons were entitled to the charity, extrinsic evidence was admitted to show, that at that period of history a religious sect existed, who applied this particular phraseology, capable though it seemed at first sight of a far wider interpretation to Protestant Trinitarian dissenters and that the founder was herself a member of such sect. *Nort Ex* 228 In *Hinckley v Thatcher*, 139 Mass 477, where the bequest was to "the Authorized Agents of the Home and Foreign Missionary Societies" testator's religious opinions, as involved in his acts in connection with churches and religious societies were considered. See also *Att Gen v Pearson* 7 Sm 290 (308) where the grant of land was for a meeting house, by Presbyterians for the worship and service of God. The trustees and the majority of the congregation having later ceased to be Trinitarian in belief a bill to restrain the use of the land for non Trinitarian tenets was brought asking a decree for inquiry as to the tenets of the founders, for interpreting the terms of the trust and the 'tenets in general' of the founders were considered by *Saduell V C*

**Meaning of words** When local terms or phrases are employed where they are in use, the presumption is that parties understood their meaning, and employed them according to their local signification. And to give effect to that agreement, the Court must know the sense in which they are employed. *Mayer v Walker* 24 Ill 133. In such cases parol evidence is admissible to explain the meaning of words and phrases. *Burr Jones* § 455. Parol evidence has been allowed to show the commercial meaning of the terms 'cotton in bales' *Taylor v Briggs*, 2 Car & P 525 'in the Month of October' *Chaurand v Angerstein*, Perke 43, *Bissel v Beard* 28 L R 740, 'holy honoured Lucas v Grouning' 7 Taunt 164 'Baltic Sea' *Uhde v Walltan*, 3 Camp 16 'bale', *Eorissen v Penn* 2 Com B N S 681 = 27 L J C P 29 = 3 Jur N S 867, 'depart with convey' *Lethbuden's case* 2 Salik 443, *Burr Jones* § 455

**Special means of knowledge** Where witnesses, as members of a family, have special means of knowledge, as to the usages of the family, their evidence will be relevant under this section, so far as the existence of such usage is concerned. *Shyamanand Das v Rama Kanta* 32 C 6. Such evidence is worthless unless it comes from persons who are shown to have some means of knowledge. There is thus analogy between opinion evidence under this section and hearsay evidence of custom based on hearsay. Vide *Per Parke B* in *Crease v Barrett*, 1 Cr M & R 929, *per Parke B*

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**50** When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact

Opinion on relationship, when relevant

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act\*, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code†

#### Illustrations—

(a) The question is whether A and B were married

The fact that they were usually received and treated by their friends as husband and wife is relevant

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant

**Principle** The question of presumption of relationship by conduct of parties often arises in cases of marriage and legitimacy. When the fact of marriage is in issue, subsequent conduct of the man and woman said to have been the parties to it is receivable to evidence the marriage. This conduct is traditionally spoken of as 'habit' and this common source of proof, with the reputation evidence which usually accompanies it, has come to be known by the phrase "habit and repute." The logical nature of the argument indicates it plainly to fall under the principle, that from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife and from this belief may be inferred the fact *Higmore* § 268. Upon an issue of the legitimacy of a child the conduct of the parents towards the child is admissible on the present principle, as involving an inference from the parents' conduct to their belief as to the fact on which the legitimacy depends (time of birth, time of marriage, identity of the child, and the like), and then from that belief to the fact itself. *Higmore* § 269. Similarly family conduct such as tacit recognition of relationship and the distribution and devolution of property is frequently received as evidence from which the opinion and belief of the family may be inferred. There is additional guarantee of its trustworthiness as opinion is to be evidenced by the conduct of the witness. *Nort* *Li* 229. The proviso is inserted as in divorce and bigamy cases the marriage must be strictly proved. *Ibid* p 230.

**Scope of the section** This section is taken from section 649 of *Taylor* which is as follows "Next family conduct—such as the tacit recognition of relationship and the distribution and devolution of property,—is frequently received as evidence from which opinion and belief of the family may be inferred, as resting ultimately on the same basis as evidence of family tradition. For since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to resolve the question to ascertain how he was treated and acknowledged by those who are trusted towards him by any relations of blood or of affinity." The presumption in favour of wedlock is another instance of the rule *omnia praesumuntur rite esse acta* (all things are presumed to be rightly and solemnly done) *For v Bearblock*, 17 Ch D 499. It has its own special maxim *semper praesumitur pro matrimonio* (The presumption is always in favour of matrimony) *Powell* *Li* 397. "By the law of England where a man and woman have long lived together as man and wife and have been so treated by their friends and neighbours there is a *prima facie* presumption that they really are and have been what they profess to be." *Per Lord Cranworth in The Bredalbane Case* 1 R 1 H L 46 at p 199. *Iyle v Elliot*, L R 19 Eq 93. This presumption of law is not to be

lightly repelled and the evidence for repelling it must be strong, distinct satisfactory or conclusive. *Per Lord Lyndhurst in Morris v Davis*, 5 Cl & F 163. This was approved by Lord Cottenham in *Piers v Piers*, 2 H L Cas p 362, see also *Langham v Thompson*, 91 L T 680, *George v Thayer*, (1904) 1 Ch 456, *Haynes v Caster*, 91 L T 431, *Cunningham v Cunningham*, 2 Dow H L 507, *De Thoren v Atk Gen* 1 App Cas 686. But according to English law in proceedings for bigamy, divorce, or damages for adultery, the marriages or ceremonies alleged by the prosecution or petitioner and upon which the proceedings are based, cannot be proved by reputation. Strict evidence thereof must be given. *Cocle Et* 91 citing *Morris v Miller*, 4 Burr 2057, *Pouell* 397, *R v Wilson*, 3 F & F 119. It is not necessary that the reputation of the neighbourhood should be uniformly and consistently in favour of the marriage. *Lyle v Ellwood* L R 19 Eq 98. *Pouell Et* 398. So also the legitimacy of a son is presumed from the conduct of the parent. *Bentley Peerage Case*, 4 Camp 416. The scope of this section, leaving the exception out of consideration, seems to be that the person himself is not to be called to state his own opinion but that, when he is dead or cannot be called his conduct may be proved by others. The section appears to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge. A husband or wife is not, therefore, precluded from proving his or her marriage. *Queen v Subbarayan*, 9 M 9=1 Weir 572. This section enacts a rule different from the law of England. According to English law general reputation is admissible to establish the fact of marriage, but section 50 is limited to opinion as expressed by conduct and there is no other provision in the Act making evidence of general reputation receivable. *Seshammal v Kuppanayyanagar* 91 Ind Cas 162=A I R 1926 Mad 475. Where the question is whether one person is related to another in any degree the facts that, according to the religious usage of the party, the names of particular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution, are instances of conduct within the meaning of this section and are admissible in evidence. *Ramlalshna v Chinnu*, 26 Ind Cas 110.

**Relationship by marriage.** The parties and sections of marriage and general reputation of the fact may be evidenced with as much strength and distinctness by actions as by words. Thus the former may appear by their elopement and return as married persons. Their visiting with families of respectability was successfully relied on in the claim to the *Say and Sele* Baroncy, and was dwelt upon as a strong fact by *Abott C J* in summing up the evidence in the case of *Beaz v Ward*. A similar weight was ascribed to the fact of a husband procuring a woman to be presented at Court as his wife. *J Hubbock Succession*, 247. The act of exchange of marriage consent, as constituting a marriage may conceivably be evidenced by various sorts of evidence, any one of which might suffice to persuade the tribunal in the absence of some special qualitative requirement. In the first place the conduct of the two persons, in living together in the manner usual for married persons is some circumstantial evidence that they exchanged consent at a prior time. This evidence from conduct is commonly spoken of as *habit* and it is something more than mere co-habitation or living together, because it signifies living together and behaving in every way with the evident belief and assumption that they have the rights and responsibilities of persons who have contracted a lawful marriage. In the second place repute of the community or neighbourhood that these persons have been lawfully married is a kind of testimony which is based partly on the parties habit as married persons, partly on contributions of personal knowledge by those who have witnessed the exchange of consent, and partly on the absence of contrary evidence which would naturally have come to light had it existed. This net result of the sifting of the facts by gossip and by interested investigation is summed up on the community's reputation, and this, though it would ordinarily be inadmissible by the Hearsay rule, is by long acceptance admissible under a special exception to that rule. Now these two sorts of evidence habit and reputation are commonly found available together, and are therefore commonly offered at the same time. They are admitted on distinct theories, the

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one being circumstantial in its nature the other testimonial, but in practice use they are generally found associated. *Hignore* § 2083. In *Breadbanes Case* L. R. 1 Sc App 182, 192, 196 211, *Lord Chelmsford* said: "Habit and repute arise from parties cohabiting together openly and constantly, as if they were husband and wife and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are really married." In the same case *Lord Westbury* said: "Co habitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*. It is a holding forth to the world by the manner of duly life, by conduct, demeanour and habit, that the man and woman live together, have agreed to take each other in marriage and to stand in the mutual relation of husband and wife, and when credit is given by those among whom they live by their relations, neighbours, friend, and acquaintances to these representations and this continued conduct then habit and repute arise and attend upon the co habitation. The parties are holden and reputed to be husband and wife, and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged." *Hignore* § 2083. In cases other than mentioned in the proviso evidence of habit and repute alone would be sufficient to prove marriage. *Leader v Barry*, 1 E-p 353, *Doe v Fleming* 4 Bing 266, *Maxuell v Mazuell* Eccl 290 292 R v *Stoddard*, 2 Burr Sett Cas 508. "The general rule is that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established ought at least to furnish cases in support of his position." *Per Parke B* in *Doe v Fleming* 4 Bing 266. *Sherborne v Naper* 2 Ridg W P C 221, *Reed v Passer*, Perke N P 231, 233, *Evans v Morgan*, 2 Cr & J 453 456, *R v Mills* 10 Cl & F 534, *Goodman v Goodman*, 4 Jur N S 1220 1224 *contra Cunningham v Cunningham*, 2 D W 482. Where the question is as to the legitimacy of a certain type of marriage contracted by the members of certain family, much may be gathered from the treatment accorded to the alleged wives and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under s 50 of the Evidence Act (illustration B) as it shows the repute in which such marriage was held in the family. *Maharaja of Kolhapur v Sundaram Aiyar* 48 M 1=A I R 1925 Mad 497, see also *Abdul Razal v Aga Mahomed* 21 C 666 P C, *Khoja Hedayet v Rayan*, 3 M I A 295, *Mahabta v Ahmed* 10 C L R 293.

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. *Mi Me v Mi Sheue*, 16 C W N 529=39 I A 57=39 C 192=14 Bom L R 204.

**Legitimacy as evidenced by conduct.** In *Berkeley Peerage case* Sir James Mansfield remarked that "if the father is proved to have brought up the party as his legitimate son this amounts to a daily assertion that the son is legitimate." 4 Camp 416. Similarly in *Banbury Peerage Case*, App to Lc Merchant's Peerage Cos 120 Lord Eldon said: "Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question (of legitimacy)." My Lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the child should be severed in two parts and that each take half the true mother instantly waived her claim and he decided upon that, that the child was hers. What is the lesson this story teaches? Not, perhaps, that mere declarations are evidence in such a case—for such declarations may be made for a temporary purpose (in that case both women made declarations and one of course made false declarations)—but it teaches that the conduct of a parent, the feelings of a parent—those feelings being inferred from such conduct—afford us some

evidence assisting us in arriving at a right conclusion as to the matter in controversy. It has been argued at the bar that mere declarations of parents on such subjects are not admissible evidence to affect a question of legitimacy and that conduct is precisely the same thing that it is substantially nothing more than a declaration, that it is only declaration by deed instead of word. I will not say that all simple declarations are evidence in such a case but I will say that the conduct of a husband and wife towards a person claiming to be their legitimate child is in some cases admissible evidence upon the question whether the husband and wife had sexual intercourse at such a time as by the course of nature that child might have been the fruit of that intercourse. It is often material species of evidence. It is not always but it is frequently a safe ground for inference, for it comes from the least suspicious source that is, from the very individuals who are the most interested to give a different testimony. If there ever was a case where circumstantial evidence of this description is admissible, it is this. In the same case *Lord Redesdale* said "Ad now judgment of a child by the reputed father and mother as their child is generally the only evidence of the fact even that the child is the child of the woman unless evidence of the persons present at its birth can be produced, and such acknowledgment is sufficient evidence if not rebutted by clear evidence to the contrary." *Wigmore* § 269. So also the concealment of the birth of a child from her husband *Hargrave v Hargrave*, 2 C & K 701. The subsequent treatment of such child by the person who at the time of its conception was living in a state of adultery with the mother—and that the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband—are circumstances that will go far to rebut the presumption of legitimacy which the law raises in favour of the issue of a married woman. *Taylor* § 649. *Goodright v Saul* 4 T R 356. *Morris v Davies* 5 Cl & Fin 163, *Banbury Peerage Case* supra. *R v Mansfield*, 1 Q B 144. *Townshend Peer* 10 Cl & Fin 289. *Atchley v Sprigg*, 33 L J Ch 345. Again if the question be whether a person, from whom the claimant traces his descent was the son of a particular testator the fact that all the members of the family appear to have been mentioned in the Will but that no notice is taken of such person is strong evidence to show either that he was not the son, or at least that he died without issue before the date of the Will (*Therby Peer* 10 Cl & F 100 per *Lord Campbell* *Robson v All Gen* 10 Cl & Fin 498—500) and if the object be to prove that a man left no children the production of his Will in which no notice is taken of his family and by which his property is bequeathed to strangers or collateral relations is cogent evidence of his having died childless. *Huagate v Gascoigne* 2 Phill 25. Opinion expressed by conduct is admissible under this section to prove legitimacy. *Gopalasami v Arunachellam*, 27 M 32.

**Adoption.** Under this section the conduct of parties is very strong evidence regarding the factum of an adoption. *Mullangi v Venkatasubrammah* 19 Ind Crs 740=25 M L J 373=13 M L T 515. Such evidence is also admissible where a person is treated as an heir. *Maharaja Pertao v Maharam Subhao*, 3 C 626 P C=1 C L R 113.

**Proviso.** The proviso is inserted because in divorce adultery and bigamy cases the marriage must be strictly proved—that is by the evidence of a witness who was present at the marriage, or by the production of the register or examined copy of the register or such other record as the law of the country or custom of a class, may provide. *Ant R* 230. *Greenl Et* Vol 3 § 204. In cases of bigamy proof of second marriage is not sufficient. *Greenl Et* Vol 3 § 205, *U S v Miles* 103 U S 304. But the marriage may be proved by the conduct. *Com v Jarlson* 11 Bush (Ky) 679. Upon every charge of adultery, whether in an indictment or a civil action, the case for the prosecution is not made out without evidence of marriage. And it must be proof of actual marriage in opposition to proof of cohabitation reputation or other circumstances, from which marriage may be inferred and which in these cases are held insufficient for otherwise persons might be charged upon pretended marriages set up for bad purposes. *Morris v Miller*, 4 Burr 2059, expounded in *Doug* 174, *Smith v*

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*Huson* 1 Phill at 313 11, (1811) It is not sufficient to prove co habitation and marriage by reputation (*Catherwood v Calson*, 13 M & W 265, *Roscoe Cr* 137 In a libel for divorce the Court will require proof of the marriage even though the party accused makes default of appearance *Williams v Williams* 3 Greenl 135

The rule of law underlying this proviso has its origin in *Morris v Miller* 1 Burr 2057 decided by Lord Mansfield in 1767 In that case the opinion of the Court was asked upon the following question, whether to support an action for criminal conversation, there must not be proof of an actual marriage, the fact was they were married at Mayfair Chapel, the register or books could not be admitted in evidence *Keith* who married them was transported, and the clerk who was present was dead, so that the plaintiff could not prove the actual marriage by any evidence Counsel for the plaintiff argued that 'we proved articles (of post nuptial settlement) co habitation, name, and reception of her by every body as his wife, though we did not prove it by any register or by witnesses who were present at the marriage' Lord Mansfield C J said "It certainly may be done so in all cases except two,"—namely bigamy and criminal conversation The plaintiff's counsel then argued that the defendant's admission of the marriage sufficed The defendant's Counsel argued that the reputation evidence (1) does not come up to the rule of being the best evidence in the plaintiff's power (2) it was not an actual or ceremonial marriage Lord Mansfield C J observed 'Proof of 'actual marriage' is always used and understood in opposition to proof by co habitation and reputation and other circumstances from which a marriage may be inferred We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife there must be evidence of a marriage in fact acknowledgment, co habitation and reputation are not sufficient to maintain this action It shall not depend upon a mere reputation of a marriage, which arises from the conduct or declarations of the party himself Inconvenience might arise from a contrary determination which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact,—as, by a person present at the wedding dinner if the register be burnt and the person and clerk are dead' Twelve years later the learned Judge thus justified his opinion in *Birt v Bulou*, 1 Doug 171 (174) (1779) 'An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage in other cases co habitation reputation, etc are equally sufficient since the Marriage Act, as before But an action for criminal conversation has a mixture of penal prosecution for which reason and because it might be turned to bad purpose by persons giving the name and character of wife to women to whom they are not married, it struck me in the case of *Morris v Miller*, that in such an action a marriage in fact must be proved *Wigmore Case Cr* cases nos 194 195 From the observations of Lord Mansfield in the above two cases it is clear that this requirement of proof of a marriage in fact is confined to two classes of case, namely (1) where the charge is a criminal one and (2) in the civil action of criminal conversation The phrase proof of a marriage in fact' or actual marriage signifies proof by an eye witness i.e either by the register containing the parson's entry or by the oral testimony of parson, clerk or some other person present at the ceremony This mode of proof is accepted by *Gikhrist J* in *State v Hindley* 14 N H 480 495 (Am) In criminal prosecution like indictment for bigamy adultery etc direct evidence of the marriage is required and thus may appear from the testimony of witnesses who were present at the ceremony This constitutes proof of a marriage in fact and is merely direct evidence of the marriage as contradistinguished from co habitation etc which is indirect evidence of marriage *Ibid* It may be added that in Lord Mansfield's time the action of criminal conversation occupied a far more prominent position and was therefore more liable to abuse *Wigmore* § 2084 Nevertheless the rule of law as laid down by Lord Mansfield in the above two cases is applied uniformly in common law of England *Catherwood v Calson*, 13 M & W 260 (1844) But the rule is not very sound and cannot be supported on principle *Vide Wigmore* § 2084 But

the comparative infrequency of this action now a days has allowed the rule to continue without dispute *Ibid* § 2085 S 50.

The present law of England is thus stated by Stephen J "The facts that they cohabited and were treated by others as man and wife are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer." But this seems to put it too broadly. The marriage and subsequent ceremony upon which the prosecution is based certainly cannot be so proved, but it may be that another marriage becomes material in such prosecution, and such marriage can certainly be proved by reputation, although it is proving a marriage 'in a prosecution for bigamy'. Thus in the case of *R v Wilson*, 3 F & F 119, the prisoner pleaded that when she went through the first ceremony alleged, the man was already married, and, therefore, the ceremony was void, and she had not committed bigamy. This marriage, so alleged by the prisoner, was allowed to be proved by reputation *Cockle Cas* 92. Be that as it may, the Indian Legislature following the English rule excluded from the operation of the proviso the civil action for damages against an adulterer and included in it the offence of adultery (rule s 497, Penal Code) in as much as in India 'Adultery' is a criminal offence whereas in England it is a civil wrong. See also Stat 24 & 25 Vict C 100, § 57, Stat 20 & 21 Vic C 85 § 33. 'These exceptions rest on the ground that such proceedings, being of a penal nature, require the strictest proof and a further reason for the exception in the cases of adultery seems to be, to prevent parties from setting up pretended marriages for evil purposes.' *Taylor* § 172, *Morris v Miller*, 4 Burr 2057. After criticising Lord Mansfield's reasons for the exception in *Morris v Miller*, (*supra*) Prof Wigmore says "What is the peculiar immorality of the offence of bigamy? Usually, it is the deception of the other party to the marriage, by leading her (or him) into a void and unsanctioned relation and by afterwards deserting for another, as well as the injury to the progeny by placing them in the world without rights of legitimate children. Now this deception and desertion and social wrong are equally consummated by a relation appearing in habit and repute to be a marriage, even though it be not a valid one. The moral meanness of that man and the social consequences of his misconduct, are equally reprehensible, whether or not his first marriage could be proved by an eye witness and whether the marriage be legally binding or not. If it was not, it ought to have been. That the law of Evidence, instead of applying the equitable maxim that what ought to have been done will be treated as having been done, should let him go free of the charge of bigamy, precisely because he did not do the honest and lawful thing is a singular instance of *haeret in cortice*. As the rule of Evidence is confessedly based on a moral tenderness for the accused, it would seem that this moral tenderness should not be shown to a person whose conduct is equally reprehensible in any case. The more meritorious opponent in a civil case, whether it be a wife, or heirs, or creditors, may be deprived of his alleged rights upon proof of marriage not consisting in eye witness testimony. It is a scandal to be more cruel and tender in favour of an opponent in that particular criminal charge in which the opponent has placed himself on a level of moral meanness below that of the least meritorious opponent in any civil case." *Wigmore* § 2084.

Under the proviso to this section, in proceedings of the kind therein specified opinion relevant under that section is not by itself sufficient to prove marriage which must in consequence, be proved in some other way. *Madhau v Iatleh*, 5 P R 1891 Cr. So where proof of marriage is an essential element of a crime as in the case with s 498 Penal Code, the marriage must be proved in the ordinary way, i.e., by other and more reliable evidence than that of the mere opinion of a person who as a member of the family or otherwise has special means of knowledge. *Queen Empress v Subbarayan* 9 M 9=1 Weir 572. This is in accordance with the principle that strict proof should be required in all criminal cases. *Empress v Kallu* 5 A 233-A W N 1893 1. *Empress v Pitambar* 5 C 566. But that principle is sufficiently satisfied inasmuch as in criminal cases a rule has grown up that the persuasion must be beyond a reasonable doubt. *Wigmore* §§ 2084, 2497. But never the less under



**S 51** this section in all prosecutions for adultery under s 497 Penal Code the marriage must be strictly proved *Gopal v Emperor*, 4 Bur L J 107 = A I R 1930 Rang 328 So the existence of a legal marriage has to be proved before a conviction under s 497 or s 498 I P Code can be sustained In such a case under this section the Court while not directed to exclude evidence of opinion as expressed by conduct, must not base a finding that such a marriage has taken place upon the evidence of opinion alone Outside that, the Court is at perfect liberty to arrive at a decision whether a legal marriage is in existence upon all relevant and admissible evidence which is placed before it in due course of law *Raghupat v Emperor*, 28 Cr L J 311 = 4 O W N 172 = A I R 1927 Oudh 140 To justify a conviction under s 497, Penal Code the actual fact of the marriage between the complainant and the woman must be proved in some way or another *Emperor v Bahu Dhondi*, 17 Bom L R 75 = 16 Cr L J 213 = 27 Ind Crs 837 see also *Empress v Ashad*, 13 C L R 125, *R v Inhabitants of Brampton*, 10 East 282 *R v Allison R & R* 109, *R v Manuvaring*, 26 L J M C 10, *Emperor v Dal Singh*, 20 A 166, *Gopal v Emperor*, A I R 1925 Rang 328 In divorce cases as well marriage should be proved strictly *Prem Chand v Hira* A I R 1927 B 594

**51** Whenever the opinion of any living person is relevant,  
 Grounds of opinion the grounds on which such opinion is based  
 when relevant are also relevant

#### Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion

**Principle** The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing' *Per Washington J in Harrison v Rouan* 3 Wash C C 587 "Opinion is no evidence without assigning the reason for such opinion" *Per Duncan J in Rambler v Fryon*, 7 S & R 94 *Higmore* § 1917

**Scope of the section** In all cases in which opinion of experts are receivable, the grounds or reasoning upon which such opinion is based may also be inquired into *Phup El 4th Ed* 362, *Gout of Bombay v Meruani* 10 Bom L R 907 (913) So it is clear that an expert may state his reasons for his opinion *Seaton v North Bridgewater* 116 Mass 200 *Wood v Sawyer*, Phill (N C) 276 Physicians may describe the symptoms that would be apparent and would ordinarily accompany an injury such as plaintiff sustained *Cole v Fall Brook Coal Co*, 53 N E 670 Where an expert testifies to the value of a certain piece of land, he may be asked the question, 'How did you get at your opinion of the market value?' *Hawkins v City of Fall River*, 119 Mass 94 But in *Secretary of State for Foreign Affairs v Charlesworth* 28 I A 121 (130) = 26 B 1 their Lordships point out 'It is quite true that in all valuation, judicial or other, there must be room for inferences and inclinations of opinion which being more or less conjectural are difficult to reduce to exact reasoning or to explain to others Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind and knows that every expert witness called before him has had his own set of conjectures of more or less weight according to his experience and personal sagacity In such an enquiry as the present relating to subjects abounding with uncertainties and on which there is a little experience there is more than ordinary room for such guess work and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at In a proceeding to assess damages for taking property for a street a witness testifies that in his opinion the market value of the property is enhanced by the widening of the street He is then asked to state the ground and reasons upon which his opinions are founded He should be allowed to give the reasons' *Dickenson v Inhabitants* 13 Gray 535 In that case the Court observed 'The ground on which an expert, a person of

large experience in any particular department of art, business or science is permitted to testify to his opinion, is that from his larger experience and more exact observation of facts and the connection between certain appearances and their causes and results he is able to draw correct conclusions from circumstances which a man of ordinary knowledge and experience could not do.

The circumstances on which such an opinion may be founded are either facts of general notoriety assumed to be known to all persons of skill and experience in the department to which they pertain and which when explained, may be comprehended and applied by any person of good understanding, or it may be founded on facts proved. Such general facts, assumed to be generally known without specific proof, because they are capable of being known and understood without any such proof to all inquiries, are vastly too numerous to define, but the point may be illustrated by saying that they are such as the elements and forces of physical nature, the structure, capacities and functions of the human and other animal bodies, the common powers, propensities and passions of human nature and the impelling and governing motives to human action. As these are capable of being comprehended when explained, without specific proof, it appears to the Court that the witness should be permitted to explain the grounds and reasons of his opinion to the Court and jury, they may readily perceive the force of his reasoning, the soundness or fallacy of his logic and therefore judge of his capacity to give an opinion on the subject and the correctness of his conclusions and consequently the weight due to his opinion. But it is objected that the admission of this evidence would open the door to evidence entirely incompetent, by allowing the witness to state facts on which the opinion is founded—facts not proved by competent evidence. This objection seems to us to be founded on a misconception of the manner in which the investigation is to be conducted, and the testimony of experts received and applied. It assumes that the facts will be taken to be true because the witness has stated that he founds his opinion upon them, but this is quite a mistake. In order to obtain facts the opinion of a witness on matters not depending upon general knowledge but on facts not testified of by himself, one of two modes is pursued—either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him, and in either case the question is put to him hypothetically whether if certain facts testified of are true, he can form an opinion and what that opinion is? The jury will then be instructed, if the truth of such fact is contested, to consider whether the fact on which such opinion rests is proved to their satisfaction, if it is, then to give such weight to the opinion resting on it as it deserves, but if the fact be not proved by the evidence, then to give the opinion no weight. This is necessary to enable the jury, upon the true theory of jury trial, to decide all questions of fact upon competent evidence laid before them. But the consideration submitted in the argument in opposition to this view, namely, that the opinion may be given on the assumption of facts not proved is a strong additional reason why the grounds and reasons of the opinion should be stated in order that the jury may see that it is not founded on hearsay, general rumour, or facts of which some evidence may be given but being controlled by other evidence are not found true by the jury. This inquiry has been more frequently made in cross-examination, yet we are of opinion that it is competent evidence in chief. It is, in fact, this general knowledge on the specific facts judicially proved from which the jury draw their ultimate conclusion, though in matters of science they may be aided by the more exact observation and the larger experience of the trained expert." *Lauson expert d'Op* Lk pp 270, 271

## CHARACTER WHEN RELEVANT

Character meaning of Character is a combination of qualities distinguishing a person, the individuality which is the product of nature, habits and environments. *Standard Dictionary*. So it is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguish him from others. *Webster's Dictionary*. "Is a man honest, is he good natured, is he of a violent temper, is he modest and retiring or impudent and forward—the all constitutes traits of character and are facts." *Per Pearson* 11 Bottoms & Kents, 3 Jones L 160, 11 *Wynmore* § 52.

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**Meaning of Character under the Act** In explanation to section 50, the Legislature state that the word 'character' includes both reputation and disposition. This is very misleading. 'That actual character' says *Prof Wigmore* is distinct from reputation of it, and the latter is merely evidence to prove former ought to be a truism. But the common use of the word character in the senses both of actual disposition and of reputation has led to obscurity of language in judicial opinions, and has thus tended to remove the emphasis from the distinction. When we argue that a defendant probably did not commit a forgery because his disposition was honest, or that a witness probably is speaking falsely because he is mendacious in disposition we are arguing from his moral constitution, which in its turn becomes a fact to be proved, and when we then resort to reputation or individual opinion or particular conduct we are resorting to it as evidence from which we may make some inference of the actual trait. *Wigmore* § 1608. Reputation is the estimation in which a person is held by others, especially the popular opinion, whether favourable or the reverse. *Standard Dictionary*. 'Character lives in a man reputation outside him.' *Holland Gold Foil*, C 19 p 219. 'Character is like an inward and spiritual grace of which reputation is or should be the outward and visible sign.' *R G White, Words and their uses* C 5 p 99. But it must be noted in this connection that there is some difference between a person's character and a person's general character. The term 'character' was normally applied to the actual qualities and not to the community's estimate of these qualities. More over the term 'general character' which it was sometimes applied to the latter to distinguish it from the former when spoken of at the same time was also and commonly applied to the former alone,—especially to make the second distinct on or to distinguish the general traits themselves from the 'particular acts instancing them'. This latter meaning (i.e. general disposition as opposed to the inadmissible particular acts showing it) seems to have been the original and natural source of the phrase and the orthodox application of it. *Wigmore* § 1951 (e), *Layser's Trial*, 16 How St Tr 246. In this sense the general character means general or abstract trait is distinguished from particular instances of it. So 'general character of a witness according to this sense means his qualities as a man generally. But now the term "general character" is used in the sense of reputation. A graphic definition of reputation which there is called general character, was given by *Erskine*. He described it as the low spreading influence of opinion arising from the deportment of a man in society. As a man's deportment good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence.' *State v Lanton* 76 N C 216, *Burr Jones* § 158.

**Scope of Sections 52 to 55** The framer of the Act has dealt with the sections under the heading 'character when relevant'. But in the explanation of section 55 he has indicated how the character of a person can be evidenced. We have shown clearly that the definition of the Legislature that character includes both reputation is not only misleading but erroneous. Character and reputation are quite different things although in some cases the term 'general reputation' has been used for the term 'character'. But there are two distinct problems of evidence about character in which the common use of one word for two ideas has caused confusion. (1) Is a person's disposition—i.e. a trait or group of traits, or the sum of his traits—relevant and admissible for certain purposes? (2) Whenever it is so admissible as an evidentiary fact and thus becomes in its turn a proposition to be proved, how is it to be evidenced? The first question is essentially one of Relevancy, though auxiliary policies often come in to exclude relevant character. The second question however is ruled in an entirely different quarter: it has nothing to do with character as an evidentiary fact, but with the mode of proving character assuming it to be properly movable either as an evidentiary fact or as an issue. *Wigmore* § 52. So far as the first point is concerned character is offered as an evidentiary fact in sections 52, 53 and 54. But the character of a person may also be a fact in issue (vide explanation to section 54 and section 55) and in the latter contingency character not in the strict sense of disposition but character in the sense of general

character' or "reputation" may also be a fact in issue, as in the cases of defamation. Whenever a party's character is itself a fact in issue whether in the sense of disposition or reputation, and whether it be in a civil proceeding or in a criminal case proof of that character is always admissible. *Taylor* § 375, *Best* § 208. But when a party's character is required to be proved not as a fact in issue but as an evidentiary fact, it is generally excluded. So the general rule is that from a party's character his conduct can not be presumed. So in civil cases a party's character as an evidentiary fact is wholly excluded. Such evidence can be given only in such cases, where the amount of damages depends on the character of a party. Good character of an accused is an evidentiary fact is admissible under section 53, from which the probability or improbability of his imputed conduct can be ascertained. When evidence of his good character has been offered, evidence of his bad character is also admissible. But the bad character of a party in a criminal case may also be a fact in issue. In such a case of course, evidence of his bad character is always admissible. These are the questions which are essentially one of relevancy. Now we come to the second phase of the question i.e. how the character is to be evidenced. Two special problems which the second question raises are concerned with the Hearsay Rule and with the Opinion Rule. The Hearsay Rule concerns the question whether Reputation Hearsay, when offered to show character forms an exception to that rule and on what conditions the exception is allowed—what constitutes reputation, from how many people must it arise, in what place and at what time and so on. (Vide notes under s. 55 *infra*). The Opinion Rule raises the question whether individual testimonial opinion or estimate of character is obnoxious to that rule, and operates (if so applied) to exclude the testimony of individuals on personal observation of another's character. *Wigmore* § 72. "A witness called to prove them (traits of character) can only give the opinion which he has formed by his observations of the conduct of the person under peculiar circumstances. Has a man the estimated character or reputation of being honest or of being good natured, or passionate, or humane or cruel—this general character as it is called is also a fact: it is the opinion which those who are acquainted with him have formed in respect to his several traits of character. This is also a mode of proving real character, which is the object in view. But it is objectionable, because it is a mere approximation and does not arrive at the fact itself. The opinion of a man's acquaintances that he is honest or good natured, etc. does not prove that he is so. Still this mode of proof is less objectionable than that which depends on the individual opinion of witnesses: therefore it is admissible in more instances than the other. *Per Pearson J in Bottoms v Kent* 3 Jones L 160, *Wigmore* § 72. For further discussion on this point vide notes under s. 55 *infra*.

## 52 In civil cases the fact that the character of any person

In civil cases, character concerned is such as to render probable or to prove conduct improbable any conduct imputed to him is put, irrelevant irrelevant, except in so far as such character appears from facts otherwise relevant

**Principle** Evidence of a party's character in a civil suit is irrelevant for two fold reasons namely, (1) A party's character is usually of no probative value and (2) it should not be admitted as it tends to confuse the issue and to prejudice the jury. *Wigmore* § 64. The first ground is thus forcefully stated by *Farler J in Houghtaling v Kellerhouse* 2 Barb (N.Y.) 119. But in a civil suit where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy, should be admitted to turn the scale. Here the rejection of evidence is on the ground of remoteness or want of reasonable connection between the principal and evidentiary fact. *Best* Fr 5th Ed § 255. "In criminal cases evidence of good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime. But in civil cases such

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evidence is with equal good reason not admitted, because no pre-umption would fairly arise in the very great proportion of such cases for the good character of the defendant that he did not commit the breach of contract or of civil duty, alleged against him. Such evidence is also excluded on the grounds of (i) confusion of issues, (ii) unfair surprise or (iii) undue prejudice. In many civil cases the exclusion of character evidence rests also upon the danger of leading the jury into collateral inquiry which will confuse and obscure the real issues. *McClellan v. El* § 116 "It is not only in contravention of the fundamental rule that evidence shall be confined to the issue to admit such testimony, but it would be infinitely dangerous to the administration of justice." *Per Hosmer C J in Stout v. Converse* 3 Conn 345. *Higmore* § 64. In *Wright v. McKee*, 37 Vt 163, *Aldis J* said "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced, it may then perhaps suffice to turn the wavering scale, very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbours—especially if they are wealthy, influential, popular or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partiality, or other bias of which they are unconscious and in cases which are not clear they are apt to agree with the first one who speaks to them on the subject or to form their opinion upon the opinions of others. The introduction of such evidence in civil cases wherever character is asserted would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that is easily manufactured, is liable to abuse, and if in common use in the Courts, is likely to mislead as to guide right." *Higmore* § 64.

**Scope of the section.** The term "person concerned" is vague, but this section it is presumed, refers to the character of parties to the suit and not to the character of witnesses and represents the old state of the law, according to which in actions unconnected with character, the character of either of the parties is irrelevant and evidence introduced with the sole object of exposing the character of a party to the view of the Court is excluded. Of course, the Court may form its own conclusion as to the character of the parties or witnesses from their conduct as exhibited by the relevant facts proved in the case and it is perfectly legitimate for a Court to draw, from the opinion which it has so formed of the character of a party or witness, the inference that he might probably enough have been guilty of the conduct imputed to him or that he is not worthy of credit. In ordinary action on a contract it would be clearly irrelevant to offer evidence of a party's personal disposition or reputation for cruelty. Such evidence could throw no light upon the question at issue—did he commit a breach of his contract to repair plaintiff's house or mend his clothes? *North v. El* p. 230. It seems hardly credible, says *Prof. Burdett Jones* "that in this twentieth century cases have still to be decided and text books written about the reception of evidence of character in ordinary suits yet only so recently as in 1910 there was an illustration of the necessity for appellate watchfulness. An action to recover land was brought by two brothers named *Quinnally* against *Temple* and others. The plaintiffs were the sons and heirs of *John Quinnally* who died in 1835. The defendants claimed title under a deed from one *Forbes* to one *Barrett* dated 1837 containing a recital that it was 'of land which he (*Forbes*) purchased from *John Quinnally* by deed bearing date October 7 1836, now delivered to the present purchaser who hereby acknowledges the receipt thereof. The question submitted to the jury, therefore was whether the recital in the deed to *Barrett* that *Quinnally* had conveyed the land to *Forbes* was true or untrue. Unless the jury was satisfied of its truth they were instructed to find for the plaintiffs. The defendants to sustain and support the truth of the recital were permitted to prove against the objection and exception of the plaintiffs, that *John Forbes* who conveyed to *Barrett* was a man of good reputation for honesty and fairness in his business transactions,

and that the witness never heard 'his integrity in land transactions questioned' Evidence as to the general character of *John Forbes* was offered and received, of course, on the theory that a man of good character for firmness in business transactions would not probably represent by a recital in a paper signed by him that the land had been conveyed to him when it had not been. *Circuit Judge Shelby* said 'If, as a witness on the stand he had testified to the recited facts the same argument would apply—that his statement would be supported and strengthened by proof of his general good character for truth and veracity, yet it is well settled that evidence of good character of a witness whose character has not been attacked is not admissible. Until an attack is made on it the character of a witness is not in question. The same is true as to the character of a defendant in a civil suit where the nature of the action itself does not involve his general character therefore evidence of his character cannot be received to contradict an imputation of dishonesty or fraud. Even if the position of *Forbes* was analogous to that of a witness his evidence could not be bolstered and supported no attack having been made on him by proof of his general good character' *Quinnally v Temple*, 176 Fed 67, *Burr Jones* § 148. The *California Code of Civil Procedure* laid down the law in the following words:—§ 2053. Evidence of good character of a party is not admissible in civil action until the character of such party has been impeached or unless the issue involves his character'. However just the inferences which might in many cases be drawn as to the merits of the controversy from the character of the parties such inferences are too vague and unreliable for that degree of certainty which should prevail in legal tribunals. So character is not relevant in civil action for assault and battery (*Thompson v Church*, 1 Root 312) nor in actions for trespass (*Cummins v Crawford* 88 Ill 312) trover (*Wright v McKee* 37 Vt 161) negligence (*Commonwealth v Worcester*, 3 Pick 462), or divorce (*Wood v Herndon*, 5 Port 382) nor in an action by physician for fees (*Jeffries v Harris* 3 Haw 105), nor is evidence of plaintiff's bad repute relevant in civil action for assault and battery (*Dolan v Brewer* 77 Ill 280). *Burr Jones* § 148. Evidence of character in such cases has but a remote bearing as proof to show that the act in question has or has not been committed. It is uncertain in its nature, because true character is ascertained with difficulty and those who are called to testify are reluctant to disparage the influential and often too willing to disparage one under a cloud. *Circuit Judge Selby* in *Quinnally v Temple*, *supra* said "At best such evidence is a mere matter of opinion and in matters of opinion, witnesses are apt to be influenced by prejudice or partisanship of which they may be unconscious or by the opinions of those who first approach them on the subject. The introduction of such evidence, in civil cases, to bolster the character of parties and witnesses who have not been impeached would make trials intolerably tedious and greatly increase the expense and delay of litigation. In the words of the great Poet "Reputation is an idle and most false imposition oft got without merit, and lost without deserving" *Othello Act II, sc 3*. If in all cases of contract and tort such evidence were to be received the result would be more dependant on the popularity of the party than on the merits. The testimony would consist largely of matter of opinion and be greatly affected by bias and partisanship and would cause intolerable delay and expense. In a civil action for assault the proof was offered of defendant's character as a quarrelsome man. The Court said—

The general character is not in issue. The business of the Court is to try the case and not the man and a very bad man may have a very righteous case. *Thompson v Church* 1 Root (Conn) 312. For still more obvious reasons, the character of the parties is generally irrelevant in actions on contract. *Butler v Landenslayer* 81 P 116. In actions based on negligence it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent, in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent. *Fenney v Tuttle*, 1 Allen 157.

Except so far as such character appears from facts otherwise relevant. Of course the Court may form its own conclusion as to the character of the parties or witnesses from their conduct, as exhibited by the relevant facts.

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proved in the case, and it is perfectly legitimate for a Court to draw, from the opinion which it has so formed of the character of a party or witness the inference that he might probably enough have been guilty of the conduct imputed to him or that he is not worthy of credit. *Not Et* 230

Where character evidence is admissible There are of course many cases in which character is a fact in issue or a relevant fact. For instance, in an action for libel if the libel consisted in attributing bad qualities to the plaintiff and the defendant justified, the existence or non existence of those qualities it would be a fact in issue. "Character as employed in these sections includes both reputation and disposition (*Ide* s 55). It must be distinguished from the 'state of mind' to which reference is made in section 14 and which (*Ide* illustration (k)) may be relevant in judging of the probability of conduct. *Cun* *Ev* § 204. So it is clear that where the general character of a party is itself in issue proof may be received of what that general character is. *Taylor* § 307, *Best Et* § 258, *Phap Et 4th Ed* p 167. *Martin v Hardesty*, 27 Ala 458. "In civil cases," says *Posf Wigmore* 'orthodox principle has seldom been abandoned in rulings upon the character qualities usually in issue,—the competence of an employed as to carefulness the professional competence of a physician to skill the mental capacity of a testator as to sanity, and the like in short the non moral traits of character as distinguished from the moral traits of peaceableness honesty, charity and general goodness, which usually come into question for a defendant in a criminal case. As to the former class of traits, the orthodox rule in England was followed in America and per oral knowledge and opinion was admitted' *Wigmore* § 1984, see also *R v Williamson* 8 C & P 635 *R v Long Pelham's Chronicles of Crimes Ed* 1891 II 217 227, *Greville v Chapman* 5 Q B D 738, *R v Whitehead*, 3 C & K 201, *Ramadge v Ryan*, 9 Bing 333 *Biemer v Freeman* 10 Moo P C 306 362. So also where the question was whether a governess was "competent, lady like and good tempered" while in her employer's service, witnesses were allowed to assert or deny her general competence, good manners and temper. *Fountain v Boodle*, 3 Q B 5. *Brine v Biral Gelle* 3 Ex 692, *King v Waring* 15 Esp 14. *Jones v James* 18 L 1 243. *Phap Et 4th Ed* 167. And in such cases particular instances may be mentioned. *Best Et* 258, *Wharton Et* § 19. *Phap Et 4th Ed* 167. In certain cases the evidence of character may be relevant for an assessment of damage, in such cases such evidence is admissible. *Ide* s 12 p 176. In such a case no evidentiary use is made of character it merely plays a part in the legal issues of the case and the nature of the litigation must be looked to in determining whether character is so involved. *Wigmore* § 54.

**Character in action for fraud** Where the nature of a civil action does not involve the general character of a party evidence as to that character can not be offered to contradict an imputation of dishonesty or even of fraud. The transaction presented in an ordinary civil case must depend upon its circumstances and not upon the character of the parties. In such a case no matter how serious a moral delinquency may be involved in a fact and how much the establishment of that fact may affect a party's reputation he can not invoke the aid of his previous reputation to disprove the fact. *Smith v Plunket* 1 Strob (S C) 372. The doctrine has been announced in a few cases in American Courts that if a party is charged with fraud or other act involving a moral turpitude and the charge is based only on circumstantial evidence he may rebut the charge by proof of his good character. *Henry v Brown* 2 Hersh (Conn) 213. *State v Beck* 17 Minn 241. *Townsend v Grate* 3 Page 455. *Walker v Stephenson* 11-p 284. *Quinn v Ferry* 3 Caine (N Y) 120. *Greenleaf v Baker* 11-p 284. *Quinn v Ferry* 3 Caine (N Y) 120. *Greenleaf v Baker* 11-p 284. And generally in a case of tort whenever the defendant is charged with fraud from mere circumstance evidence of his general good character is admissible to rebut it. *Green Et* § 54. But this view is contrary to the clear weight of authority and does not seem to be his upon any recognized principle of the law of evidence. Instances are constantly arising both in actions in tort and contract, where the motive of the parties are called in question but the fact does not in any legal sense render the general character of such parties relevant to the issue. It is a far safer rule that, in conformity

to the general rules of evidence in civil cases each transaction should be ascertained by its own circumstances and not by the character of the parties. The rule may be considered as settled that in civil suits evidence of character is not admissible except where it is directly in issue and when from the nature of the issue such evidence is of special importance. Whether the act charged or complained of be indictable or not is not material. *Ward v. Heald* 5 Port (Ala) 382. *Burr Jones* § 151. The Indian Legislature has left no doubt on this point by excluding all evidences of character by this section where the character is not in issue or relevant to issue. So character evidence has been held irrelevant in actions for robbery, to set aside probate of a Will on the ground of fraud, on an insurance policy when the defence was over valuation for fraudulent burning of the property, for false representation as to the solvency of another for incurring a debt or other obligation for maliciously burning property for assault and battery for embezzlement for malicious mischief for fraudulent conveyance of property, for criminal conversation, for false arrest and imprisonment, for malicious prosecution for divorce on the ground of adultery and for procuring a deed of fraud. *Burr Jones* § 153. To some extent the reputation of parties is liable to be affected by any litigation but this is not ground on which evidence of character is held material in such actions as slander seduction and others which have already been referred to. In *Smets v. Plumet* 1 Strob (S C 372), the reason for excluding character evidence is thus stated "If in every case when an act of dishonesty is imputed the imputation may be met by such evidence then there are few cases into which such evidence might not be introduced trials would be insupportably tedious and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case." *Burr Jones* § 155. The law on the subject is thus laid down by *Lyre C B in All Gen v. Bouman* 2 B & P 532 note (a) "I admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it which is this that in direct prosecution of a crime such evidence is admissible but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not. If evidence of character were admissible in such a case as this it would be necessary to try character in every charge of fraud upon the Excise and Custom House Laws."

In criminal cases, previous good character relevant

**53** In criminal proceedings the fact that the person accused is of a good character is relevant

**Principle** "The object of laying the latter (character) before the jury is to induce them to believe from the improbability that a person of good character should have conducted himself as alleged and that there was fraud or misrepresentation in the evidence on the part of the witnesses." *Per Patterson J in P v. Stannard* 7 C & P 671. In the same case *per J. J.* "It is evidence to induce them to say whether they think it probable that a person with such a character would commit the offence." It is evidence of character then as indicating the probability of his doing so. It is not evidence of character as essentially irrelevant. "This presumption arises from the improbability of crime arises from the general improbability proved by common sense and experience that a person who has uniformly been of good character and upright course of conduct will depart from it. It is not a presumption that a person may be overcome by temptation and fall into crime, and cases of that kind do occur, but they are exception to the general rule of good character. The influence of the presumption may be said to be a distinction of some kind supported by direct and positive evidence. It is not a presumption. It will not avail to control the mind where the evidence is strong and clear. If the evidence is strong and clear, it will not avail against the defendant, the presumption from proof of good character will be of great weight and will be sufficient to turn the scale in favour of acquittal." *Conway v. Perce* 22 S T 116.



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**Origin of the rule** Character being thus relevant it follows that an accused may offer his good character to evidence the improbability of his doing the act charged. But up to the beginning of 1800 S, its admissibility was not recognised in this absolute form. The admission of such evidence was subject to the following limitations namely, (1) character evidence was admissible only in capital cases (2) such evidence was admissible only in doubtful cases to turn the balance of evidence and (3) when the charge of the offence was admitted such evidence was not relevant. The following passage occurs in *F M C Nalley's Evidence* 370 (1802, *Ireland*) 'It has been heretofore held that a prisoner cannot examine to character except in *favorem vite*, when charged on a capital indictment but the rule is now widely extended in cases of misdemeanours. And this appears to have been the ancient practice. In *R v Brown*, 1798, the point appears finally settled. Lord Carleton C J C P said he had conversed with many of the Judges on the subject now before the Court, who thought as he did, that evidence of such a nature might be very material, for example, suppose a man of very great property indicted for perjury when the object to be attained by the perjury was a mere trifle, for instance a shilling or suppose a man to be charged with a riot or assault who was known to be of a peaceable and quiet disposition, evidence of character in such cases, directly encountering the nature of the charge in the indictment, must be of the last importance. Lord Kildarden, C J K B agreed with Lord Carleton and observed that the reason generally assigned for the admission of such evidence in capital cases only was altogether unsatisfactory to his mind. It was said to be in *favorem vite*, but he had no conception, according to the principle, of sound sense and right reason, that character could be evidence in a case affecting the life of a man and yet not evidence in a case affecting his freedom his property, and his reputation. *Wigmore Cas Pt Case No 21 Wigmore* § 56. As regards the second limitation that such evidence was limited to doubtful cases only, the following charges to the jury of Lord Ellenborough in *Darison's Trial*, 31 How St Tr 217 are pertinent. 'If you do not know which way to decide character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward because there is hardly any one who has not at some time maintained a good character. If the evidence were in even balance, character should make it preponderate in favour of a defendant but in order to let character have its operation, the case must be reduced to this situation. *Wigmore* § 56 see also *R v Broadhurst* 13 Cr App R 125. But now it is well settled that an accused in a criminal case can always adduce evidence of his good character in his defence. In *Commonwealth v Hardy* (1807) of Mass (317) (Am) Patterson C J, said 'that he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all (criminal) cases, for he did not see why it should be evidence in a capital case and not in case of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with a jury but it ought not to prevail against the positive testimony of credible witnesses. When the defendant chooses to call witness to prove his general character to be good the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecution to go into this enquiry until the defendant has voluntarily put his character in issue and in such cases there can be no examination as to particular facts. *Wig Cas Pt No 22 Wigmore* § 56.

**Scope** The prosecution in a criminal case is not allowed to resort to the accused's bad character as a basis of inference of his guilt the reason being that such evidence is too likely to move the jury to condemnation irrespective of his actual guilt of the offence charged. *R v Boulton Leigh & Co* 234 (40). But the accused himself may always invoke his good character as tending to disprove his commission of the offence no matter what the grade of the offence and no matter how strong the evidence against him. *Greenfield* 1 Cr 11 (11). The character by which ever party offered must be as to the specific trait—e.g. honesty violence charity etc involved in the fact charged. *Per Lord Hale in Hardy's Trial* 21 How St Tr 1076. It has

already been stated that the rule with respect to the use of character evidence in criminal cases was in early times confined to capital offences—*Canem v People* 16 N Y 501 (507). It arose out of a desire to give the accused person every chance and it was considered that evidence of good character might justify an inference that the accused would not have committed the crime charged and that therefore the crime was not in fact committed by him. The rule was subsequently extended to all criminal cases—*Att Gen v Bouman* (1791) 2 Bar & P 532 note (a). Upon the trial of an information against X for keeping false weights and for offering to corrupt an officer X offered testimony as to his character. The evidence was excluded, on the ground that it was not a criminal but a penal action—*Eyre C B* said “I cannot admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is thus that, in a *direct prosecution for a crime*, such evidence is admissible but where the prosecution is not directly for the crime, but for the *penalty* as in this information, it is not.” The Courts generally have refused to extend the principle beyond cases which were strictly criminal in their nature. The evidence in its nature is circumstantial and is to be given such weight as the jury think proper. It has no peculiar value beyond other circumstantial evidence, nor on the contrary is its effect limited to cases where on the other evidence, the jury are left in doubt. It is to be treated just as other circumstantial evidence, and is to be considered with and as a part of the whole case—*Ramsen v People*, 43 N Y 6. Without it other evidence may be convincing and yet in itself may be the foundation for that doubt which is necessary to an acquittal—*People v Moett* 23 Hun (N Y) 60, 65. “This is” says Mr. Norton “generally speaking of importance only where there is a legitimate doubt as to the prisoner’s guilt, in which case such evidence is entitled to weight. When evidence was given as to the good character of a boy who had been clearly found guilty of theft, an Irish Judge summed up “Gentlemen of the Jury there stands a boy of most excellent character who has stolen six pairs of silk stockings.” See also *R v Turner*, 6 How St Tr 613, *North* Ld 231. So also in *Com v Webster* 5 Cush (Mass) 295=52 Am Dec 711 the Court observed at p 325. But, where it is a question of great atrocious criminality the commission of the act is so unusual—so out of the ordinary course of things and beyond common experience it is so manifest that the offence if perpetrated must have been influenced by motives not frequently operating upon the human mind—that evidence of character and of a man’s habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of the lower grade. Against facts strongly proved good character cannot avail. So we have many times found the proposition laid down in substance that where the act is one of great and atrocious criminality, and is strongly proved by other evidence, there evidence of good character cannot avail. This is erroneous as a statement of a principle. What is in the mind of the Court is, without doubt, that under such circumstances, evidence of previous good character would be of little weight. The very fact that it is competent to go to the jury shows that it may avail—*Whelley’s Ld* § 118. In *Com v Webster* 5 Cush (Mass) 29, the Court in the latter part of the judgment also said. But still even with regard to the higher crimes, testimony of good character, though of less avail is competent evidence to the jury, and a species of evidence which the accused has a right to offer. See *Canem v People* 16 N Y 501, 505–507. Now the accused’s character in criminal cases is always admissible. Whether, when admitted, it should be given weight except in a doubtful case or whether it may suffice itself to create a doubt is a mere question of the weight of evidence, with which the rules of admissibility have no concern—*Wigmore* § 56.

It is to be observed that, where character evidence is admissible, there is a limit to the sort of evidence which will be received. A person’s character is made up of many different traits. One trait, for example that he is a passionate, quick tempered person may properly lead to an inference that he might have committed some crime of violence charged against him, while it would have no bearing upon the question of whether he had been guilty of a larceny or forgery. Hence it is that proof of character where it is allowed should be, and is generally,

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confined to those particular traits which have some logical connection with the nature of the offence charged. *Griffin v State*, 71 Ohio St 55. In *Dorsey Trial*, 6 How St Tr 539, 552, where the accused was charged with seditious publication evidence was adduced by the prisoner that he was a faithful member of the trained bands. In disallowing this evidence, *Hyde L. C. J.* said "Do not mistake yourself. The testimony of your civil behaviour, going to church, appearing in the trained bands, going to Paul's being there at common service,—this is well. But you are not charged for this. A man may do all this and yet be a naughty man in printing abusive books to the misbehaving of the King's subjects." In *Turnes Trial*, 32 How St Tr 1007, *Abbott J.* said "As far as my experience goes, the enquiry into character is always adopted to the charge. So where a man is charged with unnatural crime evidence that he paid his bills regularly would be inadmissible. Per *Mr Justice* in urging in *Hardys Trial*, 21 How St Tr 1076, *Horne Toles Trial* 25 How St Tr 348. "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act." Per *McClellan J.* in *Morgan v State*, 88 Ala 221.

It is needless to dwell on the fact" says *Mr McKehey* "that the character proved must be character prior to the time of the commission of the offence. This is implied from the very purpose for which the evidence is admitted." *McKehey's Ev* § 118. But the above statement of law is not correct. Character at an earlier time is as much relevant as character at a later time than of the deed in question. This relevancy depends on the assumption that it was substantially unchanged in the meantime. Character at the earlier or later time is offered not to prove or disprove the act in question but to prove the character at the time when the deed in question was done. All that is required is that the character must relate to a period proximate to the period of the supposed offence. *R v Sanderson*, 14 How St Tr 596. Similarly character in one place stands on precisely the same footing as character in another place. The person is the same wherever he is, and it is with the person that the trait is concerned. Most of the doubts, however, raised by a variation of time or of place have no concern with relevancy, but with the hearsay use of reputation to evidence character. Thus a reputation '*post litem motam*' may be untrue, unworthy, a reputation in a community other than the prisoner's home may be ill founded. *Wigmore* § 60. So far as this section is concerned which deals with relevancy those questions do not arise and more so as under the Indian Evidence Act character includes both reputation and disposition. No importance can be attached to evidence of good character where the case against the accused is clear. When it is doubtful some weight must be given to it. *Queen Empress v Nur Mahomed*, 8 B 223.

**Effect and operation of evidence of good character.** Good character should be permitted to operate as a positive, appropriate and substantial defence. No distinction should be made in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused. *State v Murry* 118 Mo 7, 25, *State v W. Nally* 87 M 644. *Rex v Stamford* 7 C & P 673. Both rests on the same basis. A man's good character is a fact making strongly for the inference that he is innocent and not a mere make weight to be thrown in the scale if his guilt is trembling in the balance. *Underhill Cr Ev* § 79. Though good character is of especial importance when the incriminating evidence is wholly circumstantial it is not to be rejected or even disregarded when the evidence against the accused is direct. *State v Rodman* 62 Iowa 456=17 N W 663. And, except in a few early cases (*Rex v Turner*, 6 How St Tr 565 613. *Com v Webster*, 5 Cush 295) its admissibility has never been limited to doubtful cases, or to those in which the other evidence was contradictory or unconvincing. *Underhill Cr Ev* § 79. It has been usual to treat the good character of the accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party character however excellent is no subject for their consideration,

but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to his good character. It is, however, submitted with deference that the good character of the party accused, when satisfactorily established, is an ingredient which ought always to be submitted to the jury together with the other facts and circumstances of the case. The nature of the charge and the evidence by which it is supported will often render such ingredient of little or no value but the more correct use seems to be, not in any case, to withdraw it from consideration but to leave the jury to form their own conclusion upon the evidence whether an individual whose character was previously unblemished, has or has not, committed the particular crime for which he is called upon to answer. 2 Russ (175). The correct rule is that in all cases a good character, if proved to the satisfaction of the jury must be considered. *People v Van Dam* 10 Mich 125.

Good character, though never conclusive may acquit if it creates a reasonable doubt. Though evidence of good character should always receive due consideration the fact that the defendant has established a high character for peace or honesty furnishes no reason why the jury must believe the evidence offered on his behalf if it is weak and contradictory. *State v Brown* 34 S Car 11 (Am). The rule is that evidence of good character must always be considered not alone but in connection with all the evidence bearing upon the question of the guilt or innocence of the accused. The jury have no right to separate it from the mass of the testimony and to say that they believe the accused has a good character and that therefore they will disregard all the evidence of guilt. *Sweet v State*, 75 Neb 263. But while proof of unblemished character alone may not be sufficient as against proof of guilt beyond a reasonable doubt, evidence of good character should go to the jury without language of disparagement by the Court, to be considered with all the evidence and not independently of it. *Springfield v State* 96 Ala 81. In a criminal case the circumstances may be such that an established reputation for honesty and integrity would create a reasonable doubt of guilt and require an acquittal though, aside from such reputation the evidence might be convincing, and justify a verdict of guilty. *Underhill Cr L* § 80. If the evidence of guilt is so convincing that it precludes a reasonable doubt, an acquittal will be justified if the evidence of good character considered in connection with all the other evidence, raises a reasonable doubt. *Commonwealth v Cate*, 220 Pa St 138 (Am). Evidence that the accused is a man of good character considered in connection with the other evidence may be sufficient to create a reasonable doubt of guilt where such a doubt would not otherwise exist. The verdict of the jury, however is to be based upon the whole evidence, and if, after considering carefully the evidence of good character, the jury still believe the accused is guilty beyond a reasonable doubt they are justified in rejecting the evidence of good character. *Broune v United States*, 26 C C A 31. The mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past is no reason to suppose that he will not succumb to temptation at the close of his career but before a man of this type and such antecedents is adjudged guilty the evidence against him must be of an unimpeachable character. *Mangat Rai v Emperor*, 10 Ind L J 262=29 Cr L J 710.

**54 \*** In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

**Explanation 1**—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

\* This section was substituted for the original section 54 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 6.

**S 54.** *Explanation 2*—A previous conviction is relevant as evidence of bad character

**Principle** "(Character) is strictly relevant to the issue, but it is not admissible upon the part of the prosecution because, as my brother Martin says, if the prosecution were allowed to go into such evidence, we should have whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed in orchard and so on through the whole of his life, and the result would be that the man on his trial might be overwhelmed by prejudice instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity, because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injury to the other ninety nine" *Per Willes J in R v Rounton*, Leigh & C 520, 540. In the same case *Martin B* said "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged." Evidence of character and previous conduct of a prisoner being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury. *Queen v Bylunt Nath*, 10 W R Cr 17. *R v Tubenfield*, 10 Cox 1. *Ananta Lal Haia v Emperor*, 42 C 957. But after a defendant has attempted to show his good character in his own defence, prosecution may in rebuttal offer as evidence his bad character. *Wignore* § 38. The reason for the reception of this evidence is thus stated by *Twiss J in R v Rounton supra* "If the prisoner, having a bad character misleads the Court, the false impression should be removed." See also *Per Alderson B and Campbell C J in R v Shrimpton*, 2 Den, Cr C 327. In *Ford Mansfield's* phrase, the defendant by going into his own character "gives a challenge to the prosecutor." *Clarke v Periam*, 2 Atk 333 (339).

**Old Section** Before the amendment of the section by Act III of 1891, s 6 the section ran as follows "In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant, but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant (*Explanation* This section does not apply to cases in which the bad character of any person is itself a fact in issue). So under this section as originally framed, previous convictions are in every case admissible against an accused person. *Queen Empress v Kaitick Chunder Das*, 14 C 721. 2 Weir 760, *Empress v Sulha* A W N 1886 47 but see *Koshun Dosadh v Empress* 5 C 768=6 C L R 219. Where a man is being tried upon a specific charge unless within the four corners of the law proof of a previous conviction is allowed for the purpose of proving guilty knowledge, or whatever it might be, no question ought to be permitted and no evidence allowed to show that this is a man of bad and dishonest character. But if the accused at his trial chooses to put in issue the question of his good character it is then competent to rebut such evidence by giving evidence of general civil reputation. *Queen Empress v Hughes* 11 A 25=A W N 1891 170.

**Scope of the present section** As a general rule the badness of the character or reputation of the accused is not a fact in issue or relevant to the issue and it is not permissible to show that he is of bad character or that he has a general disposition to commit the same kind of offence as that of which he stands indicted. "It is not competent for the prosecutor to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried." *Visram v At Gen for A C II* (1891) A C 57. The reputation of the accused may be made relevant to the issue by the accused if he tenders evidence to show that he is of good character. In all criminal proceedings the accused is allowed to call witnesses to speak of his good character (*rule 53*) *Fuss Cr Law p 217*. The reason for excluding

evidence of the accused's bad character by the prosecution is thus stated by Sir James Fitzjames Stephen in his general view of the Criminal Law of England at pp 309-310. A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few perhaps only to one or two persons. If general bad character is too remote a *fortiori* the particular transactions of which that general bad character is the effect, are still further removed for proof, accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transactions. *Woodhouse's Ex p* 451. Under this section the fact that the accused has a bad character is irrelevant and cannot be admitted whether elicited by the prosecution or by the defence. *Ma Myin v King Emperor*, 6 L B R 4=9 Cr L J 576=2 Ind Crs 349. The law in India was the same even before the passing of the Indian Evidence Act. *Queen v Mahim*, 6 B L R App 108=15 W R 37 Cr, *Queen v Behary* 7 W R 7 Cr, *Queen v Phoolchand* 8 W R Cr 11, *Queen v Gopal Thakoor* 6 W R Cr 72, *Queen v Bylunt*, 10 W R Cr 17. *Queen v Kulum Shrih*, 10 W R Cr 39. *Reg v Timmi* 2 B H C 125. But this section has no bearing whatever upon the question of the relevancy of a previous conviction after an accused has been convicted of the offence with which he has been charged and for the purpose of enhancing the sentence to be put upon him. *Nga O' Gyn v Queen Empress*, L B R (1872-1892) 419. *Emperor v Ismail* 16 Bom L R 934=26 Ind Cr 995=16 Cr L J 83. *Queen Empress v Nga Pui Pon* L B R (1893-1900) 93. *Hasar v Emperor* 7 P R 1895 Cr. *Queen Empress v Nga You* 5 B R (1893-1896) Vol I 52. So a trying Magistrate ought not to take any previous conviction into consideration for the purpose of establishing the charge upon which the accused was tried and deciding as to the guilt of the accused in respect of the offence for which he was tried. *Queen Empress v Nga Pui*, 1 B R (1893-1900) 93.

Where evidence of the good character of an accused person has not been given evidence of his previous bad character is irrelevant at any stage of a criminal proceeding. *Ila v Empress*, 15 P R 1885 (T B). *Nga Po v A* L 8 Cr L J 411. Such evidence is only relevant where the accused has shown that he has a good character or where the bad character of any person is itself a fact in issue. *Hasar v Empress* 7 P R 1895 Cr. Except for the purposes of awarding enhanced punishment in cases falling within the provisions of s 75 Penal Code evidence of previous convictions after amendment by Act III of 1891 s 6 stands upon the same footing, as regards admissibility as other evidence of bad character. *Hasar v Empress*, 7 P R 1895 Cr, *Emperor v Allomaya*, 5 Bom L R 805=28 B 129, *Emperor v Hurped* 5 Bom L R 1034. In a trial for an offence under s 101 where the character of the accused is not in issue evidence of bad character or reputation is not admissible and therefore evidence of previous convictions cannot be adduced. *Mankwa Parsa v Queen Empress* 27 C 139=4 C W N 97. The good or bad character of the accused whenever relevant must be with respect of the species of crimes charged against him. *R v Ranton* Leitch & C 520 (537). *Captain Kudd's Trial*, 14 How St Tr 146. Evidence of bad character cannot be given for the purpose of showing that the accused were of such a disposition that they were likely to commit the crime charged. But that prohibition does not in any way affect the evidence which is required to prove a motive for the crime which is otherwise relevant. *Jagua v Emperor*, 5 P 63=93 Ind Crs 584=7 Pat L 1 396=A 1 R 1926 Pat 232.

In England the law makes a distinction between the question of the guilt or the innocence and the question arising after the conviction of an assessment of the punishment which ought to be imposed upon him. For the first question the rules of evidence are strictly enforced and only matters properly relevant to that question can be proved. Evidence of the bad character of the accused including evidence of previous convictions is generally inadmissible, though in special cases it may be admissible. But in assessing punishment the Court takes into consideration not only the nature and circumstances of the crime itself but matters extraneous to that crime. There may be matters concerning the accused himself

**S. 54** such as his character and antecedents, or matters which have no direct relation to him, such as the state of the crime in the country generally or in the particular locality. And in regard to this second question the ordinary rules of evidence do not apply or at least are greatly relaxed. The Indian law has adopted the policy of leaving the assessment of sentence in the main to the discretion of the Court trying the case. This section of the Evidence Act has no bearing whatever upon the question of the relevancy of a previous conviction, after an accused has been convicted of the offence with which he has been charged it is relevant for the purpose of enhancing the sentence to be passed on him. *Empeior v Aga Ba*, 111 Ind Cas 453=29 Cr L J 869=A I R 1928 Rang 200 (F B).

**Accused person's bad character is irrelevant.** The evidence merely to prove that the accused person's character is such that he is likely to commit the act of cheating with which he is charged is not admissible. *Gudhari v Crown*, 26 P W R 1910 Cr =6 Ind Cas 964=11 Cr L J 428. So the prosecution can not show the bad character of the accused in the first instance, i.e. before he offers to prove his good character. *Felsenthal v State* 30 Tex App 675. *Underhill Cr L* § 7b. 'The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of law is due alike to the righteous and unrighteous. The sun of justice shines alike for evil and for good the just and the unjust. The crime must be proved, not presumed, on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule even in any degree would open a door not only to direct oppression of those who are vicious because they are ignorant and weak but even to the operation of prejudices as to religion, politics character profession manners, upon the minds of honest and well intentioned jurors.' *Per Verisland Sen in People v White* 24 Wind 374. *Wigmore* § 56. So character in the sense of reputation or disposition is not relevant when it is offered against the accused. *R v Cole* 1 Phil Ex 508. The whole philosophy of the subject is thus summarised by *Perham J in People v Shea* 147 N Y 78 (Am) when he said 'Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trial have existed for many years. One of these methods favours, this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused his tendencies his nature his associates his practices and in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England however has adopted another and, so far as the party accused is concerned a much more merciful doctrine. In order to prove his guilt it is not permitted to show his former character, or to prove his guilt of other crimes merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question.' *Wigmore* § 57. Similarly *Doe J in Da Ling v Westmoreland* 52 N H 401 (406) and 'There is an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged. That such evidence is relevant the law acknowledges by receiving in criminal cases and in some civil cases evidence of a defendant's good character in his favour and allowing such evidence to be rebutted and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English Judges led by merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation.' *Wigmore* § 57. Evidence of bad character can not be given for the purpose of showing that the accused were of such a disposition as they were likely to commit the crime charged. But after a defendant has attempted to show his good character in his own and prosecution may in rebuttal offer as evidence his bad character. *Wigmore* § 58.





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committed without a dishonest intention. *Imperor v. Bahhtwar* 25 Punj. L. R. 313-102 Ind. Cr. 192-28 Cr. L. J. 576. The presumption arising from evidence of good character and of the fact that an accused person is an educated man of good family connection which would render it *prima facie* unlikely that he would be guilty of crimes of violence, cannot be pressed too far in the case of offences originating in extreme political feeling. *In re Jogana Thapar* 6 M. L. J. 17-11 Cr. L. J. 30-1 Ind. Cr. 700. But in other cases the good character of an accused person and the insignificance of the gain which would result from the offence committed by him are circumstances which in criminal cases have occasionally great weight but neither of them can dispose of clear and undisputed facts. *Government of Bengal v. Umesh Chunder* 16 C. 310.

**Explanation I** This section is not applicable in case when the bad character of the accused itself is a fact in issue. *Khiluan v. Emperor*, A. I. R. 1924 Oudh 450. Such bad character of an accused proves a fact in issue under chapter VIII of Part IX of the Criminal Procedure Code. So far as section 110 of the Criminal Procedure Code is concerned the evidence that is required to justify an order under that section must be evidence that would prove that the accused by his general reputation or otherwise comes within the category of one of the clause of that section. *Sher Zaman v. Emperor* 10 P. R. 1899. The fact that the accused had a bad character is not irrelevant under s. 54 of the Evidence Act when the evidence relating to it is not given for the purpose of showing that the accused was a bad character and was therefore likely to commit offences of the kind of which he has been convicted. *Daulat Ram v. Emperor* 2 L. L. J. 653. Evidence that one of the accused ran cocaine and gambling dens long before the existence of the conspiracy which was the subject of the charge, was held admissible the prosecution case being that some of the accused were first thrown together by frequenting or running such dens and that they continued to meet at such places for the purposes of the conspiracy charged. *Sital Singh v. Emperor* 46 C. 700-50 C. L. J. 255-51 Ind. Cr. 33. If the evidence of a bad character is introduced in order to establish a relevant fact which cannot be proved *alimunde* the evidence of bad character is admissible. Thus where evidence is given in a case of murder to prove that the accused had committed theft though it may be excluded as being evidence of character it is admissible to prove a motive or is evidence to prove habit and association. *Khiluan v. Emperor*, 5 O. W. N. 760-A. I. R. 1924 Oudh 450.

**Explanation II** Whenever under this section evidence is regarded bad character of an accused is admissible his previous conviction is also admissible as evidence of his bad character. But in other cases evidence of previous conviction is not admissible unless accused produces evidence of his own good character. Such evidence of the previous conviction of an accused person amounts to evidence of bad character. *Fela Akur v. Emperor* 5 Pat. L. J. 706-60 Ind. Cr. 531-22 C. L. J. 219. The evidence of previous conviction may be considered in enhancing the sentence after the charge is proved. *Lahim But v. Emperor* 5 O. W. N. 124-109 Ind. Cr. 349. Upon the conviction of an accused the Court has to determine what punishment to award and to do this should take into consideration not only the nature and gravity of the offence committed but also the character of the accused. The bad character of the accused then becomes a fact in issue. Evidence of bad character being admissible as affecting the sentence evidence may be given only of general reputation and general disposition and not of particular acts by which reputation and disposition is shown. Evidence of previous conviction is an exception to this rule. Evidence of departmental punishment is inadmissible for the above purpose. *Aaya Po v. Queen Empress* L. B. R. (1893-1900) 52. The object of this section is to lay down that evidence of bad character including a previous conviction is as a rule irrelevant to help to establish an accused person's guilt but not to lay down that it may not be taken into account in passing sentence. *Sufan v. Emperor* A. I. R. 1929 M. L. J. 506. *Emperor v. I mail* 39 B. 326-26 Ind. Cr. 995.

**Character of prosecutor when relevant** In a prosecution for rape, or for attempting to commit rape or for indecent assault, the accused is entitled to cross-examine the prosecution, and to call evidence in order to show that she has a general bad character in respect of chastity or morality, as for instance to prove that she is a common prostitute. *R v Clarke*, 2 Starke 241, *R v Baker*, 3 C & P 589 *Wills Pt 2nd Ed* p 89. In all cases of this character the assent of the witness to the act is the material matter in issue and on that question the defence generally rests on circumstantial testimony. In determining that question which is purely a mental act it is important to ascertain whether her consent would from her previous habits be the natural result of her mind or whether it would be inconsistent with her previous life and reputation to all her moral feelings. Such habits as are imputed to the witness by this inquiry have a tendency to show such consent as the natural operation of her propensities, and rebut the inference or necessity of actual violence. *See Isham* in *State v Johnson* 25 Vt 511, *Wigmore* § 62, *R v Ryam* 2 Cox C 115, *R v Pissington*, 1 Cox Cr 18, *R v Clay* 5 Cox C 116 *R v Roberts* 2 M & R 512 *Fry* § 363. He may also cross-examine (*infra* *R v Martin* 6 C & P 362) and give evidence (*Reg v Riley* 18 Q B D 181, *R v Coleridge* 11 Cox 410) of specific acts of immorality with himself as they are held to be relevant upon the question of consent. *Wills Pt 2nd Ed* 86. Further than this he may cross-examine her as to specific acts of immorality with other men but in this case evidence may not be called to contradict her answers and she may even decline to answer at all. *R v Hodgson* R & R 211 *R v Holmes* L R 1 C C 331. If evidence of bad character is called by the accused the prosecution may call evidence to rebut it. *Wills Pt 2nd Ed* 86.

## 55 In civil cases the fact that the character of any person

Character as affect is such as to affect the amount of damages  
ing damages which he ought to receive, is relevant

**Explanation**—In sections 52, 53, 54, and 55, the word “character” includes both reputation and disposition, but \*except as provided in section 54,] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown

**Principle** A principle of the law of damages is involved, i.e. whether compensation shall be regulated according to a certain fact, namely, quality of reputation: if yes, reputation becomes material, if no reputation is immaterial, and will not be considered. *Wigmore* § 70

**Scope of the section** Character is often by the substantive law of the case, a part of the issue and is not used as tending to prove any other fact. In such a case its admission involves only a question of that substantive law and no question of evidence. *Greenl Et* § 14(d). Where the character of a person affects the amount of damages such character is a part of the issue. Where A sues B for defamation and the issue is as to the proper amount of compensation the question arises whether it is fair to measure his compensation by the quality of his original actual standing in the community, and in particular whether the fact that he had little or no reputation to lose may be considered as good reason for diminishing the damages accordingly. It must be noticed that the cases generally deal not with actual character but with reputed character and further more that this reputation is not offered evidentially, but as an element brought into issue by the law of the case. *Wigmore* § 70. It is obvious that on the principle so generally accepted for an action of defamation (*vide infra*) the plaintiff's reputed character may be considered, in mitigation of damages in any other action in which the law of damages recognizes the

\* These words and figures in the *Explanation* to section 55 were inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891) s. 7

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harm to reputation as one of the elements of recovery. This has always been conceded for the actions of seduction, criminal conversation, indecent assault, breach of promises of marriage, malicious prosecutions, etc. *Higmore* § 70

**Character evidence in suits for defamation.** Whether, in an action for defamation, evidence impeaching the plaintiff's previous general character as showing that at the time of the publication he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages is a point which has been much controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff while seeking redress in a Court of Justice for a specific injury the difficulty of showing an uniform propriety of conduct during his whole life, and would give the defendant an opportunity, under pretence of mitigating the damages, of continuing and aggravating the original calumny, and that too, under circumstances when, from the absence of any plea of justification, his opponent was utterly unprepared to disprove the aspersion. *Taylor* § 359. "Therefore there is full concurrence of opinion amongst the whole Court that such general evidence of bad character is not admissible and that principally on the grounds that a party cannot be expected to be prepared to rebut it, and that if it were to be received, any man might fall a victim to a combination made to ruin his reputation and good name even by means of the very action which he should bring to free him self from the effects of malicious slander." *Per Graham B in Jones v Stevens*, 11 Price 235, 256, 269. In the same case *Garrow B* said: "If ever it should (become the law that such evidence should be admissible) the libeller will become a much more general character than we find him now, for he will derive protection and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed of resorting for redress to Courts of Justice to vindicate his name, where it would be permitted to the defendant to bring forward testimony of general bad character which from its nature it would be impossible to disprove, whereby they in effect become the means of putting the libels of which they complain on the records of the Courts of giving a wider circulation to the calumnies contained in them." *Higmore* § 70. So it is further contended that if such evidence was admissible any man might fall a victim to a combination made to ruin his good name, even by means of the very action which he should bring in order to free him self from the effects of malicious slander, that timid though well conducted men, would consequently not choose to vindicate their characters in Courts of Justice, and thus libellers would enjoy a most dangerous impunity. *Taylor* § 359. To this it is replied with much force, that though the arguments on the other side would be entitled to great weight if the question respected the right of proving particular acts of misconduct they do not apply where evidence is offered of merely general reputation, that every man who demands compensation for the ruin of his good character ought to be prepared to rebut any evidence of his general bad character, that the danger of admitting testimony of this kind is only imaginary since the witnesses on cross examination might be compelled to state the grounds of their belief that as any failure in the evidence would probably much increase the damages witnesses would scarcely be called, except in support of a decisive case, that the law will not presume the existence of criminal conspiracies to ruin reputations and cannot be moulded to suit the convenience of irrational timidity that to estimate the extent of the injury which a plaintiff has sustained and consequently the amount of damages to which he is entitled the jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant, and, that they can best, if not only arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him by those with whom he was personally acquainted. *Taylor* § 360 citing *Richards v Richards* 2 M & Rob 577 *Lord Leicester v Waller* 2 Camp 211 *Bell v Paine* 11 Ir Law R N 541. The reputation cannot be said to be injured where it was before destroyed. So where the plaintiff has previously extinguished his own character he has no basis for an action to recover compensation for the loss of character and its consequential damage. The law considers him as bringing an action of damage

to a thing which does not exist *Holt's note to Holt's N P 308, Wigmore § 70, Williams v Callendar Holt N P 301, Emei v Marie, per Lord Ellenborough, cited in 2 Camp 253* The reason for the admission of such evidence is thus given by *Care J in Scott v Sampson, L R 8 Q B D 491* "Speaking generally, the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse and damage results to the person of whom they are made, he has a right of action The damage however which he has sustained must depend entirely on the estimation in which he was previously held He complains of an injury to his reputation and seeks to recover damages for that injury, and it seems most material that the jury who have to award the damages should know if the fact is so, that he is a man of no reputation To deny this would, as is observed in *Starkie on Evidence*, be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation A reputed thief would be placed on the same footing with the most honourable merchant a virtuous woman with the most abandoned prostitute To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential It is said that the admission of such evidence will be hardship upon the plaintiff, who may not be prepared to rebut it, and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty there was something in this objection, which however, is removed under the present system of pleading which requires that all material facts shall be pleaded, and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character in coming prepared with friends who have known him to prove that his reputation has been good" *Wigmore § 70, Englishman v Laypat Rai 37 C 760=14 C W N 713* See also *Knobell v Fuller*, Per Add Cts 134, *Newsam v Carr 2 Stark R 70, Plesshaw v Robinson 2 St Ev 641 Moore v Oastler, 2 St 641, Maubry v Barber, 2 St Ev 641, Airlman v Onley, 2 St Ev 306 (n), contra, Jones v Stevens, 11 Price 235, Wauthman v Weaver, D & R N P C 10, Cornwall v Richardson Ry & M 307, see also notes under s 12 at p 176 supra The American view on this point is thus stated by *Prof Greenleaf* "In most jurisdictions the former argument has prevailed, and the defendant may show the plaintiff's bad reputation in mitigation Several distinctions, however, must be noted (a) If the general issue is pleaded, the amount of damages is in issue, and the result in almost all jurisdictions is as above, (b) if a plea of truth is pleaded, some Courts hold that to allow the defendant to show the plaintiff's reputation would in effect be merely to allow him to attack the plaintiff's character instead of properly proving his plea, and (c) this is even maintained by some where the charge is a general one—e.g. A is a fraudulent man—and where the general character is thus in issue on the plea of *not guilty* *Stuart, 1 T R 748* (d) in the Courts admitting the plea of *not guilty* on a further difference arises as to whether (d') his general bad reputation alone may be used, or (d'') only his reputation for the particular vice involved in the defamation e.g. honesty chastity, etc, or (d''') both *Greenleaf § 14 (d)**

**Seduction** Character evidence of the daughter is admissible in an action for seduction for here the disgrace to the father is actually lessened if the daughter is already of bad reputation or has been, his previous bad reputation may therefore be shown *Starkie, 1 Camp 477, Dodd v Norris 3 Camp 519, Corbett v Le Mesurier, 1 Ex & Ch 261, Williams § 75* The father's own reputation is immaterial *Id.* In such an action the element of damage is the loss of society of the daughter if the father is not the father is the loss of society of the daughter Hence the damage is less if the daughter was a person of bad reputation before the seduction *Id.* *Forehand, 1 Mo 711, 5 Mo 117, 11 Mo 117, 12 Mo 117, 13 Mo 117, 14 Mo 117, 15 Mo 117, 16 Mo 117, 17 Mo 117, 18 Mo 117, 19 Mo 117, 20 Mo 117, 21 Mo 117, 22 Mo 117, 23 Mo 117, 24 Mo 117, 25 Mo 117, 26 Mo 117, 27 Mo 117, 28 Mo 117, 29 Mo 117, 30 Mo 117, 31 Mo 117, 32 Mo 117, 33 Mo 117, 34 Mo 117, 35 Mo 117, 36 Mo 117, 37 Mo 117, 38 Mo 117, 39 Mo 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- § 55. mitigation of damages and specific acts of intercourse with other men may be shown *Smith v. Milburn*, 17 Iowa 39 (Am.) When a father claims damage the daughter's character is not admissible under this section, although it is so under section 12 *supra*. *I vide the next topic*

**Criminal Conversation** In an action for criminal conversation, the wife's previous bad reputation may be shown *Starkie F. 101 H. 303*, *Higmore* § 73. In such a case the husband's own reputation is immaterial; that a distinction is to be made as to his actual conduct or character for this, while not necessary, an excuse for the defendant may well serve in mitigation, in as much as the loss of his wife's virtue can mean little to a person of his behaviour, than the reputation is here received as evidence of actual character. *Higmore* § 73. According to *Justice Field*, the person whose character is in question is under this section assumed to be the same as the person who claims damages. *Field, F. 6th Ed. 20*. Therefore under this section the wife's character is not admissible although it is relevant under § 12 *supra*. The husband's general character for infidelity may be proved because in such a case he can claim very little damage for the loss of his wife's society. *Taylor* § 362, *Jones v. Jones* 19 I. 1 N. S., *Narracott v. Narracott*, 13 I. J. P. & M. 61.

**Indecent assault** The reputed character of the plaintiff in an action for indecent assault is material. Here both the actual and the reputed character would have a bearing. *Gross v. Brodretch*, 21 Ont. App. 637. The plaintiff's character for unchastity is always receivable. *Miller v. Curtis*, 18 Ma. 127. 'The mental sufferings of a vulgar and licentious woman from an indecent assault would be less than that of a modest and virtuous woman' *Mitchell v. Worl*, 13 R. I. 61, *Higmore* § 75.

**Breach of promise of marriage** The bad character of the plaintiff, in an action for breach of promise of marriage is clearly in issue both as a defence and according to circumstances in mitigation of damages. But for defence purposes it has to be proved. The general reputation of a woman for unchastity is no bar to her action for breach of promise of marriage. To constitute unchastity a defence the defendant must not only prove her to be actually unchaste but also that he had no knowledge of such unchastity at the time of making the promise to marry. *Foster v. Hanchett* 68 Vt. 319 (Am.). The rule in such cases is that if any man has been prying his address as to one that he supposes to be a modest person and afterwards discover her to be a loose and an immoral woman, he is justified in breaking any promise of marriage he may have made to her, but to entitle a defendant to a verdict on that ground, the tribunal must be satisfied that the plaintiff was a loose and immoral woman and that the defendant broke his promise on that account, and they must also be satisfied that the defendant did not know her character at the time of the promise, for if a man knowingly promise to marry such a person he is bound to do so. And therefore if the plaintiff has been guilty of criminal intercourse with another, and such fact is unknown to the defendant at the time of contract, he may prove it as a defence. It makes no difference when the unchastity occurred whether before or after the promise to marry so long as it was unknown to the defendant at the time of the promise in the former case, and that he did not waive it or request in it in the latter but took the most expeditious method of rescinding and cancelling his contract for that good reason. *Burn Jones* § 151. In *Williams v. Feltus* 119 Iowa, 252 *Bishop C. J.* says "It is a correct doctrine, most certainly that where a man discovers after entering into a contract for marriage—the rule is the same, of course, the parties being reversed—that his fiancée is a woman of unchaste or immoral character he may, at his election renounce the contract and may plead such fact as justification of his conduct in any Court of law or equity. The principle involved is akin to that upon which the doctrine of implied warranty rests. But if the plaintiff has been seduced first by the defendant under promise of marriage, he cannot be heard to prove her bad character. The rule was thus stated by *Parker J.* in *Boydton v. Kellong* 3 Mass. 189 (Am.). "It appears from the declaration in this case, that the plaintiff has been seduced by the defendant and that pregnancy was the consequence of the seduction. This of itself, would degrade her in the estimation

of the public, and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than a bare statement of it. A gentleman, under pretence of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for pecuniary satisfaction even that, inadequate as it is, is to be resisted or reduced, by urging her ignominy as a reason why she should not recover. To permit such a defence would be a reproach upon the administration of our law. *Burn Jones* § 151 (a)

**Malicious prosecution** In actions for malicious prosecution, the defendant may show the general bad reputation of the plaintiff as known to him when he launched the prosecution. *Martin v Hardesty* 27 Alb 458 (Am)

**Explanation** The meaning of the explanation is not very clear. Character cannot include reputation. Character may be evidenced by reputation. 'That actual character is' says *Prof Wigmore* "distinct from reputation of it, and the latter is merely evidence to prove the former ought to be a truism." *Wigmore* § 1608. The term 'character' when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others, the term 'reputation' applies to the opinion which others may have formed and expressed of his character, so that as has been remarked in some of the books, when treating of this subject a man's character may be really good when his reputation is bad, and, on the other hand, his reputation may be good when his character is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction, the term general character being used in legal signification, as it is frequently used in common parlance to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. *Per Caldwell J* in *Bucklin v State*, 20 Oh 23 (Am), *Wigmore* § 1608. Similarly in *Wright v Chaffordville* 142 Ind 636 (Am), *Jordan J* said 'Counsel seemingly confuses real character—that which is actually impressed by nature traits or habits upon a person—with what is generally termed reputed character. Reputation may be evidence of character, but it is not character itself. That which a person really is must be distinguished from that which he is reputed to be.' *Wigmore* § 1608. So it is clear that the real meaning of this explanation is that the term 'character' as used in sections 52, 53, 54 and 55, has been used in the sense of disposition as well as reputation and to prove the disposition of a person, evidence of his general disposition is to be given and to prove his reputation, his general reputation is to be proved.

**English law** Under the English law the term 'character' was normally applied to the actual qualities and not to the community's estimates of these qualities. *Wigmore* § 1931. In *Thomas Hardy's Trial* 24 How St Tr 999 evidence was admissible to the effect "I have always esteemed him as a man of a mild and peaceful disposition." Similarly in *Alexander Davison's Trial* 31 How St Tr 186 *Lord Ellenborough* said "The correct inquiry is as to the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the indictment." *Wigmore* § 1931. See also *Trial of Cooper, Vasson, Stephens and Rogers* 13 How St Tr 1180 ff. *Fernley's Trial* 11 How St Tr 106, *Sir John Linn's Trial*, 13 How St Tr 40, *Butler's Trial* 13 How St Tr 1260. So the witness constantly spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation but to speak from reputation alone is regarded in the 1700's as improper. On this point the law in England was afterwards changed and allowed reputation alone. *Wigmore* § 1931. In *Jones's Trial* 11 How St Tr 310 (1809) *Lord Ellenborough C J* incidentally said "It is reputation, it is not what a person knows." But the isolated phrase above in *Jones's Trial* somehow caught the attention of later treatise-writers and being misunderstood has proved a great tumbling block. *Wigmore* § 1931. The practice and the rule in England to the middle

S 55 of the 1800s are thus plain. The statements of the early and classical writers (all writing from experience at the bar) are equally clear when we understand the usage of the term character in this connection. *Peake Et 2nd Ed 8* (1802), *McVally Et 321* (1811), *Starke Et 1st Ed Vol II, 366* (1824), *Phillips Et 1st Ed 72, 108* (1811). That personal belief, estimate, or knowledge—under whatever name—was proper and unquestionable testimony to character seems clear enough as the law and the practice throughout the whole period. *Higmore § 1931*. In 1865 *R v Houston Leigh & Co 20=10* Cox Cr 25 was decided by a Court consisting of 13 Judges two (dissenting) *Cockburn C J* in delivering his judgment said. It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does it mean? Does it mean evidence as to his reputation among those to whom his conduct and position are known, or does it mean evidence of disposition? I think it means evidence of reputation only. No one ever heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind the way, and the only way the law allows of your getting at the disposition and tendency of his mind is by evidence as to his general character founded upon the knowledge of those who know anything about him and his general conduct. Now, that is the sense in which I find the word 'character' used and applied in all the books of the text writer of authority upon the subject of evidence. When we come to consider the question of what in the strict interpretation of the law, is the limit of such evidence I must say that, in my judgment, it must be restrained to this: *the evidence must be of the man's general reputation*, and not the individual opinion of the witness. The witness who acknowledged that he knew nothing of the general character and had no opportunity of knowing it in the sense of reputation, would not be allowed to give an opinion as to a man's character in more limited sense of his disposition. *Pollock C B, Williams, Blairburn, Byles, Keating Mellor* and *Shee J J* and *Martin, Channell and Piggot, B B* concurred and *Earle C J* and *Willes J* dissented. But in the same case *Earle C J* said. What is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of any party accused, and basing thereon a presumption that he did not commit the crime imputed him. Disposition can not be ascertained directly, it is only to be ascertained by the opinion formed concerning the man which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. The question between us is, whether the Court is at liberty to receive a statement of the disposition of a prisoner founded on the personal experience of the witness, who attends to give evidence and state that estimate which long personal knowledge of and acquaintance with the prisoner has enabled him to form. I think that each source of evidence is admissible. You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and according to my experience, you may have a more personal judgment of those who are capable of forming a more real substantial guiding opinion than that which is to be gathered from general rumour. I have never seen a witness examined to character without an enquiry being made into his personal means of knowledge of the character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say, 'This man has been in my employ for twenty years. I have had experience of his conduct, but I have never heard a human being express an opinion of him in my life. For my own part I have always regarded him with the highest esteem and respect and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Chief Justice has laid down would exclude his evidence and that is the point where I differ from him. To my mind personal experience gives cogency to the evidence whereas such a statement as 'I have heard some persons speak well of him' or 'I have heard general report in favour of the prisoner' has a very slight effect in comparison. Again to the proposition that general character is alone admissible the answer is that it is impossible to get at it. There is no such thing

as general character, it is the general inference supposed to arise from hearing a number of separate and disinterested statements in favour of the prisoner. But I think that the notion that general character is alone admissible is not accurate. It would be wholly inadmissible to ask a witness what individual he has ever heard give his opinion of a particular fact connected with the man. I attach considerable weight to this distinction because in my opinion the best character is that which is the least talked of. The arguments of *Mr Taylor* upon this branch of the case have commanded my assent. They are strongly confirmed by the case of *Rex v. Davidson* 31 St Tr 99. In that case *Lord Ellenborough* held that the personal experience of a witness or his opinion founded upon his personal experience, was admissible. According to my recollection there were thirteen witnesses to character called in that case, and five or six gave evidence of very considerable personal experience of the prisoner, so as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner had been employed under government and in other situations, and he was not interfered with till he came to the statement of a specific transaction. Then *Lord Ellenborough* stopped him, saying that particular facts were not admissible. Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner's disposition and *Lord Ellenborough* says the correct inquiry is as to the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the information. This is very strong proof that the practice is to stop a witness when he refers to particular facts only, but leave him at liberty to give his opinion founded on those facts. In this particular case the question was 'what was the character of the prisoner? and if the answer had been 'I knew him when I was his pupil and I say that his character is bad' and it had stopped there, it would in my opinion have been unobjectionable. It was a statement of personal experience, and the witness gave his answer according to the general inference which he had drawn from that experience. But the witness added a specific fact—the opinion of his brothers. Strictly that specific fact was not admissible, but in a grave case involving a very important question I cannot rest my decision on the particular answer. *Wills J* also said. I apprehend that the main disposition is the principal matter to be inquired into and that his reputation is merely accessory and admissible only as evidence of disposition. The judgment of the particular witness is superior in quality and value to mere rumour. Numerous cases may be put in which a man may have no general character—in the sense of any reputation or rumour about him—at all, and yet may have a good disposition. For instance, he may be of a shy retiring disposition, and known only to a few, or again, he may be a person of the vilest character and disposition and yet only his intimates may be able to testify that this is the case. One man may deserve that character (reputation) without having acquired it, while another man may have acquired it without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant we apply to his master. A servant may be known to none but members of his master's family, so the character of a child is known only to his parents and teachers and the character of a man of business to those with whom he deals. According to the experience of mankind one would ordinarily rely rather on the information and judgment of a man's intimates than on general report and why not in a Court of law? The evidence in this particular case was of a very peculiar character because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within reach of his influence—persons who would not be likely to communicate his conduct to the neighbourhood or to one another."

In *R v Davidson* 31 St Tr 99, *Lord Ellenborough* himself afterwards (Col 183) put the final question to a witness "From your knowledge of *Mr Davidson's* character and conduct, do you think him capable of committing a



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fraud? In the next year (*John's Case*, 31 How St Tr 309, 310) Lord Ellenborough said 'What was his (the accused's,) general character for integrity in the question?' And again after the following question and answer: 'During the time you did know him, what was his general character for integrity? During the whole time I know him I considered him a man not only of unexceptionable but of a most honourable character—Lord Ellenborough. It is reputation it is not what a person knows. There is hardly one question in ten applicable to the point. It is very remarkable, but there is no branch of evidence so little attended to.' In 1794, in *Hardy's Case*, 24 How St Tr 999, there is a passage in the examination of witness *John Carr*, which shows what was then regarded as the true rule, and how common it was to disregard it: 'How long have you known *Mr Hardy*? Upwards of twenty years—Have you known him well during that time? Yes—what character has he borne during that time? The character of a sober, peaceable, honest worthy man—From what you know of his character, is he a man at all likely to ruse any dishonesty, or commit any acts of violence? Never—*Mr Attorney General*. That is a question never put *Mr Gibbs*. It is a question, I never heard any objection to—*Lord Chief Justice Eyre*. I have often heard it put, and often heard it objected to: it is certainly not a strictly regular question, you are to ask his general character, and from thence the jury are to conclude, whether a man of such a character would commit such an offence. At the same time, in justice to the question I must say I have known it asked a hundred times, I have very often myself objected to it—*Mr Garron*. If it had not been for the observation that it never was objected to it would not have been objected to.' See the remarks of *Ruffin C J* in *Downey v Murphy* 1 D & B 85 the learned and important article of *Professor Wigmore* in 32 *Am Law Rev* 713, on 'Proof of character by personal knowledge or opinion. Its History.' Much reason is there shown for the view, that until a recent period character meant disposition, and the term "General character" imported only a contrast with particular acts. *Thayer Cas Ev* p 280 see also *Willis Trial* 15 How St Tr 650, *Huggins Trial* 17 How St Tr 349, *Acton's Trial* 17 How St Tr 500, *Captain Goodes Trial* 17 How St Tr 1061—1063, *Doyan's Trial* 28 How St Tr 1067, *R v O'Donnell*, 7 State Tr 637 (693), *R v O'Connor*, 4 State Tr 930, 1161, *Ward's Trial* 9 How St Tr 299. See *James Fitzjames Stephen* in his Digest of Evidence Note XXV as well as in his History of Criminal Law Vol I p 450 observed: "One consequence of the view of the objection taken in *R v Routon*, is that a witness may with perfect truth swear that a man who to his knowledge has been receiver of stolen goods for years has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to continue a good reputation with a bad disposition and according to *R v Routon* the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, what was the prisoner's character for honesty, morality, or humanity, as the case may be nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common men of witness understand the distinction. The case expressly decides that if a man gains a reputation for honesty or morality by the grossest hypocrisy he is entitled to give evidence of it which evidence cannot be contradicted by people who knew the truth. Similarly the following passage occurs in § 300 of *Fayton's Evidence*: "The rule (i.e. the rule laid down by *Corbett C J* in *Ex v Routon*)—which appears to rest rather on authority than on reason,—would probably have been rejected long ago by Courts, had it not been for two causes. First the rule in practice is seldom strictly enforced and next it has to a certain extent been modified by the Judges. Aware that the best character is generally that which is the least talked about (*Per Corbett C J* in *Ex v Routon*) they have found it necessary to permit witnesses to give negative evidence in the subject and to state that they never heard anything against the character of the person on whose behalf they have been called. Nay some of the Judges have gone so far as to assert that evidence in this negative form is the most cogent proof of a man's good reputation. *Ibid*

**Rule under the Indian Evidence Act** The Indian Legislature leans to the opinion of *Earle C J* and *Willes J* in *Ret v Routon*, 34 L J M C 57 who held that evidence of character extended to disposition as well as to reputation. *Nort E* p 234 In *Richmond v Norriel*, 96 Com 582=115 Atl 11. *Wechler C J* said "Character might be proved in three possible ways (1) The estimate in which the individual is held in the community, that is, his general reputation as to the trait in question (2) The opinion as to this trait of those who have known the individual and had the opportunity to know whether he possessed this trait or not (3) The acts of the individual under somewhat similar circumstances from which his character as to this trait may be inferred. The evidence of general repute affords the basis for an inference as to the actual character, whether it be the entire character or a single trait of character. Method 1 is generally recognized (in England and in America) as an established method of proving character. Method 2 is permitted in some jurisdictions (of the United States of America) but in most it is denied. Whether or not one way or quick temper will require proof of a mental characteristic and this is the proof of a fact. No one knows so well about this fact as he who has known the person and had the opportunity to determine it. How much more convincing is such evidence than that of a witness who testifies to the general repute of this person as to this mental characteristic? His testimony is based upon hearsay and quite likely rumour and gossip. If mental characteristic is a fact there is no valid reason why this fact may not be proved by any witness who knows what it is. Personal observation and personal knowledge are a more trustworthy reliance than general reputation. We think the decisions which we have referred and others to which we need not refer, require the admission of evidence of character from those who know." *Wigmore* § 1986. Similarly in *State v Lee*, 22 Minn 109 *Berry J* said "As it is the fact of disposition which is important and material there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition is from his personal observation. Whether the witness knows what he pretends to know in regard to the disposition of a person in question whether his opportunities for acquiring such knowledge have been sufficient or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross examination, or both." *Wigmore* § 1986, see also *Englishman v Lippatt Rai*, 37 C 760=14 C W N 713.

**Except as provided in section 54** The character evidence as is contemplated in section 54 is not confined to general disposition or general reputation. The character or disposition offered whether for or against him must involve the specific trait related to the act charged. *Wigmore* § 59. "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant could not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act." *McClellan J* in *Morgan v State* 88 Ala 224 (Am), *Wigmore* § 59.

**Reputation** Since reputation is looked to merely as evidence of the character reputed it follows that the reputation is hearsay testimony, for it is the expression of an opinion on the part of the community used testimonially, but uttered out of the Court and not under cross examination. It is therefore admissible if at all, as an exception to the Hearsay rule. It has been said in an opinion often quoted [*Idem Per Lord J* in *Haller v Moors* 122 Mass 504 (Am)] that reputation is admissible as a fact, i.e., a circumstantial evidence, but this is the merest error. Reputation is a testimonial evidence, i.e. the assertion of a number of persons used as the basis of an inference to the truth of the fact asserted and the true nature of this use cannot be obscured by calling it a fact. It is true that reputation is not always and necessarily used as hearsay, i.e. as a testimonial assertion. It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action for defamation, or where the reputation of a house of ill fame is in issue, in

**S 55** these and similar cases, the reputation is the fact to be proved irrespective of the actual character reputed. *Higmore* § 1609. The topics that concern this subject are chiefly as follows: (1) The time of the character provable, (2) the nature and formation of a reputation, (3) the persons qualified to testify to reputation, (4) the cross examination of such witnesses to reputation.

**Time and character of the Reputation.** Character is continuous quality, not quickly changed or changeable. The character of a person at another time may well be considered as evidencing his character at the time in question. As regards prior character the correct view is that character at any preceding time is admissible provided it is not too remote in time to have real probative value. As to subsequent character the question is a different one. A person's character after a certain time is equally indicative of his character at that time as is his character at a prior time and no difficulty on this score arises. But, from the point of view of the truthworthiness of the reputation used as evidencing the character, an objection may be suggested to a reputation obtaining *post litem motam*, i.e. after trial begun or after controversy started, especially in the case of the accused person's reputation, for unfounded suspicions engendered by the accusation may have contributed to colour the reputation and render it untrustworthy. *Greenl. Ev.* § 461 (d).

**Nature and formation of Reputation.** In enquiry into the limitations affecting the nature and formation of a reputation it must be remembered that reputation is used only by way of an exception to the Hearsay rule, and that it must therefore take such a solid and definite shape as to be worthy of attention and to justify the exceptional resort to such evidence. Mere rumour is of course not reputation. A reputation involves the notion of the general estimate of the community as a whole—not what a few persons say nor what many say, but what the community generally believes. *Kimmel v. Kimmel*, 3 S. & R. 337. It is not necessary that the community as a whole or a given proportion of them should have been heard to speak on the subject, it is what they believe that is important. *Pielens v. State* 61 Mass. 567. Further more, their belief may be as well indicated by their silence as well as by their utterance, and accordingly the fact that no one has been heard to say anything against the person's veracity or honesty or other quality in question is universally deemed to be equivalent to a reputation attributing that virtue to the person and therefore to be admissible. The reputation, moreover, can be supposed to be trustworthy only so far as it has arisen among those who have had opportunities of ascertaining the person's character i.e. it must be predicated of the persons among whom he dwells not of persons in a different place or in a place where he has merely sojourned, the form of the question usually refers to the opinion in the neighbourhood or the community but the sanctioned phrasings vary. *Greenl. Ev.* § 461 (d).

**The persons qualified to testify to reputation.** The witness to reputation must be one who by evidence in the community, or otherwise has had an opportunity to learn the community's estimate, and the preliminary enquiry whether he knows the person's reputation is usually insisted upon. *Wetherbee v. Norris* 103 Mass. 566. A person who leaves out of the neighbourhood is therefore not qualified and it has been doubted whether a person who has merely visited the neighbourhood for the express purpose of learning the reputation is qualified. *Manson v. Hartland* 4 Esp. 102. *Douglass v. Towsey*, 2 Wend. 354. *contra*, *Boulkes v. Sellway* 3 Esp. 236, *Greenl. Ev.* § 461(d).

**Cross examination of a witness to reputation.** In testing a witness who speaks of good character it will expose the untrustworthiness of his testimony if he admits that rumours of misconduct are known to him for the knowledge of such rumours may well be inconsistent with his assertion that the person's reputation is good. *Per Parke B.* in *R v. Wood*, 5 Jur. 225. Accordingly the propriety of inquiry whether he has not heard that the person whose reputation he has supported has been charged with this or that misdeed has usually been conceded. On a similar principle a witness impeaching reputation may be tested on cross-examination by requiring him to specify the sources of his information, and in particular the persons whose remarks have served to

give rise to his assertion that the reputation is bad, because there is practically no other effective way of exposing a false or unfounded assertion of a bad reputation. *Weels v Hall*, 19 Conn 377. This practice seems to be generally conceded to be proper. The preceding two principles apply in the proof of a defendant's or other person's reputation as well as of a witness's reputation. *Greenl Ev* § 461(d).

**General Reputation, meaning of.** It is commonly said that the reputation must be "general", that is, the community as a whole must be agreed in their opinion, in order that it may be regarded as a reputation. If the estimates vary, and public opinion has not reached the stage of definite harmony, the opinion cannot yet be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity, for there are always dissenters. To define precisely that quality of public opinion thus commonly described as 'general' is therefore a difficult thing. *Wigmore* § 1612. A reputation, to be provable reputation at all must be a general reputation. It may be either one of two opposites, for instance either good or bad. It cannot be intermediate,—that is partly one, and partly the other for that would not be general and there would then be no general reputation either way. But, if it be not general, then obviously it does not exist as a fact, and evidence can not be received to show a partial, limited or qualified repute. The existence of a diversity of opinion is one of the means by which a witness may know there is general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation and as a totally independent circumstance is not the thing to be proved. *Per Mc Sherry J*, in *Jackson v Jackson*, 82 Md 17=33 Atl 317. Although when witnesses are examined as to general character their testimony is not of much value as to habits of a suspected person, unless they can in support of their opinion, adduce instances of the misconduct imputed, when the question is only as to his repute, the evidence of witnesses, if reliable is not without value, though they may not be able to connect the suspected person with the actual commission of the crime. *In the matter of the petition of Pedda Siva Reddi*, 3 M 235=2 Weir 54.

**General Disposition.** Here the character is applied to the actual qualities and not to the community's estimate of these qualities. The term 'general character' means the "general traits as distinguished from the 'particular acts' instancing them. This meaning of 'character' (i.e. general disposition as opposed to the inadmissible particular acts showing it) seems to have been the original and natural source of the phrase and the orthodox application of it. In *Lavers' Trial* 16 How St Tr 246 various discreditable facts being offered to discredit a witness, the Counsel was stopped, on objection by *Platt L C J* who said 'Mr *Hungerford* you know what the rule of practice and evidence is, when objections are made to credit and reputation of the witness you can not charge him with particular offences. For if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to the particular facts to charge the reputation of any witness, but only in general you are to ask what his character and reputation is. You know, if there be any objection to him to his general character, he can answer them, but if objections are grounded on particular charges of his being a base an infamous, and an ill man, not having any notice of this it is impossible for him to defend himself'. *Wigmore* § 1981. In *R v Cobbit*, 2 State Tr N S 789 873, *Lord Tenterden C J* said 'The proper inquiry for a gentleman who has known Mr C many years is as to his general character, not as to any individual or particular acts. You may ask who have been acquainted with you what their opinion is of your character and your views on subjects connected with this publication then witness is to testify, e.g., "I have known him personally for five years, and I think him quite the reverse of a man likely to incite labourers to outrage". *Wigmore* § 1981. In *Alexander Davidson's Trial*, 31 How St 186 *Lord Mordaunt* sworn was asked "From your Lordship's general knowledge of his conduct is he a person whom your Lordship would think capable of committing a fraud? "Certainly not" *Lord Ellenborough* said "The correct inquiry is as to the general character (i.e. disposition) of

- S 55** the accused and whether the witness thinks him likely to be guilty of the offence charged in the indictment." In the same case his lordship himself put the following question to *Sir Andrew Hammond* "From your knowledge of Mr *Drison's* character and conduct, do you think him capable of committing a fraud?" So it is clear that evidence may be given of general disposition and not of particular acts by which the disposition is shown *Aga Po v Queen Empress* L B R (1893 1900) 352. Evidence as to a person's general disposition based on the opinion of the particular witness—such opinion being the result of the witness's personal experience and observation—will also be evidence as to his character. But the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally, nor does it show that such general opinion has been publicly expressed by his neighbours. *Duma Singh v King Emperor*, 5 O C 203.
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# PART II

## ON PROOF

### CHAPTER III

#### FACTS WHICH NEED NOT BE PROVED

S 56.

Fact judicially noticeable need not be proved

**56** No fact of which the Court will take judicial notice need be proved

**Scope of Part II** In part I of the Evidence Act, what facts may, and what facts may not be proved in a civil or criminal case has been dealt with. After ascertaining that question, the framers of the Act now proposes in this part to deal with the question what sort of evidence must be given of a fact which may be proved, or in other words this part shows the manner in which a fact in issue or a relevant fact must be proved. Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue. But where a fact requires proof, the rule is that it must be proved either by oral or documentary evidence. Every fact except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it, that he directly perceived the fact to the existence of which he testifies. Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in Court for inspection. Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves. Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined be varied by oral evidence, though secondary evidence may be given of the contents of the document. *Step Dig Ev Introduction* pp. xiii, xiv

**Proof** The terms "evidence" and "proof" are often used in such a manner as to include at one time the media by which facts are established, and at another the effect or conclusions produced by the testimony. It is true the attempt has frequently been made, but without great success, to distinguish between the terms "evidence" and "proof". The latter term in its more popular meaning more often refers to the degree or kind of evidence which will produce full conviction, or establish the proposition to the satisfaction of the tribunal. More accurately, proof is the effect or result of evidence while evidence is the medium of proof. *Best Ev* § 10 "Proof is that quantity of appropriate evidence which produces assurance and certainty. Evidence therefore differs from proof as cause from effect. *Hills Cir Fi* 2, 3, *Greenl Fi* 1. The words "evidence" and "proof" are often used as synonymous, in strictness however the latter is an effect of the former. "Proof is that which convinces, evidence is that which tends to convince." *Jastr. emb. 1 v Warhausm* 120 Mich 677=79 N W 935 (Am) *Burr Jones* § 4

**Scope of Chapter III** "The second chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved. In the first place the fact to be proved may be one of so much notoriety that the Court will take judicial notice of it or it may be admitted by the parties. In either of these

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cases no evidence of its existence need be given Chapter III, which relates to judicial notice, disposes of this subject It is taken in part from Act II of 1855 in part from the Commissioners' Draft Bill, and in part from the law of England' *Draft Report of the Select Committee—The Gazette of India, July, 1, 1871, Part I* p 273 'We have observed' says *Prof James Bradley Thayer* "that not all the matter of fact which Courts and juries rest upon, in deciding cases, needs to be communicated to them by the parties Much in every case is known already, and much is common to all cases, such things are assumed, stated and reasoned upon without discussion Often, also, much of which there might, in point of mere theory be a doubt will, as a matter of established practice be allowed by the Court in the first instance without formal proof And there is much which belongs to a dubious and arguable region as to which a Court may or may not proceed in this manner *Thayer Pre Et* 277

In another case proof by evidence may be dispensed with, namely, where the opponent by a solemn *infa judicial* admission has waived dispute This is known as Judicial Admission *Wigmore* § 2565

Facts which need not be proved *Stephen* in his *Digest of the Law of Evidence* (1st and 2nd editions,) Chap VII originally dealt with "judicial notice," under the general head of 'Proof' and the special head of 'Facts which need not be proved' as in this Act For this he was taken to task by an acute critic (in 20 *Solicitors Journal* 937), who suggested that since *Stephen's* art 93, relating to the burden of proof, declares that whoever desires a judgment as to any legal right depending on the existence or non existence of facts which he asserts, must prove that those facts do or do not exist," and since art 59 (about judicial notice) declares that some facts asserted by a party need not be proved by him,—the true place for this list was that of an exception to the art 93 This led *Stephen* in his third edition to change the special head of Chap VII from 'Facts which need not be proved' to 'Facts proved otherwise than by Evidence' (his definition of 'evidence' art 1 being (a) the statements of witnesses in Court and (b) documents produced in Court) and called forth certain remarks in the preface to the third edition [*Little and Brown's Ed* (1877) 26] By proof I mean the means used of making the Court aware of the existence of a given fact, and surely the simplest possible way of doing so is to remind the Court what it knows already It is like proving that it is raining by telling the Judge to look out of the window It has been said that judicial notice should come under the head of burden of proof, but surely this is not so The rules as to burden of proof show which side ought to call upon the Court to take judicial notice of a particular fact but the act of taking judicial notice, of consciously recalling to the mind a fact known but not for the moment adverted to, is an act of precisely the same kind as listening to the evidence of a witness or reading a document that is it belongs to the general head of Proof As regards all this one or two things may be briefly remarked (a) "The general head of Proof," and the means used of making the Court aware of the existence of a given fact," include the whole topic of legal reasoning they spread far beyond the law of evidence The same reach belongs to the burden of proof So that both *Stephen* and his critic recognize the wide scope of judicial notice (b) It seems a very inadequate conception of the subject of judicial notice to speak of it as "a means of making the Court aware" of a fact it has to do not merely with the action of the Court when the parties are seeking to move it but when alone and acting upon its own motion To read a document in Court or listen to a witness there is to deal with evidence and when an object is submitted to the Judge's inspection in Court But the true conception of what is judicially known is that of something which is not or rather need not be unless the tribunal will be it, the subject of either evidence or argument—something which is already in the Court's possession, or at any rate is so accessible that there is no occasion, unless the Court ask for it to use any means to make the Court aware of it, something which it may deal with quite unimpeded by any rules of law In making this imputation the *Indian* is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general *Malby Notes to Indian Evidence Act London Henry Rowde 1897* (c) There is sometimes confusion between judicial notice and inspection or the dealing by a Court with what

Bentham calls "real evidence"—a thing submitted directly to the senses of the tribunal, as in *Stephenson v The State*, 28 Ind 272 (1867) where the trial Judge had decided the question whether the appellant was over fourteen years of age by simply inspecting him. He certified to the upper Court that "as the defend int being present in Court, presented the appearance of a full grown man such proof (i.e. other evidence) was not required." But the upper Court describe the situation as one where "no proof whatever was offered as to the age of the defend int." "The Judge was not a witness, and the state is not entitled to avail itself of his knowledge, except upon matters of which the Court takes judicial notice." The real ground of the Court's decision here (granting a new trial) appeared to be that when a jury or trial Judge decides a question of fact in this way a party loses the benefit of his exceptions, because there is no way of presenting the evidence to an Appellate Court in such a manner as to enable it to judge of "the reasonableness of the impression" made upon the mind of the lower tribunal. It is difficult to assent to the Court's conception of what took place at the trial, or their view that it is impossible to have the full benefit of exceptions when the trial Court avails itself of "real evidence." *Stephen's* illustration of proving that it is raining by telling the Judge to look out of the window," is another instance of the use of real evidence.—*Thayer Ev* 280 281

**Judicial notice, meaning of.** The expression "to take notice of anything in our ordinary popular phraseology, imports observing or remarking it. In the legal language of to day to "take notice" has a meaning co relative to that of giving notice namely, that of a man's accepting or charging himself with a notification or with the imputation of knowledge of a thing. But the import of the legal expression to take "judicial notice" as indicating the recognition without proof of something as existing or as being true seems traceable rather to an older English use. The word "notice" was formerly often used interchangeably with knowledge and with the English legal term *conscience*. When the reports began to be translated and published in English in the seventeenth century and later we find that the phrase becomes interchangeably, take notice, take knowledge and take conscience. *Thayer Pie Det Ev* 278. Where a cause is presented at the bar for trial, the Court and jury are presumed to be uninform ed concerning the facts involved in the case and it is incumbent upon the litigant parties to establish by evidence the facts relied upon by them respectively. There is however a large class of facts which need not be proved since they are judicially noticed by the Court and jury. That is to say there are a great many things of such common knowledge that the Courts ought to be presumed to know them—such as the existence and procedure of their own Court the public laws, the calendar, treaties entered into by their own government and many other matters of such general notoriety that every well informed man or woman within the limits of the Court's jurisdiction must or should know. If it so happened that the proof of any such facts formed part of a litigant's case he is excused from proving them, as it is said the Court will take judicial cognizance of their existence or in other words they will be taken as proved. And the importance of the subject of judicial notice can hardly be over estimated for there is no case in which there are not some matters which fall within the judicial cognizance of the tribunal before which it is tried, since the very law which is administered by the forum is a subject of judicial notice. *Burr Jones* § 107

**Place of the doctrine of Judicial Notice in the Law of Evidence.** The subject of judicial notice is not properly a part of the law of evidence, but, as it embraces the rules which relate to the facts in issue which are assumed to be true without evidence it is closely allied to it. *McCleys Lu* § 11. Therefore the subject of judicial notice is deserving of being treated in connection with, if not, as a part of the law of evidence. It has to do with evidence in a negative sense in that it teaches, when evidence need not be given. It is not always necessary to prove every fact which goes towards the making up of a case. The fact may be of such a nature that the Court either cannot or will not require any proof. *Ibid* "Whereabout in the law does the doctrine of judicial notice belong? Wherever the process of reasoning has a place, and that is every



**S 56.** where Not peculiarly in the law of evidence. It does, indeed, find in the region of evidence a frequent and conspicuous application, but the habit of regarding this topic as a mere title in the law of evidence obscures the true conception of both subjects. The habit is quite modern. The careful observer will notice that a very great proportion of the cases involving judicial notice raise no question at all in that part of the law, they relate to pleading, to the construction of the record or of other writings, and legal definition of words, the interpretation of conduct, the process of reasoning, and the regulation of trials. In short, the cases relate to the exercise of the function of judicature in all its scope and at every step. The nature of the process, as well as the name of it find their best illustration in some of the older cases, long before questions in the law of evidence engaged attention. We are the less surprised, therefore, to find that it was not until *Stair* printed his book on evidence, in 1824, that any special mention of this subject occurs in legal treatises on evidence, and that this writer has very little to say about it. The subject of judicial notice then belongs to the general topic of legal or judicial reasoning. It is indeed woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved, and the capacity to do this with competent judgment and efficiency is imputed to Judges and juries as part of their necessary mental output." *Thayer Ev* pp 278 280

**Principle** Judicial notice is based upon very obvious reasons of convenience and expediency and the wisdom of dispensing with proof of matters within the common knowledge of every one has never been questioned. This is the principle upon which the doctrine of judicial notice rests, convenience and expediency and the saving of the time, trouble and expense which would be lost in establishing in the ordinary way facts which do not admit of contradiction. There is however no rule of any practical importance which governs every phase of the subject and each new question when it arises must be decided by the Court with no other guidance outside of analogous precedents than the general law applicable to the whole subject which is in the words of *Greenleaf*. Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. *Greenl Ev* § 6, *Burr Jones* § 105 (1)

**Pre requisites of Judicial notice** These are the three material requisites before a Court can take judicial notice of a fact (1) The matter of which a Court will take judicial notice must be a matter of common and general knowledge not merely the knowledge of specialists or experts (2) it must be known, that is well established and authoritatively settled not doubtful or uncertain and (3) it must be known within the limits of the jurisdiction of the Court, since, for example, foreign laws are not judicially noticed. Further more the mere personal knowledge of the Judge is not the judicial knowledge of the Court, judicial cognizance is taken of those matters only that are commonly known, and therefore the individual and extrajudicial knowledge of the Court that some of the parties are dead, or that the defendant is a resident of another state will not dispense with proof of those facts, and cannot be resorted to for the purpose of supplementing the record. *Wheeler v Webster* 11 D Smith (N Y) 1 (4m). And, on the other hand it is not essential that matters of judicial cognizance be actually known to the Judge. If they are proper subjects of judicial knowledge the Judge may inform himself in any way which may seem best to his discretion and act accordingly. The mere incident that the Judge himself does not know the fact will not prevent the Judge *qua* Court notice of it. The Court may obtain the information by investigation. It is easy to understand a party asking the Court to take judicial notice of a fact, and that the Judge should reply that he himself did not know it, but that if he ought to know it by reason of its notoriety, then he would take judicial cognizance of it. It would be absurd to suppose any Judge to know all that was in an encyclopedia or dictionary, and the Court will only take official cognizance of such things mentioned in those books as are the subjects of general knowledge. *Burr Jones* § 10, (a)

**Meaning of the section** It is necessary to consider what is meant by "need not be proved" in section 56. A fact is said to be proved when considering the matters before it, the Court believes it to exist (section 3). But no one, whether he be a Judge or not, can believe a thing to exist unless there is some matter before him which leads him to that belief. Everything, therefore, which a man believes must be proved in some way. The meaning of the section will however, be apparent if we consider together with s 56 the last words of s 57. What these two provisions really come to is this —with regard to the facts enumerated in s 57, if their existence comes into question the parties who assert their existence or the contrary need not in the first instance produce any evidence in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up further the Judge can, if he thinks proper, call upon the parties to assist him. But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, and which he thinks will help him. Thus he might consult any book, or obtain information from a bystander. *Marlby Ev 49*

Facts of which Court  
must take judicial  
notice

**57** The Court shall take judicial notice of the following facts —

(1) all laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed

(3) Articles of War for Her Majesty's Army, "Navy or air force" \*

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act † or any other law for the time being relating thereto

**Explanation** —The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland,

(2) the Parliament of Great Britain,

(3) the Parliament of England,

(4) the Parliament of Scotland, and

(5) the Parliament of Ireland

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland

(6) all seals of which English Courts take judicial notice the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the

\* Substituted by Act X of 1927

† 21 & 25 Vict c 67

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Governor-General\* or any Local Government in Council the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette

(10) the territories under the dominion of the British Crown

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons

(12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it

(13) the rule of the road †[on land or at sea] In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so

Whether the list is complete A similar list is also given by Sir James Fitzjames Stephen in art 53 of his Digest on the Law of Evidence As regards that list he remarks The list of matters judicially noticed in this article is not intended to be quite complete It is compiled from 1 Ph F 453-67 and T E ss 4-20 where the subject is gone into more minutely A convenient list is also given in R N P ss 88-92, which is much to the same effect It may be doubted whether an absolutely complete list could be framed as it is practically impossible to enumerate everything which is so notorious in itself or so distinctly recorded by public authority that it would be superfluous to prove it Note XXVI Similarly the list given in this section is also far from complete for instance the Anglo-Indian Courts take judicial notice of

\* For lists of such Courts, see the notifications printed on pp 372 to 374 of the Western India Volume of Macpherson's Lists of British enactments in force in Indian States

† These words in section 57, para (13), were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 6

the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any Act to notice, such as, in Bengal, list of land holders who have not made land cess returns (Ben Act IX of 1850, s 19) in Madras by law framed by the Commissioner of Police (Mad Act III of 1862 s 5), in Bombay notifications in the Gazette (Bomb Act X of 1866 s 4), in Oudh the list of Taluqdars and grantees published by the Chief Commissioner (Act I of 1869, s 10) *Whitley Stokes Anglo Indian Codes* Vol II p 887. Although the penultimate clause of section 57 does not absolve a party from proof of any fact which does not fall within the provision of clauses 1 to 13 of the section, the facts of which the Court may take judicial notice are not limited to this clause. *Englishman v Lala Lajpat Rai*, 14 C W N 713=37 C 376. A general rule of construction of Acts of Parliament is *expressio unius est exclusio alterius* (The express mention of one thing implies the exclusion of another) *Fer Sir Barnes in Blackburn v Flaxell* (1881) 6 App Cas 628 at p 634. In *Drumwater v Athan*, (1879) 10 Sup Ct N S W 103, *Heigraue J* observed "If there be any one rule of law clearer than another as the construction of all statutes and all written instruments (as for example sales under powers in deeds or wills) it is this that when the Legislature or the parties to any instruments have expressly authorised one or more particular modes of sale or other dealing with property such expressions always exclude any other mode except as specifically authorised." This rule, or as it is otherwise worded, *expressum facit cessare tacitum* (Co Litt 210r 183b), enunciates one of the first principles applicable to the construction of written instruments. *Broom's Legal Maxims* 7th Ed p 191. So provisions sometimes found in statutes enacting imperfectly or for particular cases that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution and if the law be different from what the legislature supposed it to be the implication arising from the statute, it has been said cannot operate as a negation of its existence. Any legislation founded on such a mistake has not the effect of making that law which the legislature erroneously assumed it to be so. *Maxwell* 548. Similarly in *Krishna Kamini Dasi v Nidnadhah*, 73 Ind Cas 312 at p 316=A I R 1923 Cal 66 *Ab Justice Mookerjee* said. The only inference which a Court can draw from such superfluous provisions (which often find place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real estate of the law or that it acted under the influence of excessive caution. In this case we have seen that it is impossible to make a complete list of matters of which the Court should take judicial notice. But yet the Legislature following the English text book writers on Evidence have specified certain well known facts of which the Court shall take judicial notice. In the circumstances the proper meaning of the section is that it does not forbid the Court to take judicial notice of any fact which is a proper subject of taking such notice but the Court must take judicial notice of the facts mentioned in this section and as regards that the Court is not at liberty to exercise any discretion. It was pointed out with regard to the corresponding section of Act II of 1855 that the list mentioned therein was not exhaustive and the Court was at liberty to take judicial notice of any fact of which English Courts take judicial notice. *Queen v Arbadup Goswami* 1 B L R O Cr 27, 28. *Hondroffe v Et Stl Pl* 469. But why should it be confined to facts of which the English Courts ordinarily take judicial notice. The maxim that what is known need not be proved, *manifesta* (or *notoria*) *non indigent probatione* may be traced far back in the civil and canon law indeed it is coeval with the legal procedure itself. We find it as a maxim in many of our law books and is applied in every part of the Anglo-Saxon law (*vide Bracton's Note Book* 13 n 7 Co 39 a—39 b). It is qualified by another principle *al o recto*, old, and often overtopping the former in its importance—*non refert quid notum*

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set *judici, si notum non sit in forma judicii*. Per Colr C J in *Crawford v Blisse*, 2 Bal 100 (1613) The two maxims seem to intimate the whole doctrine of judicial notice. It has two aspects, one regarding the liberty which the judicial functionary has in taking things for granted, and the restraints that limit him. *Phayer Piel Treat Fr* 278. Professor Phayer thus pointed out the future possibility of the doctrine of judicial notice. "Courts may judicially notice much which they cannot be required to notice. That is well worth emphasising, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials. It is an instrument of great capacity, in the hands of a competent Judge, and it is not nearly as much used, in the region of practice and evidence as it should be. The failure to exercise it leads daily to smother trials with technicality and monstrously lengthens them out." *Phayer Piel Treat Fr* 300. Why has this principle not been adequately used by Judges? One reason is that they apparently forget that (as Professor Phayer says) they might notice much that they cannot be required to notice by general rule made in advance e.g. a rule requiring them to notice always the incumbency of a sheriff's office might go too far, but they may in a given case be justified in declaring a specific sheriff to be notorious, and so on, in a thousand cases of facts. Another reason is that they apparently forget that the principle allows them to notice in specific cases even though no general rule for the whole class of such cases could be laid down. This is because *notoriety in fact* is the principle, and facts are not susceptible of inflexible rule. The precedents of former Judges, in declining to notice or assenting to notice specific facts do not restrict the present Judge for noticing a new fact provided only that the new fact is notorious to the community. *II ignore* § 2583.

Clause I—Laws or rules having the force of law. 'Laws or rules having the force of law include statutory law as well as unwritten law whether of a personal or local nature. *Bhaguan v Bhaguan*, 21 A 912=3 C W N 454=1 Bom L R 311. "It is almost a platitude to say" says *Prof Burr Jones* "that judicial notice must be taken of laws and the only reason for the special notice given to this branch of the subject is that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them. The law of the jurisdiction is peculiarly a matter of judicial cognizance. It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of justice. *Burr Jones* § 112. The Mohammedan Ecclesiastical law is a law having the force of law in British India and as such will be taken judicial notice of by Courts. *Whitley Stokes* Vol II p 887, *Queen Empress v Ram-an* 7 A 161. The general rules of Hindu and Mohammedan law do not require proof. They can be ascertained by making necessary reference to authoritative text books judicial decisions as well as from the opinions of the Pandit or Maulvis. *Bhaguan v Bhaguan* supra. The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom that always must be proved. Per Garth C J in *Jagat Mohini v Duarlal* 8 C 582 (187). But where a custom is judicially recognised it need not be proved. *Jadid v Jankee*, 35 C 575. *Riya Ram v Zamindar of Patpur* 23 C W N 173 (P C)=41 M 778. Sworn translations of Sanskrit works if sent by the Registrar of the High Courts in India can be used by the Judicial Committee of the Privy Council. *Collector of Madras v Muthu Ramalinga*, 12 M I A 397 (P C). Books purporting to contain the laws and customs of any particular community may acquire, by being repeatedly proved in the Court, such a status as to make it unnecessary in any subsequent case for persons of that community to prove anew the authority or the binding force of the books in question and unless such a state of circumstances is brought about, books of this nature stand on the same footing as any other evidence tending to prove the existence of a body of customs. Assuming that a rule of *Ahyasantana* law is a rule having the force of law within the term of s 57 of the Evidence Act there is one essential feature in the operation of customs which necessarily differentiates them from the operation of Acts of Legislature. In the case of laws enacted by the Legislature Courts have to take judicial notice not only of the effect of the rules, but also of those facts which are necessary for showing that

they have the force of law and that they govern the parties or properties concerned such facts consisting of proceedings of the Parliament or of the Legislative Council. On the other hand in the case of customs the facts showing that they have the force of law and that they govern the parties or the properties concerned include the fact that the alleged rules of conduct have been uniformly followed by the parties concerned or the community to which the parties concerned belong. The fact is one which the Courts are not required to take judicial notice of, nor have they any powers to take judicial notice of it unless it has been so often proved in the Courts as to make further proof unnecessary as already stated. *The Secretary of State v. Santaraja* 25 M. L. J. 411=14 M. L. T. 348=21 Ind. Cas. 432.

**Clause II** The English Courts take judicial notice of all Public Acts passed by the Parliament and since 1850 Private Acts also. It was customary before 1850 to insert a clause in Private Acts of Parliament declaring that the same should be deemed public and be judicially noticed. The effect of this clause was to dispense with the necessity, not only of pleading the Act specially but of producing an examined copy or a copy printed by the printer of the Crown, a Public Act requiring neither to be specially pleaded nor proved. By 13 & 14 Vict. C. 12, it was enacted "That every Act made after the commencement of this Act shall be deemed and taken to be Public Act and shall be judicially taken notice of as such unless the contrary be expressly provided and declared by such Act." This provision is now repealed by the Interpretation Act, 1889 52 and 53 Vict. C. 63 which provides, by s. 8, that every Act passed after 1850 'shall be a Public Act and shall be judicially noticed, as such unless the contrary is expressly provided by the Act.' So now every person litigant under an Act or local Act should also be taken judicial notice of by the Indian Courts.

**Clause III** The Court will recognize without proof the Articles of War, whether in the naval the marine, or the land service as well as the auxiliary forces,—that is the militia, yeomanry and the volunteers,—and also the reserve force. *Taylor* § 5.

**Clause IV** The English Courts take judicial notice of the laws of England and Ireland including the laws and custom of Parliament, and the privileges and course of proceedings of each House of Parliament. *Stoddart v. Hunsford* 9 A. & E. 1=2 P. & D. 1. The Indian Courts should take judicial notice of debates of Parliament. *The Englishman v. Lajpat Rai*, 37 C. 760=14 C. W. N. 713. 'The proceedings of the Legislature' says *Prof. Wigmore* 'as shown in its journal are by some Courts noticed, but this is an artificial theory, on principle, the proceedings as contained in the journal are evidenced by a printed copy or by a certified copy.' *Wigmore* § 2577. The course of proceedings in Parliament appears to be something distinct from the proceedings themselves. *Englishman v. Lajpat Rai*, 37 C. 760=14 C. W. N. 713 (726).

**Clause V** All tribunals notice the accession and demise of the sovereign of their country. *Holman v. Burrou* 2 Ld. Ray. 794. *R v. Pingle* 2 M. & Rob. 276. They also take judicial notice of the Royal sign manual and all matters stated under it. *R v. Gully*, 1 Lev. 98. *Mighell v. Sullivan of Jhore*, (1894) 1 Q. B. 149.

**Clause VI** The English Courts take judicial notice of the Great Privy Seal (Lord Melville's Case, 29 How. St. Tr. 707) of royal proclamation of the signature of the clerk of the Parliament (*Badische v. Levinstein* 4 R. P. C. 470), seal of the Corporation of London (*Doe v. Mason* 1 L. P. 50), seal of the Apothecaries Company (14 & 15 Vict. C. 99, s. 81) the seal of the Board of Trade seals of district registrars (Judicature Act 1873 s. 11), seals and signatures of Commissioners for Oaths (*Ex parte Magae* 15 Q. B. D. 332), the seal of a notary public in any part of this Majesty's Dominions, but not of a foreign Notary public (*In re Davis* 1910 W. N. 212) seals of county Courts etc. 'The Courts will also judicially notice the following seals—the Great Seal of the United Kingdom and the Great Seals of England, Ireland and Scotland respectively; the Queen's Privy Seal and Privy signet whether in England Ireland or Scotland the Wafer Great Seal, the Wafer Privy Seal framed under the Crown Office Act, 1877, the seal and the privy seal of the Duchy of Lancaster

**S 57.** the seal and the privy seal of the Duchy of Cornwall, the seal of the old Superior Courts of Justice, and of the Supreme Court and its several divisions, the old Chancery Commonlaw seal, and the seal of the old Chancery Enrolment office, the seals of the High Court of Admiralty, whether for England or Ireland the Prerogative Crown of Canterbury and of the Court of the Vice-Warden of Stinneries the seals of Courts constituted by Act of Parliament, if seals are given to him by the Act, and, therefore the seals of the Court for Divorce and Matrimonial causes in England of the Court for Matrimonial causes and matters in Ireland, of the Central Office of the Royal Courts of Justice and of its several Departments of the Principal Registry and of the several district Registries of the old Court of Probate in England and of the present Court of Probate in Ireland, of the old and new Courts of Bankruptcy, of the Insolvent Debtors Court now abolished of the Court of Bankruptcy and Insolvency in Ireland which since the 6th of August 1877, has been called "The Court of Bankruptcy in Ireland of the several united Diocesan Courts and Registries in Ireland of the Landed Estates Court, Ireland of the Record of Title office of that Court and of the country Courts *Taylor* § 6 The common seal of the city of Glasgow is not one of the seals of which the English Courts take judicial notice *In re Henderson* 22 C 491 Where the seal is not distinctly legible Courts will not take judicial notice of it *Jalal Ali v Raj Chandra* 10 C L R 469 A registered power of attorney was admitted under this section without proof the Registering officer being a Court under s 3 *Kusto Nath v Brown* 14 C 176 But the above case was dissented from in *Salamatul v Koylashpath* 17 C 903 where it was held that mere registration of a document was not in itself sufficient proof of its execution A Court can take judicial notice of the attestation and signature of a sub Registrar *Ratha Mohun v Vipendia Nath* 105 Ind C 15 422

**Clause VII** Courts will judicially recognize the political constitution or frame of their own Government its essential political agents and public officers sharing in its regular administration, and its essential and regular political operations power and action. Thus notice is taken, by all tribunals of the accession of the Chief Executive of the nation or state under whose authority they act his powers and privileges (*Elderton's Case*, 2 Ld Raym 980), and in America the genuineness of his signature (*Jones v Gales Err*, 4 Marten 63), *Re v Miller*, 2 W Bl 797) the heads of departments and principal officer of state and the public seals (*Re v Jones* 2 Campb 131) In America the Court can take judicial notice of election or resignation of a senator, the appointment or a cabinet or foreign minister (*Walden v Canfield*, 2 Rob (L) 466) In England the appointments of marshalls and sheriffs (*Holman v Burr*, 2 Ld Raym 794), and the genuineness of their signatures can be taken judicial notice of (*Brook v Whitmore*, 8 Dow P C 615) but not of their deputies *Greenl Et* § 67 In Louisiana the signatures of all the judicial and executive officers to all official acts are to be judicially noticed *Wood v Fit* 10 Mart 196 But the English doctrine does not extend to this length *Taylor* § 14 So also in England it is highly probable the Courts would not recognise the signatures of the Lords of the Treasury to their official letters *Re v Jones* 2 Camp 131, But it appears that this section is more extensive than the English law in this respect All that is required under this section is that the fact of the appointment of such officer must be notified in the Gazette of India or in the Gazette of any Local Government *Inde Jhal Ali v Haj Chandra*, 10 C L R 469 471 176 Where under s 196 Cr Pro Code an order sanctioning a prosecution and signed by the chief Secretary to the Government is filed in Court the Court can take judicial notice of that officer's signature just as of his accession to office name title and functions The genuineness of his signature is not a matter which, unless the Court deems it needs any need be proved and the exhibition of a copy of the Fort St George Gazette containing a notification of that officer's appointment as Chief Secretary is not essential *Cholancheri Ayammal*, *In re* 11 M L J 157=72 Ind Cas 513=21 C L J 103 Judicial notice may also be taken of the signature of a Deputy Commissioner of Police *Wahidul v Emperor* 14 715=19 C W N 713 see also *Tumori v Khatas*, 1 B I L O C 1 The Court can take judicial notice of the fact that a certain person is Justice of

the Perce *Queen v Nabodurip*, 1 B L R Cr 15=15 W R Cr 75 When a document of 1820 purported to be a copy of a decision passed by one A, a *Kazi*, or *Sudder Ameen* of Chittagong but there was no evidence that the person held such appointment and the seal upon the copy produced was not legible, *held* that as there was no official Gazette in which the appointment was made, existing then and as there was no certificate that the copy was a true copy, the document was not admissible notwithstanding that it was more than thirty years old *Jale Ali v Rajchunder* 10 C L R 469-8 C 831 Note Under this clause the Court shall take judicial notice of the signature of an Honorary Magistrate when he is acting as such *Ranjiban v Ahmed*, 5 Ind Cas 537

**Clause VIII** All civilized nations being like members of the great family of sovereignties, may well be supposed to recognize each other's existence and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign therefore, recognizes, and of course the public tribunals and functionaries of every nation take notice of the existence and titles of all the other sovereign powers in the civilized world their respective flags and their seals of State. Public acts, decrees and judgments exemplified under this seal, are received as true and genuine, it being the highest evidence of the character. If however upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government the newly formed nation cannot without proof be recognized as such, by the judicial tribunals of other nations until it has been acknowledged by the sovereign power under which the tribunals are constituted (*City of Berne v Bank of England* 9 Ves 347) the first act of recognition belonging to the executive function. But though the Seal of the new power prior to such acknowledgment is not permitted to prove itself, yet it may be proved as a fact by other competent testimony, and the existence of such unacknowledged government or state may in like manner be proved the rule being that if a body of persons assemble together to protect themselves, and support their own independence, make laws and have Courts of justice his is evidence of their being a state *Greul Ev* § 4 citing *Yussari v Clement*, 2 C & P 223 But the rule in *U S v Palmer* 3 Wheat 610, 634, seems limited to the case of a defendant denying piratical intent by pleading the authority of a government having colourable existence and engaged in a revolution. On the general question the correct rule seems to be the contrary of the statement in *Greenleaf* i e, a Court will look solely to the action of the Executive where the existence of a foreign nation or government is involved *U S v Hutching* 2 Wheel Cr C 513, *Rox v Hinely* 4 Cranch 241, *Gelston v Hoyt*, 3 Wheat 216, 324 *Auer v Anna* 6 id 193, *Williams v Ins Co*, 13 Pet 415 421, *Kennel v Chambers*, 14 How 39, 51 *Highell v Sultan of Johore*, (1894) 1 Q B 149 In the last mentioned case *Kay L J* said at p 161 "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognisance—that is to say a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course the Court will take the best means of informing itself on the subject, if there is any kind of doubt and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of Johore and the means which the Judge took of informing himself as to his status was by inquiry at the colonial office. I ask the learned Judge said the next point is this. It is said that an independent sovereign may waive his right to immunity and may treat himself as subject to the jurisdiction. I agree but how is that to be done? This seems to me in the first place quite clear. Supposing by way of illustration that some well known potentate such as one of the great European Emperors were to be sued in a Court of this country, and took no kind of notice of the proceedings, it would be the duty of the Court to recognize his position and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I think the Court itself would be bound to



**S 54.** take notice of the fact that it had no jurisdiction? Whether a Court will take judicial notice of the existence of a foreign state is really a question whether, as a matter of substantive law and judicial functions, a foreign state will in domestic Courts be treated as existing, only so far as the Executive so treats it. Here it is conceded that the Executive's recognition is the determining element. *Hopmore* § 276b, see also *Foster v. Globe Venture Synd* (1900) 1 Ch 911 *Statham v. Statham and Gucluar of Bonoda* (1912) P 92. In *Taylor v. Barclay* 2 Sim 213, it was decided merely that the allegation in a declaration that a certain foreign state was recognized as such by the King could be found untrue by reference to the Foreign Office. Section 61(2) of the Civil Procedure Code provides that every Court shall take judicial notice of the fact that a foreign state has or has not been recognized by His Majesty or by the Governor General in Council. See also *Lachmi Narain v. Protap*, 2 A 1 (11) *Prccam v. Bombay Baroda*, 9 B 211.

While the Courts will take judicial notice of the existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the home government. The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state they will consider the former state of things as existing until the proper department of the government recognizes the change. *City of Berne v. Bank*, 9 Ves. 317 = 32 Eng. Reprint 636 *Taylor v. Barclay*, 2 Sim 213 = 57 Eng. Reprint 769. Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the Judges as well as all other officers, citizens and subjects of that government. *Burr Jones* Fi § 107. All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive although those acts are not formally put in evidence nor in accord with the pleadings. *United States v. Rapier*, 50 U. S. (9 How) 127. But it is the duty of the Judge to take notice whether a foreign power has been recognized by the government or not and to judicially notice the relations between this and other countries. *Burr Jones* § 107. In *Dodder v. Bank of England* 10 Ves. Jr. 352 Lord Chancellor said: "Some perplexity arises from what we know and what we can only know judicially. I can not affect to be ignorant of the fact that the revolution of Switzerland has not been recognized by the government of this country, but a Judge I can not take notice of that. So it is clear that until recognized by the domestic government the Court can not take judicial notice of the change of the ruling powers in foreign countries." *Burr Jones* § 107. So when the executive branch of the government which is charged with the foreign relations shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive with the judicial department. And in this view it is not material to enquire, nor is it the province of the Court to determine, whether the executive be right and wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. *Ibid*. It follows of course that the recognition of the existence of foreign governments is extended beyond the mere diplomatic acknowledgment of their being and that so soon as the executive action is made public, the Courts not only recognize foreign states and sovereigns acknowledged as such by the home government of such Courts, but also their symbols of authority, such as national flags and seals of states. *Burr Jones* § 107 (a). The public seals of such foreign states are of such public notoriety that no proof of them is required. They import absolute verity, and when attached to foreign judgments such judgments are sufficiently authenticated. *Church v. Hubbard*, 2 Crauch (U. S.) 187.

When an appeal is from a decree against the Ruler of a State not in his private capacity but as representing the State the death of such a Ruler and the failure to bring in his legal representative within the prescribed period will not excuse an appeal to abate, as the Court was bound to take judicial notice

under s 57 (8) of the existence of the State though its ruler might die *Maharaja of Kashmir v Mohan Lal*, 51 P R 1886

**Clause IX** The phrase "division of time" include also native eras *Willet v Stiles*, Vol II, p 888 Thus the Bengali Willam, Fasli, Sambat, Hindi, Hyri, and Jalus eras will be judicially noticed in those districts in which they are current *Field Fr 6th Ed* p 220 For this purpose reference may be made to the usual almanacs, when occasion requires *Field Fr 6th Ed* p 220

The almanac is the part of the common law and established by statute and the Court takes judicial notice of the succession of years, months, and days (*R v Broun*, Wood & M 163, *Harry v Broad*, 2 Salk 626), of the years of each sovereign's reign and the years in the calendar to which they correspond (*Holman v Burrow*, 2 Ld Raym 791, *R v Smith*, 2 Wood & R 109, *R v Pringle* 2 Wood & R 276 *Henry v Cole*, 2 Ld Raym 811) and of the days of the week upon which the days in the calendar fall *Hoyle v Cornwallis* (Lord) 1 Stra 387, *Hanson v Shackleton*, 4 Dowl 48, *Pearson v Shaw* 7 L R 1 *Halsbury* Vol XIII, p 492 So also it is not necessary to prove the course of time (*Burry v Blogg* 12 Q B 877, 882), or of heavenly bodies, nor the ordinary public feasts and festivals *Taylor* § 16 Where the period of limitation for a suit expires on a gazetted holiday and the plaintiff is prevented on the day the Court reopens it is not necessary for the plaintiff explicitly to state that on the day on which the period of limitation expired the Court was closed *Tel Chand v Ut Pallo* 16 N L R 193=56 Ind Cas 926 This clause empowers the Court to take judicial notice of any public holidays notified in the official gazette *Ibid*

**Geographical Divisions** The Courts take judicial notice of political subdivisions of the country as it was made by law and of the state or territory where they hold their sessions, and of the judicial districts within it Courts will take judicial notice of the local divisions of the state into counties, cities and towns and of the facts that certain cities are in such sub divisions *State v Pennington* 124 Mo 388, *Rogers v Cady*, 104 Cal 238 (1m) The Court takes judicial notice of the existence, extent, and geographical position of the British dominions and of the territory of the foreign States *Halsbury*, vol 13 p 493 In *Cooke v Wilson*, 1 C B N S 153, *Crouder J* at p 164 held that the Court was bound to take notice of the existence of the colony of Victoria and *Cresswell J* at p 163 that it must recognise that the colony was out of England In *Burrell v Dyer*, (1834) 9 App Cas 315 where the question was whether the words "St Lawrence" in a policy of marine insurance included the Gulf of St Lawrence, or were confined to the river of that name, *Lord Blandburn* said at p 312 "I think that the Court should take judicial notice of the geographical position and general names applied to such districts as thus in short, of all that we see on the Admiralty chart of this part of the sea" *Halsbury* vol 13 p 493 In *Foster v Globe Venture Syndicate Ltd*, (1900) 1 Ch 811, two of the issues raised were whether the tribes of Suq are independent or are the subjects of the Sultan of Morocco and whether a tract of land between the Atlas Mountains and the River Nun is the territory of those tribes or is the territory of the Sultan of Morocco As regards the second question *Jarrell J* said "I am asked to take judicial cognizance of the fact that, assuming the tribes to be independent, they do not possess jurisdiction over certain territories This is a matter which appears to me must necessarily be within the cognizance of Her Majesty because, for the protection of her subjects in the ordinary way, she should know whether redress should be applied for to the Sultan of Morocco or to the head of the various independent tribes of Suq Sound policy appears to me to require that I should act in union with the government on such a point as this Asuming that the Foreign Office have already satisfied themselves that the territory in question is within the dominion of Morocco, and have applied to the Sultan of Morocco for redress in any given matter it would surely be improper that I, sitting here as a Judge of the High Court should in the face of that act of Her Majesty, hold as a matter of fact that the territory in question was not within the dominion of the Sultan of Morocco I should be contravening the act of Her Majesty acting as a sovereign in a matter which is within the cognizance

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While the Courts will take judicial notice of this existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the home government. The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change. *City of Berne v Baul*, 9 Ves 347=32 Eng Reprint 636 *Taylor v Barclay* 2 Sim 213=57 Eng Reprint 769. Who is the sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the Judges, as well as all other officers, citizens and subjects of that government. *Burr Jones Et* § 107. All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in record with the pleadings. *United States v Raynes*, 50 U S (9 How) 127. But it is the duty of the Judge to take notice whether a foreign power has been recognized by the government or not, and to judicially notice the relations between this and other countries. *Burr Jones* § 107. In *Dodder v Baul of England* 10 Ves Jr 352 Lord Chancellor said "Some perplexity arises from what we know and what we can only know judicially. I can not affect to be ignorant of the fact that the revolution of Switzerland has not been recognized by the government of this country but as a Judge I can not take notice of that. So it is clear that until recognized by the domestic government the Court can not take judicial notice of the change of the ruling powers in foreign countries. *Burr Jones* § 107. So when the executive branch of the government which is charged with the foreign relations shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country it is conclusive with the judicial department. And in this view it is not material to enquire, nor is it the province of the Court to determine, whether the executive be right and wrong. It is enough to know that in the exercise of his constitutional function he has decided the question. *Ibid*. It follows, of course, that the recognition of the existence of foreign governments is extended beyond the mere diplomatic acknowledgement of their being and that so soon as the executive consent is made public the Courts not only recognize foreign states and sovereigns acknowledged such by the home government of such Courts but also their symbols of authority, such as national flags and seals of states. *Burr Jones* § 107 (a). The public acts of such foreign states are of such public notoriety that no proof of them is required. They import absolute verity and when attached to foreign judgments such judgments are sufficiently authenticated. *Church v Hubbard* (17 S.) 157.

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**Clause IX.** The phrase "division of time" includes also native and Hindu *Stokes*, Vol II, p 888. Thus the Bengali Willari, Fakh Sambat Hindi Hجري, and Jalus eras will be judicially noticed in those districts in which they are current. *Field Et 6th Ed* p 220. For this purpose reference may be made to the usual almanacs, when occasion requires. *Field Et 6th Ed* p 220. "The almanac is the part of the common law and established by statute and the Court takes judicial notice of the succession of years, months, and days (*R v Brown*, Mood & M 163 *Harvey v Broad*, 2 Salk 626), of the years of each sovereign's reign and the years in the calendar to which they correspond (*Holman v Burrou*, 2 Ld Raym 794, *R v Smith*, 2 Mood & R 109 *R v Pringle*, 2 Mood & R 276, *Henry v Cole* 2 Ld Raym 811), and of the days of the week upon which the days in the calendar fall. *Hoyle v Cornwallis* (Lord) 1 Str 387, *Hanson v Shadleton*, 4 Dowl 48, *Pearson v Shaw* 7 L R 1. *Halsbury* Vol XIII, p 492. So also it is not necessary to prove the course of time (*Burby v Blogg* 12 Q B 877, 882) or of heavenly bodies, nor the ordinary public feasts and festivals. *Taylor* § 16. Where the period of limitation for a suit expires on a gazetted holiday and the plaint is presented on the day the Court reopens it is not necessary for the plaint explicitly to state that on the day on which the period of limitation expired the Court was closed. *Tel Chand v M Pallo* 16 N L R 198=56 Ind Cas 926. This clause empowers the Court to take judicial notice of any public holidays notified in the official gazette. *Ibid*.

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of Her Majesty's Foreign Office. I think therefore, that the reasons given in *Taylor v Barclay*, 2 Sim 213 apply to the second question also." In *Taylor v Barclay* after referring to the case of *Thompson v Powell*, 2 Sim 194, the Court says at p 221. The judgment proceeded, not on the question whether the Court should give relief or not, or give a discovery or not or give discovery and withhold relief, but upon the question whether the King's Court should attend to the plea of a party who founded his case on the representation that certain person did form an independent government, recognised by this country, when the Government of this country did not recognise them. It appears to me that sound policy requires that the Courts of the King should act in unison with the government of the King. So in this respect the decision of the Secretary of State is final. Vide *Foreign Jurisdiction Act 1890* (53 & 54 Vict C 37). Judicial notice is taken of the countries into which England and Wales are divided and of those which are maritime countries but not of distance of one county from another nor of the particular places situated within each county (*Deybils Case*, 1821 1 B & Ald 213, per Bayley J and Best J), unless such situation is recognised by statute (*H v Holborn Union Guardian* 6 E & B 715) nor of the particular diocese within which any town is situated *R v Sympton*, 2 Id Kaym 1379 *Halsbury* Vol 13 p 491. But the Court is not bound to take judicial notice that a certain city is in a given county when two counties are referred to and the pleadings do not show clearly which is intended *Com v Wheeler*, 162 Mass 429 (Am). In American Courts have judicially noticed that certain named towns or cities are within the State without proof of the fact *King v Kent*, 29 Ala 549 (Am), *Harding v Strong* 42 Ill 148. But in an English case the Court refused to take judicial notice of the fact that *Leicester* was in the county of *Somerset*. *R v Burridge* 3 P Wms 439, 496 see also *Thorne v Jackson*, (1846) 3 C B 661, *Brumie v Thompson*, (1842) 2 Q B 784, *Humphreys v Budd* (1841) 9 Dowd 1000. The Courts take judicial notice of the leading geographical features of the country, for example the existence and general location of important ports, lakes, mountains large cities and the course navigability and character of great rivers. *Wood v Fowler* 40 Am Rep 330. In *H v Sharpe* (1803) 8 C & P 436, the Court took notice that the county of Stafford was in England. In *R v St Maurice*, 16 Q B 908 that the city of York was the county of York, city, having by statute the same limits, and in *R v Isle of Ely*, 15 Q B 89, that by statute the Isle of Ely was a division of a county. *Halsbury* Vol 13, p 494. In *Heaney v King* (1819) 2 B & Ald 301 the Court declined to take judicial notice that there was only one place named Dublin in the world, and therefore refused to constitute an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland. *Ibid*.

**Clause X** "All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government who claims to administer or of its recognition or denial of the sovereignty of a foreign power as appearing from the public Acts of the legislature and executive although those Acts are not formally but in evidence not in record with the pleadings *Jones v United States*, 137 U S 214 (Am). In England the Courts notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and the local divisions of the country as the states provinces, counties cities towns parishes and the like so far as the political government is concerned or affected but not the relative positions of such local divisions nor their precise boundaries further than they may be described in public statutes. *Taylor* § 17. The Foreign Jurisdiction Act, 1890 (53 & 54 Vict C 37) s 4 provides that any question as to the existence or extent of any jurisdiction of the crown in a foreign country arising in proceedings in a Court in the British dominions or held under British authority, to be submitted to the Secretary of State whose decisions for the purpose of the proceedings are final. If it be true said Lord Selborne in *Damodar v Deoram* 1 B 367 at p 401 (P C) "that the Indian Courts might take judicial notice of the territories of the Queen in India then if there has been a cession of territory, they must take notice of that and they must do so independently of the Gazette, which is no part of the decision but only evidence of it."

**Clause XI** The Courts take judicial notice of wars with foreign states if a state of war has been declared by the proper authorities *Dolder v Lord Huntingfield* 11 Ves 292 It is submitted that the law is as stated in the text, although Lord Eldon said during argument 'You would be obliged upon an indictment for a libel to prove that France is now at war with Austria not as to the war with this country, the Courts taking judicial notice of that with reference to our own country' See also *Halsbury* Vol 13, p 493, *Re v De Brenger* 3 M & S 67, *Thelbison v Corling* 4 Esp 266, *Taylor* Et § 18 But if no such declaration has been made the fact of a state of war is one to be proved 1 Hale P C 164 A war between foreign powers is not judicially noticed *Dodder v Lord Huntingfield*, *supra* When it is said however, that the Courts take judicial notice of wars with foreign states, it must be interpreted that the Courts take judicial notice of the act of their own executive with reference to war with a foreign state The executive recognition is the warrant for the Court *Gelston v Hoyt* 3 Wheat (U S) 246 It is the determination of a political question by another department of the government which is binding on the Judges *Jones v United States* 137 U S 211 (Am), *Burr Jones* § 107 (1) As regards the commencement of hostilities vide *The Fenoula Duncan v Foster* 8 Moo P C (N S) 411=L R 4 P C 171=26 L R 48 Under ss 6 and 8 of Act II of 1855 the Gazette of India or Calcutta Gazette containing official letters on the subject of hostilities between the British Crown and the Mahomedan fanatics on the frontier was admitted in evidence to show the commencement continuation and determination of hostilities *Queen v Amr-uddin*, 7 B L R 63 But the Court is not competent to take judicial notice as regards the date of the commencement of the hostility *Commonwealth Ship ping Representative v Peninsular and Oriental Branch Service* (1923) A C 191=92 L J K B 142=128 L T 546 The statement by H M's Commissioner and Consul General for Uganda is sufficient for the Court's taking judicial notice, under s 57, Evidence Act, of the existence of hostilities between Kabega the King Unyoro and Her Majesty the Queen and the Protected states of Uganda *Imperatrix v Juma*, 22 B 54

**Clause XII** According to English law under the general principle of recognising domestic officials notice is taken of the incumbency of other officers of Courts, although here and there some uncertainty exists as to the extent to which this will include the inferior and more numerous officers particularly Justices of the Peace and attorneys *Wigmore* § 278 see also *Eddleton's Case* 2 Ld Raym 978, *Slipp v Hoole* 2 Stra 1080 *Ian Sandan v Turner*, 6 Q B 773 (786) The reason of the uncertainty is thus stated by Prof Wigmore 'It is the law that creates certain office and attributes certain duties and authorities to the incumbents but whether the incumbent at a given time and place is a specific person depends on external political action, sometimes recorded and notorious, but sometimes neither Courts have solved this application of the principle by considerations of political good sense and convenience, which are however, difficult to reduce to a definite rule All that can be said is that the incumbencies of the more important and notorious offices are judicially noticed and that many of the lesser and local ones are not *Wigmore* § 2576 But in India so far as the trying Court is concerned the rule is forced and all Courts must take judicial notice of the names of the members and officers of the Court and of their deputies and subordinate officers and assistants and also of all officers acting in execution of its process, and of all advocates attorneys, proctors, Vakils, pleaders and other persons authorized by law to appear or act before it So also under section 4 of Act II of 1855, the Court was entitled to refer to entry made by its own Nazir *Nilunt Charlebutty v Shoo Narain*, 8 W R 276

**Clause XIII** The Judges will recognise the custom or the law of road, viz., that horses and carriages should respectively keep on the near or left side *Taylor* § 5 In *Wordsworth v Wilman* 5 Esp 273, the rule, with regard to keeping the road, is said to be that if a carriage, coming in any direction, leave sufficient room for any other carriage horse or passenger on its side of the way it is enough, and in *Wayde v Carr*, 2 D & Ry 256, the Court said that the

**S 57** 'Law of the road' was not to be considered as inflexible since, in crowded streets situations and circumstances might frequently arise, where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth and the plaintiff's servant, who was on horse back without any reason crossed over to the side on which the defendant was driving and on endeavouring to pass, his horse was killed. Lord Kenyon held, that it was putting him all voluntarily into danger, and that the injury was of his own seeking but the jury found a verdict for the plaintiff which the K B refused to disturb. *Corden v Fentham* 2 Esp 685. And although a person is not found to confine himself to the proper side of the road, yet if he do not he is bound to use greater degree of caution than if he kept to the proper side. *Plunkett v Wilson*, 5 C & P 375, *Roscoe v P E* 779. As regards rules of road *Leame v Bray* 3 Ea 593. *Turley v Thomas*, 8 C & P 104.

The Court will take judicial notice of the following rules with respect to navigation,—first that ships and steamboats on meeting 'end on or nearly end on in such a manner as to involve risk of collision' should port their helms, so as to pass on the port, or left, side of each other, next, that steam boats should keep out of the way of sailing ships, and next that every vessel overtaking another should keep out of its way. *Taylor* § 5.

In all cases and also on all matters of public history, etc. When in doubt as to any matter to be judicially noticed the Judge may refer for information to appropriate sources. *Phay v Ath Ed* p 17, *Taylor* F, 10th Ed § 21. The Judge may resort to such means of reference as may be at hand and as he may deem worthy of confidence. *Greenl Et* § 295. *Tay* Ed § 21. The provision that 'the Court may resort for its aid to appropriate books' is an advance on the English Law, under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet the books themselves cannot be cited. *Field v Ed* 971 but see *Willoughby v Willoughby* 1 L R 772. But in America such reference is made whenever required. It goes without saying that every Judge upon the bench would discern such an encyclopedic knowledge, added to a phenomenal memory as would serve him on every application that the Court should take judicial cognizance of a given fact. However wide his reading the suggestion of some matter for his Court's knowledge and notice must frequently make a demand upon him, to which without some means of reference—or refreshing his knowledge he might not be able to respond. It does not necessarily follow that the Judge should refuse to take judicial notice of a fact when his memory is at fault in respect to the same. If there is a reasonable doubt as to whether judicial notice should be taken, it should *ex abundante cautela* be resolved in the negative. *Gunning v People* 189 Ill 165 (Am). It frequently happens that it is necessary or proper for the Court to refer to sources of information concerning matters which have not been referred to in the evidence, in which case it is his duty to resort to any source of information which in its nature is calculated to be trustworthy and helpful always seeking first for that which is most appropriate. Sometimes too concerning matters of law and in either case he may use all proper means for satisfying himself in any way that appears to him satisfactory. *Burr Jones* § 132. In a New York case the opinion shows that the Court had referred to various documents and to Pollard's and Crilly's histories of the Civil War. *Summerton v Columbia Ins Co*, 37 N Y 171. In the celebrated *Dred Scott* case Chief Justice Taney evidently had resorted not only to judicial decisions statutes ordinances and works of history but to whatever sources were available to throw light upon the social and political condition of the African race in the early history of the country. *Dred Scott v Sandford* 19 How (U S) 393. *Burr Jones* § 132. Dr Wharton illustrates the principle thus: 'The Judge may consult works on collateral sciences or art touching the topic on trial. He may draw for instance on mythology, in order to determine the meaning of similes in an ambiguous writing. He may refer to almanacs (*Step v Fair* 1 Cro Eliz 227) he may appeal to his own memory for the meaning of a word in the vernacular (*Her v Woodward* 1 Moo C C 323. *Cement v Gollin*, 2 Camp 25. *Musket v Cole* L R 7 Lx 70) he may,

as to the meaning of terms, refer to dictionaries of science of all classes (*Erans v Gelling* 6 C & P 536, *Pages Case*, 1 Leon 242, *All Gen v Drummond* 1 C & L 210, *Shore v All Gen*, 9 Cl & F 355, *Louwer v Allens*, Skin 14, *In re St Catherine's Hospital* 1 Vent 149, *Slamer v Douthutch* 1 Silk 281, *Clments v Golding* 2 Cramp 25) he may determine the meaning of the abbreviation of Christian names and offices, and of other common terms, as to a point of political history (e.g. the recognition of a foreign government), he may consult the executive department of the State (*Taylor v Barclay* 2 Sim 221, *Mughell v Sultan of Johore* (1894) 1 Q B 149 *Foster v Globe*, 1900 1 Ch 811) he may enquire to be made as to the practice of other Courts (*Doe v Lilloyd* 1 Man & E 685), and *Lord Hardwicke* went so far as to inquire of an eminent conveyancer as to a rule of conveyancing practice (*Willoughby v Willoughby* 1 T R 772) *Wharton Et* § 282 Under s 57 clauses (8) and (13) a Court which is called upon to decide as to what particular date in the English calendar a certain date in the Fush year corresponds with, may resort for its aid to appropriate books or documents of reference and in such a case an almanac containing the British and Fush calendars may be referred to. Oudh Judicial calendar was not compiled expressly for the purpose of showing corresponding dates in the different era and was not an appropriate document of reference in such a case *Raghunath v Sheo Charan*, 4 O C 182. In all those and the like cases, where the memory of the Judge is at fault, he resorts to such documents or other means of reference as may be at hand and may deem worthy of confidence *Taylor* § 21, *Green Et* § 6. In some instances, the Judge has refused to take cognizance of a fact unless the party calling upon him to do so could produce at the trial some document by which his memory might be refreshed as was the case in *Van Omeron v Douick* 2 Cramp 44 where *Lord Ellenborough* declined to take judicial notice of the King's proclamation the counsel not being prepared with a copy of the Gazette in which it was published. So also in *R v Withers*, tried before Mr Justice Buller in which case it became a material question to consider how far the prisoner owed obedience to his sergeant and this depended on the articles of war which were not produced at the trial, the Judges thought that they ought to have been produced. Cited by Buller J in *R v Holt*, 5 T R 446. But in many other cases the English Courts have themselves made the necessary inquiries and that too without strictly confining their researches to the time of the trial *Taylor* § 21 *Taylor v Barclay* 2 Sim 221 *The Charkieh*, 12 L J Adm 17 cited in *Lachmi Narain v Raja Parbat* 2 A 17 *Chandler v Grices* 2 H Bl 606 *Do v Lloyd* 1 M & Gr 685, *Worsley v Fihler* 2 Roll R 119, *In Davis Trusts*, L R 8 Eq 89 93. Similar practice has been followed by the Courts of this country in many cases. *Vide Tricam Panachand v Bombay Baroda & Rail* 9 B 244 (247) *Hossain Ali v Abdul Ali*, 21 C 177 *Lachmi Narain v Raja Parbat* 2 A 7. *In re Bhagwan Das Hanjuran* 8 B 511 516. But "judicial notice being a dispensation of one party" says *Prof Wigmore* "from producing evidence it would seem that the party must in point of form make a request for it. Upon this request the Court is bound it is sometimes said to declare the fact noticed or at least to make the investigation which it deems necessary. No doubt in most instances the rule of law has the plain consequence of compelling the Judge to declare the dispensation, not to do so would be to err precisely as under any other rule of law. But it must not be supposed that this is universally true the decisions demonstrate that there are numerous topics near the line of doubt in their feature of notoriety, of which the Court may but not must take judicial notice. No definite distinction is recognized but it is plain that many of the rulings merely authorised the Court to notice a fact without requiring it. *Wigmore* § 2568. As regards the meaning of the words "matter of public history" *vide Farand Ali v Zafar Ali* 46 Ind Cis 114. In a suit for declaration that a church and its properties were trusts and the plaintiffs were its trustees and for possession of the same from defendants, certain documents consisting of printed letters of the Priests of the Jesuit Mission in the Madura District dated about 75 years ago were admitted in evidence under s 57 as a book of reference to prove the history of Christianity and especially of the Roman Catholic Mission. Held that, though



S 57. the books were admissible to prove facts of public history, they could not be relied upon to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious fact of public history. *Imbalam v I M Buthe*, (1912) M W N 152=13 Ind Cas 599. A document may be referred to in connection with ancient facts of a public nature provided it is an approved public and general history. It is provided by this section that on all matter of public history literature science or art the Court may resort for its own aid to appropriate books of reference. *Tua Channamal v Ulu Ammal* 1 M L J 326. 'It is to be observed that the section does not say how any fact historical or other wise is to be proved by the parties but gives the Court liberty to resort for it, and to appropriate books or documents of reference on matters of public history'. *Per Harrington J in Englishman v Lala Faypat Ray*, 14 C W N 713. A Court is justified in referring to books published long before the suit in which the usage of the institution and its history are described, both being matters relevant to the suit. *Augustine v Medhyote*, 1 M 241.

**Matters of science and art.** The introduction of the words 'and also in all matters of science and art' into s 57 says *Justice Maity* is very strange. It can not be meant that the Court is to take judicial notice of all such matter. If so the special provisions as to evidence on points of science or art in ss 49 and the further and special provisions which we shall come to presently in ss 60 as to the use of a treatise would be unmeaning. *Maity*, Pt 49. But none of the above three sections would be unmeaning if we bear in mind the principle on which the matters of science and art are admitted under the respective sections. When the Court has to form an opinion upon a point of science or art the opinion upon that point of persons specially skilled in such science or art are relevant facts under s 45. In *Leigson v Hubbl* 97 N Y 597 513 (Am) the rule in regard to the admission of expert testimony is thus stated by *Justice J*. It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury but to warrant its introduction the subject of inquiry must be one relating to some trade profession science or art in which persons inducted therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions, and do justice between the parties. When the facts can be placed before a jury and they are of such a nature that jurors generally are just as competent to form opinion in reference to them, and draw inferences from them as witnesses then there is no occasion to resort to expert or opinion evidence. So under this section no proof is required of those facts in science and art which are so generally known as to be matters of common knowledge. Facts of this nature which are universally known and which may be found in encyclopedias, dictionaries and other publications, will be judicially noticed but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. *Burr Jones* § 128. So *Justice Maity* is not correct in his interpretation of this section when he says "What perhaps it meant is that though the parties must obey the law as laid down in ss 45 and 60 the Judge may resort for his own aid to appropriate books without restriction. This interpretation violates the very principle of the rule contained in this section. In *Granade Ventata Ratham v The Corpn of Calcutta* 22 C W N 745 some books were supplied to the Court by the prosecution in support of the expert testimony offered by it. As regards the admissibility of the books *Chetty J* said. In connection with the books I see that one or more of them were marked as exhibits in the Magistrate's Court. In my opinion this procedure was incorrect if it were intended thereby to make these books and all their contents evidence in the case. The use of such books by the Court is regulated by sections 57 and 60 of the Evidence Act. The former section first enumerated thirteen facts of which the Court may take judicial notice. The penultimate paragraph of the section says. In all the cases as also on all matters of public history, literature,

science, or art the Court may resort for its aid to appropriate books or documents of reference.' This section does not justify the Court in treating the opinions or deductions of the authors of such books as evidence in the case whether to supplement or rebut that already given. Section 60, however, allows the opinion of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held to be proved by the production of such treatises in circumstances which no doubt apply to the present case. The conclusion seems to be that *books of reference* may be used by the Court on matters (*inter alia*) of science and aid in coming to a right understanding of and conclusion upon the evidence given while treatises may be referred to in order to ascertain the opinions of experts who can not be called, and the grounds on which such opinions are held." Under the provisions of the penultimate paragraph of s 57 and of the first proviso of s 60 of the Evidence Act, Taylor's Medical Jurisprudence may be referred to. *Hallam v Empress* 12 C L R 46.

**Private Knowledge of the Judge** In deciding a case a Judge cannot base his judgment on his own personal knowledge. *Durga Prasad v Ram Doyal* 38 C 153. There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. The latter does not necessarily include the former, as a Judge indeed he may have to ignore what he knows as a man, and contra wise. *Wigmore* § 2569. That rule was laid down so far back as the year 1406. In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case. "Suppose we put the case that one man kills another in your presence you observing it, and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death you ought to repite the judgment against him for you are knowing to the contrary, and should make further report to the King to give him pardon. No more should you give judgment in this case, before causing those to appear by whose hands the King was paid." *Gascoigne C J* said.

Once the King himself asked of me the very case that you have put and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so." Year Book 7 H IV 41, pl 5 cited in *Wigmore Cas Et* 711, *Wigmore* § 2569. *Patridge v Strange* Plowd 83. *Marriot v Pascal* 1 Leon 159 161. But Mr Haules Solicitor General arguing said. "It is said though a Judge do think in his conscience a per on guilty, yet he ought not to make use of that private knowledge and a case was quoted out of Henry IV. But I think that the Judge might have behaved himself something better than he did and sure I am now he would be blamed. I do not say that a Judge upon his private knowledge ought to judge he ought not. But if a Judge knows anything whereby the prisoner might be convicted or acquitted (not generally known) then I do say he ought to be called from the place where he sit and go to the bar and give evidence of his knowledge and so the Judge in Henry IV's time ought to have done and not to have suffered the prisoner to have been convicted and then get a pardon for him for a pardon will not always do the business." See *John Fenwick's Trial* 13 How St Tr 663 667. *Wigmore Cas Et* 711. So it is clear that a Judge cannot act from his own knowledge and call that knowledge proof. *Roche v Antwerp* 4 Johns N Y 239. A Judge can take judicial notice of a fact which is known to him in the peculiar sense that it is known and notorious to all men. So he can make use of that knowledge which he has obtained by notoriety but not that knowledge which he has obtained by personal observation. *Wigmore* § 2569. See also *Byrne v London Ferry Co*, (1907) 1 R 430. *Hunnery v Keating* (1908) 11 R 63. As regards the fact of which a Judge has got knowledge by personal observation he is merely an ordinary witness. So the Judge is to act upon the evidence properly laid before him in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all the analogy of judicial notice obtains to some extent and the tribunal is allowed to resort to this information in making up its mind. *Wigmore* § 2570. *Mulputa v Sri Raja Paradaraya* 36 M 163-23 M L J 624. In the last named case *Sundara Appai J* said. "A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he

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may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case." In the same case *Sadasua Appa J* said "I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevant concrete private incident and that fact cannot be subjected to ocular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object) and if the truth of such incidents is contested between the parties he should mention his private knowledge of such incidents to the parties, and he should refuse to be the Judge in that case unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge." See also *Hurpushal v Sheo Dyal* 3 I A 259-26 W R 55 P C Similarly where a case is to be tried by jurors "the personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be considered in deciding the case. Such a juror should communicate his information to the Court and if he is not excused from service and it is deemed proper to use his cognizance of such a fact in the trial he must be sworn as a witness and examined, subject to cross examination by the adverse party, the same as any other witness. But any juror must consider the testimony in the light of that knowledge and experience which is common to all men. For instance, it is a matter of common knowledge that a bullet piercing the brain of a human being will in all likelihood prove fatal. It is common knowledge also that a forceful tree cut newly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness. Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience. It is utterly impracticable in the administration of Courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life. Trial of fact cannot in the nature of things be divested of general knowledge of practical affairs. The Court cannot do otherwise than to direct them to use such experiences as are common to all men in the decision of questions of fact. It is part of the jury system which cannot be dispensed with." *Per Burnett CJ* in *Rostal v Portland R L & P Co*, 101 Or 569 (Am) *Wigmore* § 2570.

**Judicial notice of other notorious facts.** A Court can take judicial notice of a Government Notification under this section. *Collector of Cawnpore v Jugal Kishore* 107 Ind Cas 578 = A I R 1928 A 355. But it would be unfair to the Railway Company to take judicial notice of thefts on the Railway. *Secretary of State v Ghanaya Lal* 111 Ind Cas 523 = A I R 1928 I 483. A Court is entitled to take judicial notice of the fact that there is about 15 minutes delay of 24 hours between the arrival of a registered letter at its destination and its distribution from the Post Office or in other words that a registered letter takes 24 hours longer than an ordinary letter. *Firm of Chattri v Secretary of State* 99 Ind Cas 622 = A I R 1927 All 215. Customs regulations brought to the notice of Court may be taken judicial notice of. *W. Sano v Puran Singh* A I R 1925 Nag 74. Books dealing with customs of community written by a public officer deputed to enquire into local customs can be taken judicial notice of by Courts. *In the matter of Shyam Lal* L R 6 All 186 = A I R 1925 All 618. See also *Baj Nath v Bhindin* 91 Ind Cas 533 = 2 O W N 872. There is a customary right of privacy prevailing in Oudh and Courts are bound to take judicial notice of it without proof. *Raghu v Rihim* 93 Ind Cas 332 = A I R 1926 Oudh 352. Courts must take judicial notice of provisions of a 24 Paper Currency Act without the defendant having raised the objection in his defence at all. *Mir v Hidayat v Aga Kyang* U B L (1914) 14 Qr 13 = 24 Ind Cas 721. A registered power of attorney was admitted under s 7 of the Evidence Act without proof as the registering officer is a Court under s 3 of the Act. *Aristo Nath v F F Breen* 11 C 176. In England judicial notice is taken of the fact that the streets of London are crowded

*Dems v White*, (1916) 2 K B 1, 6 Similarly judicial notice can be taken of the universities of Oxford and Cambridge as seats of learning (*Re Oxford poem rate* 8 E & B 184) A Court can also take judicial notice of the fact that cats are domestic animals *Nye v Niblett* (1918) 1 K B 23

**Effect of Judicial Notice—Not conclusive** That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the opponent is not debarred from disputing the matter by evidence, if he believes it to be disputable. *Wignore* § 2567 Since judicial notice is an expedient for hastening the trial and eliminating superfluousness, it would be proper to prevent the party in whose favour the fact is noticed from offering evidence of it. *State v Chingien* 105 Ia 169 (Am) It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary (*Com v Manjyns*, 149 Mas- 68), but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial, whenever a Court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called. *Wignore* § 2567

**Books referred to by Courts** The following are some of the books which the Courts often resorted to in order to ascertain the matters of history, literature, science, art etc —

- (1) Directions for Revenue Officers in the North Western Provinces promulgated by the Lieutenant Governor and prepared probably by Mr Thomson *Thaloojam Das v Bisheshwar Mulherjee* 3 W R Act X Rul 29 (102) (F B)
- (2) Malthus' definition of rent *Ibid* at pp 91, 92
- (3) Mill's Political Economy Vol II *Ibid* pp 40, 41, 56
- (4) Harrington's Analysis *Ibid* p 82
- (5) Hallam's Middle Ages, Vol III, *Ibid* 97 *Lachmi v Rajah* 2 A 1 (17)
- (6) Mount Stuart Elphinstone's History of India *Ibid* pp 31, 35
- Forester v Secretary of State*, 18 W R 359 (364) *Sheikh Sultan v Sheikh Ajmuddin* 17 B 448
- (7) Buchanan's Journey in Mysore, *Ibid* pp 56, 57
- (8) Todd's Rājasthān, *Ibid* pp 56, 57, *Maharana v Ladulal* 20 B 61 (72)
- (9) Malcolm's Central India *Ibid* pp 56, 57
- (10) The Civil Law *Ibid* 104
- (11) Fifth Report 1812 *Ibid* 82
- (12) Despatch of Court of Directors 19th September 1792 *Ibid* 29 (82)
- (13) Lord Cornwallis's Minute *Ibid* 33, 82
- (14) Sir John Shore's Minute of June 1789 *Ibid* p 33
- (15) Wilson's Glossary *Ibid* p 103 *Aradas Keshari v Framji Nana bhai* 7 B H C 45 (56) *Sheikh Sultan v Sheikh Ajmuddin* 17 B 443 (444)
- Kungaswami v Guana* 22 M 267, *Chen Kunmeth v Jegunath*, 19 M 2
- (16) Adam Smith's Wealth of Nations *Horasji v Peddar* 12 B H C R 199 (207)
- (17) Mr F C Clark's Early Roman Law *Jotindra Mohun v Ganendra Mohun* 18 W R 359
- (18) Civil Code of Italy *Ibid*
- (19) McCulloch's Commercial Dictionary *Horasji v Peddar*, 12 B H C R 199 (207)
- (20) Domat 2413 *Jatindra v Ganendra supra*
- (21) Mr Prinsep's Table *Forester v Secretary of State*, 18 W R 359 (364)
- (22) Scaton's letter *Ibid*
- (23) Histories, firmans, treaties, and even replies from foreign office *The Charich* 1 R 4 A & L 59 *Phup Ferozji* p 17, cited in *Lachmi Anam v Rajah Partap* 2 A 1 (17)
- (24) The collection of treaties originally published by Mr Atcheron, the Secretary to the Government of India *Lachmi Anam v Rajah Partap*, 2 A 1 (17)
- (25) Atcheron's Treatise *Lachmi Anam v Raja Partap* 2 A 1 (17)

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- (26) New Oxford Dictionary *Dadabhai v Jamsetji*, 24 B 293
- (27) The work of Grotius Vattel Puffendorf, Chalmers Wheaton Hillmore and Twiss *Damodar v Dioram* 1 B 367 (P G), *Lachmmaram v P Lirtap* 2 A 1(23)
- (28) Lord Palmerston's speech in the debate on the relinquishment by the British crown of the protectorate of the Ionian Islands *Damodar v Gosh* 1 B 80
- (29) Lord Thurlow's speech in the debate of the House of Lords on the coron made in 1783 at the peace of Versailles *Ibid*
- (30) British and Foreign state papers Vol II *Ibid* p 387
- (31) Arbuthnot's Selection from the Minutes of Sir J Munro *Tenkatur v Sankar v Dinlanudi* 20 M 02
- (32) Dewan Bihadur Srivaya v Ayyangars 'Progress in the Malay Peninsula' *Ibid*
- (33) Richardon v Manuke *Witten Shue v Maung Kan* (sup) 1 B 1 (1897-1900) Vol II 112
- (34) Letter's Manual of Buddhist Law *Ibid*
- (35) Kin Wun Mingyis Digest *Ibid*
- (36) *Wijaya Dhammathat* Dr Jorckhammer v *Ibid*
- (37) Crook on Caste and Tribes *Mariam Bibee v Sheikh Mohomed* 1 B 06
- (38) Ritchie's Tribes and Castes in Bengal *Santola v Indragan* 1 C W N 119
- (39) Hunter's Imperial Gazetteer of India *In the matter of the Government Steamship Drain Bengale* 27 C 8(4)
- (40) Encyclopedia Britannica *Anum Kumaru v Muthupayal* 27 M 1-11 M 1 1-18
- (41) District Gazetteer of Bengal *Lalu Deme v Joyoy* 13 C 277-1 C W N 304
- (42) Hunter's Statistical Account of Bengal *Santola v Indragan* 1 C W N 6(1), *Secretary of State v Wajal Ali*, 31 C L J 111
- (43) Marshall's Responsibility in mental disease *Queen Empress v A. Vitha* 28 C 108
- (44) Baskinell and Turk's Psychological Medicine *Ibid*
- (45) Sumner's Primitive Civilization *Tina Sami v Virendra* 1 B 19 M 1

- (62) *Shakespeare's Dictionary* *Gajraj Puri v Acharam Puri*, 16 A 191 (P C)
- (63) *Ferguson's History of Architecture* *Secretary of State v Shummu gajaya*, 16 M 698 P C = 20 I A 80
- (64) *Houghton's History of Christianity in India* *Augustine v Medlicot*, 15 M 241.
- (65) *Stephen's History of Criminal Law of England* *Queen Empress v Kader Dasye*, 23 C 604 (608)
- (66) *Geographical Statistical and Historical Account of Orissa* by Stirling *Shyamchand v Rama Kanta*, 32 C 6, 13
- (67) *India Orientalis Christiana* *Augustine v Medlicot supra*
- (68) *Wills History of Mysore* *Falu v Tirumala*, 1 M 213
- (69) *Ibbetson's Census Report* *Ghulam v Secretary of State* 6 I A 269
- (70) *Wynyards Settlement Report* *Byari v Bhupendra* 17 A 456 (P C)

**58** No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions

**Principle** A Court in general has to try the question on which the parties are at issue not on the one on which they are agreed *Burjoji Cursetji v Mincherji*, 5 B 143 (152), *Mc Gowan v Smith* 26 L J Ch 8. An express waiver, made in Court or preparatory to trial by the party or his attorney conceding for the purpose of the trial the truth of some alleged fact, has the effect of a confession pleading in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it, and the other is not allowed to dispute it. This is what is commonly termed a solemn—i.e. ceremonial or formal—or judicial admission, or stipulation. It is in truth a substitute for evidence in that it does away with need for evidence. *Wignore* § 2588. Agreements of this character, intelligently and deliberately made—whether made by the parties in person or by their attorneys or solicitors of record—are encouraged and favoured. Their purpose generally is to save costs and to expedite trial, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or as in the present case the admission of uncontroverted facts of the existence of which the parties are fully cognizant. *Per Buckell J in Prestwood v Watson*, 111 Ala 604 (1m) *Wignore* § 2588

**Scope of the section** This section includes judicial admissions including admissions made in the pleadings. The effect which a judicial admission produces is of course an effect showed in common with certain other legal acts. In the first place a pleading may, by confessing a fact place it beyond the range either of needing evidence or of permitting dispute, and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun and may thus contract or diminish the effect of a pleading, that it is not a part of the required statements defining the parties' issues and that it is therefore not subject to the rules of time form, amendment, and the like which govern the allegations of pleading. *Wignore* § 2589. Under this section no fact need be proved which the parties at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Where a plaintiff admitted in a written statement in a former suit and in his oral examination in the suit question an agreement set up by the defendant by which the plaintiff undertook for consideration not to redeem a mortgaged land till after the de

**S 58.** the defendant but desired to be bound by it, *Held* that the defendant was not, in the face of the plaintiffs' admission bound to adduce evidence of the agreement *Maung Kot v. Maung So*, U B R (1897 1901) Vol II 379 This section applies to civil as well as to criminal cases *Bhulan v. Emperor*, 91 Ind C 1 253 *Bansilal v. Emperor*, 30 Bom L R 616 = 52 Bom L R 686 = A I R 1914 Bom 641 This section has in general no application to divorce cases *Oer v. Oer*, 27 Bom L R 251 = A I R 1925 Bom 231 = 49 B 368 This section normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But where there is no agreement to admit facts and no pleading has been put in by a party it can not be said any such admission has been made in his pleading *Ibid*. A mere reference in the plaint to the contract in suit having made "office dhara" or according to the practices of the office is no indication whatsoever to the defendants that the plaintiffs rely on one of the supposed terms of this "office dhara" in support of their claim or that one of the supposed terms of this "office dhara" is the implied stipulation of certain nature so as to amount to admission by the defendants of the alleged stipulation *Dassonai v. Yusufali* 86 Ind C 364 = A I R 1925 Sind 80 Of the various kinds of judicial admissions, those contained in pleadings command careful consideration, but with regard not only of this presumed solemn contracts but with regard to the time at which they were made, their use in the action of which they form the basis, their use dehors that action, the change in the circumstances by withdrawal or amendment in brief by the circumstances surrounding their offer in evidence against the party making them including of course, their verification by parties having absolute knowledge and those who speak only from information and belief. When parties allege matters of fact in their pleadings then pleadings may be offered in evidence against such parties as admissions of the facts so alleged *Burn Jones & Co.* The admissions of attorneys of record bind their clients, in all matters relating to the progress and trial of the cause, but to this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at trial in such cases, they are in general conclusive, and may be given in evidence even upon a new trial *Doe v. Bod*, 7 C & P 6 *Langley v. Lord Oxford* 1 M & W 508 If the admission is made before suit it is equally binding provided it appear that the attorney was already retained to appear in the cause *Marshall v. Cliff*, 4 Camp 133 But in the absence of any evidence of retainer at the time in the cause there must be some other proof of authority to make the admission *Wagstaff v. Wilson* 4 B & Ad 339

There is another class of judicial admissions, made by the payment of money into Court upon a rule granted for that purpose. Here it is obvious the defendant conclusively admits that he owes the money thus tendered in payment (*Blaeburn v. Scholes* 2 Campb 341, *Rueler v. Paisgrave*, 1 Camp 558) that it is due for the cause mentioned in the declaration (*Scotton v. Brinlet* 5 Bing 28 *Pennet v. Francis* 2 B & P 550, *Jones v. Hoar*, 5 Pick 285 *Huntington v. American Bank* 6 Pick 310) that the plaintiff is entitled to claim it in the character in which he sues (*Liscombe v. Holmes* 2 Camp 441) that the Court has jurisdiction in the matter (*Millet v. Williams*, 5 F R 19 21), that the contract described is rightly set forth and was duly executed (*Gutteridge v. Smith* 2 H Bl 374 *Israel v. Benjamin* 3 Campb 40) that it was broken in the manner and to the extent declared (*Dyer v. Ashton* 1 B & C 3) and if it was a sale of goods sold by sample that they agreed with the sample (*Teggeth v. Cooper* 1 B & C 3). In other words the payment of money into Court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money *Deyer v. Ashton* 1 B & C 3 *Stapleton v. Nouell* 6 M & W 9 *Archer v. English* 2 Scott N S 155, *Archer v. Walker* 9 Dowd 21, *Greenall Es* § 205. But it admits nothing beyond that.

The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it i.e. the prohibition of any further dispute of the fact by him and of any use of evidence to disprove or contract

it *Higmore* § 2590 So a fact that is judicially admitted needs no evidence from the party benefiting by the admission *Ibid* § 2591 A party or his agent may make admissions for the purpose of dispensing with the proof at the trial by agreement or otherwise before or at the trial *Phipps v. The Earl of Alford* p 10 Such admissions may be made by pleadings as well *Hollis v. Burton*, (1892) 3 Ch 226 *Burjorj v. Muncherji* 13 B 113 An admission made by the pleader binds the client *Kaleelund v. Gueebala* 10 W R 322 The plaintiff is entitled to a decree on the mere admission of the defendant *Issur Chunder v. Noddeep* 6 W R 132 The plain language of this section should not be unduly restricted by reference to considerations of public policy *Per Hallis C J in Mallappa v. Malam Yoga* 48 Ind Cas 158 = 12 M 41 So the admission of a party in his pleadings as to an oral agreement modifying a written contract gets rid of the danger which it is intended to guard against by the prohibition against the admission of oral evidence contained in the 4th proviso to section 92 of the Evidence Act *Ibid* But in the same case *Seshagiri Iyer J* said 'The rule of law announced in *Stallard v. Pooley* 6 M & W 664 which accepted oral admissions of every kind as proving documents has no doubt been departed from in India [see section 22 of the Evidence Act and sections 59 and 65 (h)] It is open to argument that admissions in pleadings are in the nature of secondary evidence and that the prohibitions in section 22 applies equally to pleadings as well Otherwise parties may compel a Court by statements in pleadings to pronounce judgments upon evidence which is not legally admissible There is the further fact that notwithstanding the admission in the pleadings the Court may call upon the party to prove a fact In such cases the proof must be restricted to the modes mentioned in the Act But it should be borne in mind in this connection that Chapter III deals with facts which need not be proved

**Different kinds of judicial admissions** This section deals with admissions made by the parties to an action or made voluntarily, or pursuant to a notice to admit documents or facts given by the opposite party as well as admissions by agreement at or before trial A party may in his pleading state expressly that he admits all or certain of the allegations of fact made in the pleading of his opponent He may also admit any allegation or allegations in a statement of claim or counter claim by not denying or not stating that he does not admit the same He may also give express notice in writing that he admits all or certain of the facts alleged by his opponent If the defendant admits all the facts pleaded in the statement of claim the plaintiff will only be allowed to call evidence to prove additional facts by permission of the Court and on special grounds *The Hardwick* (1883) 9 P D 32, *Annual Practice* 1921 p 466 Where an admission is made before the hearing, the agreement to admit should be in writing and signed by the parties or their agents When an admission as frequently happens is made at the hearing, the Judge's note is sufficient *North v. Li* 278 So the statement of a Judge who presides at a trial, is conclusive as to what passed at the trial Neither the affidavits of bystanders or of jurors, nor the notes of counsels or of shorthand writers, are admissible to controvert the statement of the Judge *Heg v. Pestonji*, 10 B H C R 75(81)

**Agree to admit at the hearing** "With regard to facts admitted at the hearing the expression 'at the hearing' is ambiguous If it means before the evidence has begun to be taken then what I have said already applies to it If it means after the evidence has begun to be taken then in a civil case no doubt the party or his pleader may at any time relieve his adversary from the necessity of proof and the generality of the language used in this section would lead to the inference that this was so in a criminal trial also though it is generally supposed to be otherwise and that on a criminal charge admissions made after a plea of not guilty can only be made use of as evidence *Wardby Ev* p 51 'At the hearing', means when there are more hearings than one the final hearing Thus where A sues to eject B for non payment of rent and B at the first hearing orally agrees to payment in full at the final hearing no evidence of title or tenancy need be given *Whitely Stokes* Vol II, p 889 When an agreement sued upon is admitted by the defendant, proof of it is dispensed with A



§ 58 Court cannot dismiss a suit based on an admitted document, on the ground that the document was not sufficiently stamped *Rahimtolla v Murray*, 11 Ind C.L. 810. Where the defendant admits the signature of his father in the mortgage deed, the plaintiff is relieved under this section from any further responsibility of proving the document *Lalchand v Lalchand* 42 B 352=20 Bom L.R. 354=45 Ind Cas 374, *Arun Sahu v Kelar*, 2 P 317=74 Ind Cas 120. Where the fact of a prior partition having taken place is admitted by both parties, the same need not be proved and the fact that the instrument in writing is not registered will not make the instrument inadmissible for a collateral purpose *Maung Po Kim v Maung Shuc*, 1 Rang 405=1924 Rang 150.

**Agree to admit by any writing before the hearing** With regard to the facts admitted prior to the hearing, it is quite correct to say that they need not be proved, in the sense that no evidence need be given of them. Not only this need not be done, but it would not be allowed to be done. As to the admissions before the hearing it is certain that, in a criminal case they can only be used as evidence and for this purpose it does not signify whether they are in writing or not. Admissions in writing before the hearing in civil cases would come under consideration when the Judge is considering what is to be tried. Still even then they must be proved to be genuine unless they are admitted in the presence of the Judge. The direction given to the Court by the 1st paragraph to § 58 is controlled by the provisions of the Civil Procedure Code which requires the Judge to determine what issues are to be tried before the taking of evidence begins. If a Judge wished to allow a party to withdraw his admission, he would have to amend the issues *Mari by Ex p 51*. Each party to an action is in that action conclusively bound by those admissions which he expressly makes in the pleadings, or by stipulations oral or written which are formally entered into for the purpose of dispensing with proof *Burr Jones* § 274, see also *Bingham v Stanley* 2 Q B 117, *Robins v Lord Maudstone*, 4 Q B D 811, *Bolean v Rutlin* 2 Ex 660. Admissions made by parties or their attorneys in their pleadings in the action or by stipulation is to fact or by dispensing with certain proofs may be withdrawn if not true provided there remains sufficient time for the other party in which to prepare his case and provided such party has not been injured by relying on such admissions *Wallace v Mathews* 39 Gr 617 (Am). Such admissions will not be allowed to be withdrawn, however if the situation of the parties has been substantially changed as by the death of a party or of a witness *Wilson v Baul of Louisiana*, 55 Gr 98 (Am). If a party desires to withdraw admissions of the character under discussion he should give full and timely notice of his purpose, so that the other party may have reasonable time to supply the proof *Hirvates v Redel* 43 Gr 142, *Ellons v Larlins*, 5 Car & P 350. *Burr Jones* § 274.

**Admission by pleading** "Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. Civil Pro Code Order 8 rule 5. This rule states what amount to admission of fact in pleading. Rule 3 of Order 8, requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth. Rule 5 provides that every allegation of fact in the plaint if not denied in the written statement or stated to be not admitted shall be taken to be admitted by the defendant. (Vide *Mullas Civil Pro Code* note under rule of Order 8). The whole object of the rule is to narrow the parties down to definite issues and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. Per Jessel M J in *Pry v Holtworth* (1876) 3 Ch D 637. A party may directly deny the allegation of his opponent or he may state that he does not admit the allegation. But an allegation which is not specifically denied or stated to be not admitted is treated as admitted. *Hogel v Ann* 5 Ch D 781 aff 7 Ch D 284. *Green v Scott* (1875) 13 Ch D 569. *Collins v Good* 7 Ch D 812. A refusal to admit must be stated as specifically as a denial. *Phry v Holtworth* 3 Ch D 637 640. *Hill v L & W J J Co*, 35 L R 810. Leave in a proper case

may be given to a party to recall admissions which he has made. *Hollis v Lorton* (1892) 3 Ch 226 C A. Where a document is by reference included in the plaint or written statement, and its terms and execution admitted on the record by the pleadings it is not necessary to prove it or put it in evidence and its non-registration is immaterial. *Munug Kyau v Munug Po Wan* U B R 1901 3rd Qr Evidence I. Plaintiffs sued defendants for damages for 27 bags of dried prawns which were consigned to the plaintiffs and which were damaged by rain water on the 25th May while stored in one of the defendants' godowns. The defendants in the written statement did not refer to the question of notice. In revision it was contended that the plaintiffs had not proved the notice. *Held* that the defendants must be deemed to have admitted notice under order VIII rule 5 C P Code and proof was dispensed with under s 58. *Commissioners for the Port of Rangoon v Moola Danood* 9 Ind Cas 470. The plaintiffs filed a suit in the Court of the first class subordinate Judge for partition of a certain property. In the plaint the market value of the property stated was such as to make the suit triable only by the first class subordinate Judge. The Judge however made over the trial of the suit to the joint subordinate Judge at Lhanna who had no jurisdiction to try it if the property was correctly valued in the plaint. Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it. The trial proceeded on merits and the subordinate Judge passed a decree for partition in favour of the plaintiffs. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market values stated in the plaint. The objection having been overruled they appealed to the High Court. *Held* that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint and as they by their conduct and silence treated the market value to be the amount sufficient to give jurisdiction to the Court they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in s 58 came into operation and prevented the result of the statement of the market value in the plaint. *Jose Inouiss v Francisco* 12 Bom L R 712. Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old debt due by them and that subsequently it was arranged that a third person who was not a party to the mortgage should pay the debt and redeem the land. *Held* that this was a clear admission that the relation of mortgagor and mortgagee was established between the defendants and the plaintiffs, and that therefore the production of the mortgage deed was unnecessary under the provisions of section 59 of the Evidence Act. *Munug Kan v Munug Myat* 11 Ind Cas 850. Plaintiff sued for redemption alleging that he had sold the land in suit out and out to the defendant for Rs 250 less than 12 years before suit but that at the time of sale a stipulation was made for repurchase by the plaintiff at any time on payment of the purchase money. *Held* that as the plaintiff had admitted in the plaint the factum of an absolute sale in favour of the defendant it was unnecessary for the latter to prove the sale. *Munug Pya v Munug O Za* 4 Bur L T 10=9 Ind Cas 770. Where an oral agreement is admitted in the pleadings of the parties proof of the agreement is dispensed with by this section and the Court is bound to recognise and give effect to such agreement. *Malappa v Vaga* 42 M 11=35 M L J 555=48 Ind Cas 159. Where a party to an action makes solemn admissions against his interest in a pleading they should be treated as admitted facts and he will not be heard to question the correctness thereof at any stage of the case in the trial Court or on appeal. If the statements or admissions were made by himself or by his counsel under an honest mistake or misapprehension of what the facts really were and he desires to be relieved from the effect thereof he should apply to the trial Court for leave to withdraw such admissions or pleadings and if required to do so make a showing of good faith in support of his application which should be granted or denied in the furtherance of justice. *Rogers v Brown*, 15 O & L 524, *Bair Jones* § 271.

As regards the effect of an admission made in a pleading for proving of the execution of a document the following observation of *West J* in *Bujoy v Muncherji*, 5 B 142, at pp 142-143 are very important. "The second question is that of whether the proof of the document is superseded by its admission in

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the pleading. On this point the case of *Mc Gowan v. Smith* 26 L. J. Ch. 841 the other referred to seem conclusive. A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed and admissions which have been deliberately made for the purpose of the suit whether in pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them. This includes any document that is by reference incorporated in the bill or answer (*Gresely's Law of Evidence* 407). The point is not in issue, and as to the counter-claims of the parties, a plea or a special replication admits every point that it does not directly put in issue. The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts. Thus a submission that the defendants would not be in any way affected by the notice set forth in the bill, precluded them from disputing the validity of this notice. Such rules are to be applied with discretion in the country where a strict system of pleading is not followed but here, as I suppose everywhere the language of *Lord Cairns* holds true, that the first object of pleading is to inform the persons against whom the suit is directed what is the charge that is laid against him (*Broune v. Mc Clintock*, 6 E. & Ir. App. 45). The principle is equally valid as applied to either party in the case. The Court is to frame the issues according to the allegations made in the pleadings or in the written statements tendered in the suit which here contain a full assertion and admission of the execution of the document A by the defendant *Muncherji*. But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document and assume it to have been executed and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not I think called upon to prove the execution of the document, or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on consideration of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading such an attempt could not be allowed to succeed but for its proposed purpose in this case it is not invalid. But in admission made by a party to a suit or his attorney, that a fact is true exists and need not be proved does not dispense with proof of the existence of that fact subsequent to the date of the admission. *Lawson's Presumptive Facts* 2nd Ed. 237. *McLeod v. Wakeley*, 3 C. & P. 311. In the above case *Lord Fentenden C. J.* said "I do not think that I can hold that this admission can be extended to a publication after its date. I consider that the admission goes down to its date but not further."

**Distinction between evidentiary admissions and admissions by pleadings.** There is a distinction between evidentiary admissions and admissions by pleading. This section governs admissions by pleadings. *Sadhu v. Singh* U. B. R. 1907 Evidence 1. Admissions made for the purpose of disposing of the case with proof at the trial must be distinguished from those tendered as evidence the former not being usually receivable in other proceedings and the latter not being usually conclusive. *Phup Pt.* 4th Ed. p. 10. The evidentiary admissions have been termed by *Prof. Hymore* as quasi admissions. According to him the true admission, in the fullest sense of the term is another thing and involves a totally distinct principle. It concerns a method of securing an admission by offering any evidence at all. So the "quasi admission" is an admission in the matter of evidence whereas the admission proper or judicial admission with which this section deals is a waiver relieving the opposing party from the need of any evidence. So a judicial admission is a formal act, done in the course of judicial proceeding, which waives or dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Hymore* § 1058.

**Admission in Divorce cases.** Admission of husband or wife is a matter of necessity all allegation of agency when they are to be used in direct proceedings excepted course when collusion establishes a form of fraudulency which destroys their right. Unlike other contracts the contract of marriage, cannot be dissolved by the mere consent and argument of the parties.

and in actions for dissolution of this contract, that is for divorce, admissions are closely scrutinized. Although the husband and wife are the parties to the record, the State is for the purposes some deemed interested in the proceeding. The contract of marriage is *tripartite*, the husband, the wife and the State being the parties thereto, and it can neither be entered into nor dissolved except by the consent of and in the manner prescribed by the State. It necessarily follows that no admissions by either party to the contract, however collusive upon such party, can be conclusive upon the State in a suit for the dissolution of the contract, and that such dissolution cannot safely be deemed unless the admission be corroborated by strong proofs. *Burr Jones* § 262. In *Williams v Williams* 1 Hagg 299, Lord Stowell says that a confession is a species of evidence which though not inadmissible, is to be regarded with great distrust while in *Mortimer v Mortimer* 2 Hagg 310 the same learned Judge announces that a confession ranks high "I should say highest in the scale of evidence, though in the same case he admits that the rule that confessions alone will not support a charge of adultery is too firmly established to be shaken. In *Harris v Harris* 2 Hagg 676. In *Lushington* is more intelligible when he says that a confession perfectly free from all taint of collusion when confirmed by circumstances and conduct, ranks among the highest species of evidence. The suit for divorce has been called a triangular proceeding *suu generis*, in which the government occupies the position of a third party. Since the public have an interest in actions for divorce and ought not to be bound by the admissions of one of the parties it has generally been held that a divorce should not be granted upon the uncorroborated admission or confession of a party. *Richardson v Richardson* 30 Am Dec 538, see also *Ovi v Ovi* 27 Bom L R 251=49 B 368.

**Admission in criminal cases.** According to *Mr Norton* this section is confined to civil suits only. *Nort Et* 248. But *Mr Justice Cunningham* says "Under the English law a prisoner under trial for felony can make no admission so as to dispense with proof, though a confession may be proved against him. *Steph Dig Art* 60. The present section appears to allow of an accused admitting at the trial such facts as he pleased to admit. *Cun Et* p 213. So an accused person is bound by an unqualified admission made at the trial by his solicitor. In England, a formal admission by the counsel at a trial has been allowed in order to dispense with more formal proofs. In India there is nothing to prevent a prisoner, on being questioned under s 34 of the Criminal Procedure of 1882 to make an admission, and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser, and there seems to be no reason in principle why when the admission has been so made in his presence at the trial so as to dispense with the attendance of witnesses for the prosecution it should not be held to bind him. *Queen Empress v Leandro Rat Un Cr C* 769. This section applies to criminal trials as much as to civil cases. *Bhulan v Emperor* 91 Ind Cas 233=27 Cr L J 57=A I R 1926 Oudh 215. *Bansilal v Emperor*, 30 Bom L R 646=52 Bom 686=112 Ind Cas 110=A I R 1928 Bom 241. In England in a trial for felony the prisoner can make no admissions so as to dispense with proof though a confession may be proved as against him. *Steph Dig Art* 60. So where there were two prosecutions for felony, and counsel for defence offered to admit the evidence taken on the first trial, as given in the second, *Patteson J* doubted whether that could be done even by consent in a case of felony, but he directed the witnesses to be sworn and read their evidence over to them from his notes. *R v Foster*, 7 C & P 495. But in cases of misdemeanour, evidence may be taken by consent. *Per Patteson J* in *ibid contra*, *Phips* 11. When the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with and that part of the prosecutor's evidence admitted *L Abinger C B* said. "In a criminal case tried on the crown side of the assizes I can not allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel." *R v Thornhill*, 8 C & P 375 (1838). *Roscoe* p 160. In India the rule was not uniform vide *Queen v Karim Mundle* 17 W R Cr 49. *Queen v Gagalao* 12 W R Cr 80. But so far as the construction of this section is concerned *Laird J* observed "A pleader's authority to admit a certain fact so as to dispense with the necessity of further proof is clearly

**S 58.** laid down in regard to a civil case in *Mahadeo v. Sunderabai* 3 Bom L R 167 and I think the principle applies in regard to this particular case in the appellate Court. The fact that it was a criminal case does not really make any difference. Further more, I am not convinced that s 58 Evidence Act does not apply to justify the action of the Sessions Judge. No doubt in England an admission by an accused, which falls short of his pleading guilty is not taken into account and is not binding against him. But section 58 makes no exception in regard to criminal proceedings and while I do not say that it can be availed of to cure and a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial yet I think it can apply in a case like this which relates only to proceedings of an appellate Court. *Bonsild v. Emperor*, A I R 1928 Bom 241 (242) = 112 Ind Cas 110 = 52 B C 54 = 30 Bom L R 646. But admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice. *Per Un A J in ibid*. An accused person is bound by an unqualified admission made at the trial by his solicitor. In England a formal admission by the counsel at a trial has been allowed in order to dispense with mere formal proofs. In India there is nothing to prevent a prisoner on being questioned under s 347 of the Criminal Procedure Code of 1892 to make an admission and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser and there seems to be no reason in principle why, when the admission has been so made in his presence at the trial so as to dispense with the attendance of witnesses for the prosecution, it should not be held to bind him. *Queen Empress v. Leandro Mascarenhas*, Rat Un Cr C 769 = Cr Reg 34 of 1895.

**Proviso.** Both under section 58 of the Evidence Act and under order VIII, rule 5 of the Code of Civil Procedure the trial Court has a discretion to require proof of the due attestation of the mortgage bond sued upon notwithstanding an admission by the defendant in his written statement that the bond had been duly executed. *Munappa v. Vellaichami*, 1918 M W N 833 = 9 L W 5 = 5 M L T 19 = 19 Ind Cas 278.

**Judicial Admissions made by mistake.** It is only necessary to add that where judicial admissions have been made improvidently and by mistake, the Court will in its discretion, relieve the party from the consequences of his error by ordering a repleader, or by discharging the case stated, or the rule or a remedy if made in Court. This rule is based on the maxim *Non fallet i, qui cessat, nisi ius ignoravit*. *Greenl Fr* § 206. Agreements made out of Court between attorneys, concerning the course of proceedings in Court are equally under its control in effect by means of its coercive power over the attorney in all matter relating to professional character and conduct. But, in all these admissions unless a clear case of mistake is made out entitling the party to relief he is held to the admission, which the Court will proceed to act upon not as truth in the abstract but as a formula for the solution of the particular problem before it namely, the case in judgment without injury to the general administration of justice. *Gresley on Civil in Equity* pp 349-358, *Greenl Fr* § 206.

**Future of the Doctrine of Judicial Admissions.** 'The doctrine of Judicial Admissions' says Prof. Wigmore 'has a large future before it, if Judges will but use it adequately. In the first place the Judge should apply it to all informal as well as formal admissions by counsel during trial. In the next place the Judge should freely call upon counsel to state whether a fact is in good faith disputed; he should require admissions to be made where it seems probable that the fact is not actually disputed. By this method, the pre-entation of evidence will be confined to the matters of fact alone which the parties do dispute. It is easy to see how large a mass of needless skirmishes would thereby be eliminated how much time would be saved and how much confusion of the jury would be avoided. And this would be attained by the mere application of an existing principle. Already in England the principle is so used on a large scale in the modern practice of setting issues before masters. But it can also be used by the Judge at the trial.' *Wigmore* § 2307.

## CHAPTER IV

### OF ORAL EVIDENCE

**Proof of facts by oral evidence**      **59** All facts, except the contents of documents, may be proved by oral evidence      **S. 59**

**Oral evidence** Oral evidence is evidence which is confined to words spoken by the mouth. *Per Petheram C J in Queen Empress v. Abdulla*, 7 A 385 (397) 1 B. It includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry. *Id.* s. 3. It is what the English lawyers call testimonial evidence. Testimony is a species of evidence by means of witnesses. The broader term 'evidence' includes that which is given by witnesses or offered by documents. *Id.* s. 3. In *People v. Kenyon* 5 Park Cr (N. Y.) 274, 288 Mr. Justice Campbell said: "It may be well to bear in mind that there is marked difference between testimony and evidence. The latter is much more comprehensive than the former—testimony being the statements or the declarations of a witness and evidence being rather the result or deduction from all the facts established whether by testimony by events or by circumstances by writings records and other materials." It is called evidence, said *Cole* because thereby the point in issue in a cause to be tried is to be made evident to the jury, and the evidence to a jury containeth the testimony of witnesses and all other proof to be given and produced to a jury from the finding of any issue joined between parties. 'Testimony' in legal as well as in common usage signifies a statement of facts by witnesses and to disprove the testimony of a witness is to disprove the facts testified to by him. *Burr Jones* § 14.

**Wordings of the section** This section is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say when such evidence of their contents is admissible as secondary evidence. See section 63 cl. 5 section 52 cl. (5) *Not Et* 239.

**Contents of a document cannot be proved by oral evidence** It is a cardinal rule of evidence—not one of technicality but of substance that where written documents exist they shall be produced as being the best evidence of their own contents. *Dunmore v. Roy Luckmial* G C L R 101=7 I A S. This section is based on the best evidence rule. The rule is thus stated by *Greenleaf*: "A fourth rule, which governs in the production of evidence, is that which requires the best evidence of which the case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any, which from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud for when it is apparent that the better evidence is withheld it is fair to presume that the party had some sinister motive for not producing it and that if offered his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant, that no evidence shall be received which is merely substitutionary in its nature so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of moral original sources of information. But where there is no substitution of evidence but only a selection of the weaker instead of stronger proofs or an omission to supply all the proofs capable of being produced the rule is not infringed. Thus a title by deed must be proved by the production of the deed itself, if it is within the power of the party, for this is the best evidence of which the case is susceptible and its non production would raise a presumption that it contained some matter of apparent deference. But being produced, the execution of the deed itself may be proved by one only of the subscribing witnesses though the other also is at hand. And even the previous examination of a deceased subscribing witness, if admissible on other grounds may supersede the necessity of calling the survivor. So in proof or disproof of handwriting it is not necessary to call the supposed writer himself. And, even where it is necessary to prove negatively, that an act was done without

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the consent, or against the will of another it is not in general necessary to call the person whose will or consent is denied' *Green Ev* § 82 In the case of *Earl of Suffolk v Greenhill*, Ch Rep 89, 92, the Court held it very dangerous to admit the contents and sufficiencies of deeds to be proved by the testimony of witnesses, the construction of deeds being the office of the Court Similarly in *Vincent v Cole*, M & M 257, Tenterden L C J said 'I have always (perhaps more so than other Judges) acted most strictly on the rule that what is in writing shall be proved by the writing itself My experience has taught me the extreme danger of relying on the recollection of witnesses, how ever honest as to the contents of written instruments, they may be easily mistaken that I think the purposes of justice require the strict enforcement of the rule' *Wigmore* § 1179, *Macdonnell v Evans* 11 C B 942, *Sheridan v Trial* 31 How St Tr 669 *Argument of Mr Burrows* *Musst Imam v Hargood* 7 W R 67 (P C)=4 M I A 403, *Elowin v Haralal* 11 W R 2 (P C)=6 B L R 4, *Meerustullah v Imaman*, 5 W R 26 P C=1 M I A 19 (4), 43) *R v Francis* 12 Cox C C 612

What facts may be proved by oral evidence Oral evidence may suffice to prove possession *Dino bandho v James Furlong*, 9 W R 155 *Shro Sahayre v Goodar*, 8 W R 328 *Gorind v Anund*, 5 W R Cr 79 Oral evidence if credible would be sufficient to prove a title by prescription *Meharban v Mukhob* 7 W R 462 So also oral evidence is sufficient without documentary evidence to establish a question of title *Ram Soondur v Akima*, 8 W L 36 In proving a native pedigree, the oral statements of deceased relatives will be admitted in the absence of any registers of births and deaths *Moheden v Mahomed*, 1 Ind Jur O S 132=1 M H C R 92 It is not valid reason to disbelieve the evidence of a witness who swore that he had received the amount of a decree from the plaintiff when the money was paid by the plaintiff's agent *Ialla Mohdeo v Sattanund* 17 W R 502 Boundaries may be proved by oral evidence *Rance Swut Soonduree v Rajendur Kishore*, 9 W R 12, but see *Goluch Chandra v Rajah Sreenud Biddadhar* W R (1864) 136 Oral evidence is relevant to prove the existence of an agreement and if sufficient will justify the decree of a claim *Goluch Kishore v Nund Mohun* 12 W L 394 A Judge maintaining that oral evidence is of no value without a *pallah* and *lobuliyat* to prove the quantity of defendant's *muldee* *last land* and the amount of rent, misdirects himself in point of law as to what was necessary in deciding the facts *Dinoo Singh v Doorga Pershad*, 18 W R 348 So also oral evidence is admissible to prove an adjustment of accounts *Kampli Kasibara v Soma muddi Ram*, 1 M H C R 183 A plaintiff denying the execution of document may adduce oral evidence to prove his contention *Khatter Mohun v Gureedhar* 20 W L 184 No Court much less an appellate Court is justified in ruling that in the absence of documentary evidence mere parol evidence is not sufficient to prove the plaintiff's case when it is supported by a number of witnesses, whose testimony is believed by the first Court *Mohesh Ray v Boodhum Mahloos* 15 W L 314 In India a contract for sale of goods can be proved by parol evidence *Durga Prasad v Bhuyan* 6 Bom L R 498 Oral evidence as to the acts and conduct of parties is admissible for showing that a certain deed is as it purports to be an out and out sale or a mortgage *Mohamed Ali Hossein v Na ar th* 25 C 259=5 C W N 326 *Khanakar v the Hufu* 28 C 256=5 C W N 25 *Ka lu Nath v Narrooy* 1 W R 22 Oral evidence may be employed to prove the payment of a debt due on *samadastat* *Guman v Sorabji* 1 B H C 1 Oral evidence of the discharge of an obligation executed in writing is admissible *Im mulsam sarangar v Kamabhattar*, 2 M H C R 112

Oral evidence weight and value of In a case where oral evidence is conflicting and where documentary evidence does not help one in coming to a definite conclusion the only proper course is to see what are the admitted facts in the case and what are the circumstances deducible from the oral evidence both as to the truth of which there can be no doubt This alone can be the true method of arriving at a correct conclusion *Abdul Halim v I v* *Selat the 104 Ind C* 517=A I R 1924 Oudh 15, Statement made by a witness at the trial should be altogether rejected when it is in hopeless conflict

with his previous statements *Ram Karan v Emperor* 7 Loh L J 371=26 P L R 659=A I R 1925 Loh 483 It is impossible to place reliance on an uncorroborated statement of a man who is describing an event which took place 12 years ago and which was not an event of a particularly striking character *Gurcharan v Satya Naran* 8 L R 314 (Rev) A few casual and somewhat ambiguous phrases in a deposition cannot destroy the clear effect of the whole deposition *Kashubai v Mamalhan* A I R 1925 Nag 265 The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is not now implicitly followed by Courts in the appreciation of evidence It is the duty of the Court to sift the evidence and separate the truth from falsehood if it can *Maung Po Gyan v Maung So*, 1 Bur L J 213 It is a recognised principle that where a party comes into Court with a story which cannot be believed in its essential details it is impossible to rely on a part of the story for the purpose of convicting the accused *Phatah Singh v Emperor* 5 Pat L W 157=(1918) Pat 288=47 Ind Cas 73=19 Cr I J 877 To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent, is an error in law and justifies interference in second appeal *Ram Subhog Chaurbe v Kesho Prasad* 29 Ind Cas 673 In *re Goonamonee and ors* 17 W R 59 *Mutter J* said "In determining the value of oral evidence it is not enough for the Appellate Court to say, as the Judge says in this case 'I find no fault with the evidence *per se* and it must be allowed to prevail,' but that Court is bound in my opinion also to enquire, as thoroughly as the Court of first instance, whether the probabilities arising from all the surrounding circumstances of the case are such as to justify a reasonable mind in coming to the conclusion that the evidence is worthy of credit This precaution is nowhere more necessary than in this country It is true that there is no precaution of perjury against oral testimony but it has I believe been sufficiently confirmed by a long course of experience that nothing can be more dangerous than to act upon such testimony without testing its credibility both intrinsically and extrinsically Where there is contradiction of oral testimony the Court must look to the documentary evidence in order to see on which side the truth lies *Mussamat Iman v Hingorind*, 4 M I A 403 (407), *Elkora Singh v Hiralal Singh* 11 W R P C 24

In *Rhangama v Itchama* 4 M I A 1 106 their Lordships of the Judicial Committee observed 'These instruments are produced and the facts tending to their conclusion are sworn to by a vast number of witnesses There appears to us to be no objections to this testimony beyond the observation which may be made on all Hindoo testimony that perjury and forgery are so extensively prevalent in India that little reliance can be placed on it See also *Malthura Panday v Ram Rucha*, 3 B L R A C J 112 *Rajah Lelaland v Musst Basheeromissa* 16 W R 102 Similarly in *Mudhoo Soodun Sundial v Suroop Chander Sukra* 4 M I A 431, 411 the Judicial Committee again observed 'It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindoostan that all oral evidence is necessarily received with great suspicion and when opposed to by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak it may be of little avail but we must be careful not to carry this caution to an extreme length not utterly to discard oral evidence, merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witness' deposition, *viz* *toce*, how necessary however it may be always to sift such evidence with great minuteness and care' This case was cited with approval in the case of *Emperor v Balgangadhar Tilt* 6 Bom I R 324 (350)=28 B 179 see also *Wise v Sanduloomissa* 11 M I A 187 (189) *Queen v Elahi Nur*, B L R (C B) 482 *Siraj v Chinna* 10 M I A 162 *Fduv Behan* 11 W R 315 But it would be indeed most dangerous to say that where the probabilities are in favour of the transaction, we conclude against it solely because of the general fallibility of native evidence Such an argument would go to an extent which can never be maintained in this or any other Court for it tends to establish a rule that all oral evidence must be discarded, and it is most manifest that



**S 59** however fallible such evidence may be, however carefully to be weighed justice never can be administered in most important cases without recourse to it. *Bunari Lal v Maharajah Hitaran* 7 M I A 148 (167)=1 W R P C 125. So "the ordinary legal and reasonable presumptive fact must not be lost sight of in the trial of Indian cases however untrustworthy much of the evidence submitted to the Court may commonly be that is due weight must be given to evidence there as elsewhere and evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation." *Ramaswami Ammal v Kalanthai Vatchear*, 11 M I A 351, 355. Such rejection if sanctioned would virtually submit the decision of the rights of others to the suspicion and not to the deliberate judgment of their appointed Judge. *Ibid* see also *Sreeman v Gopal* 11 M I A 28. *Hanmant Rao v Secretary of State* 25 B 298, *Allypoto v Buchandha* 12 W R P C 21=3 B L R P C 13. *See Bar v Idrisuddin* 9 B L R 478, *Queen v Rumecharan* 8 A 315. *Kalyandha v Shubchandha*, 6 B L R 501. So in such a case it would be safe to follow another principle laid down by the Privy Council not to look to the probabilities of the case. *Lunani v Hitaran* 1 W R 125 (P C). In the words of *Laron Paine* in *W. Isabullah v Bala Imman* 1 M I A 19=5 W R P C 26, "there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other than to consider what facts are beyond dispute and examine which of the two cases best accord with those facts according to the ordinary course of human affairs and the usual habits of life." See also *W. Halim v W. Jandi* 103 Ind Cas 870=A I R 1927 Sind 209. So in *Sri Raghunada v Sri Brojo Kishore* 3 I A 146 it was intimated that, if the Judge had refused to weigh the probabilities of the case because he believed one set of witnesses rather than the other he would in forming his belief have excluded from his consideration that which he ought to have entered into it. Probabilities are thus an important element of consideration, where the evidence appears unreliable or is directly conflicting, but a case should not be decided upon probability alone apart from the evidence which the parties have submitted to the Court. *Tallahpo v Sollabmatul* 71 W R 438. Evidence of witnesses though not independent, but not broken in cross examination and accepted by the Judge who heard them and saw their demeanour, should not be rejected on mere suspicion when the story told by them is not improbable. *Maghulan v Ahmad* 8 C W N 241=26A 401 (P C)=6 B o n L R 233.

The consistency of testimony is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses bear testimony to the same transaction, and concur in their statement of the series of particular circumstances and the order in which they occurred such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions, either the testimony is true or the coincidence is the result of concert and conspiracy. If therefore the independence of the witness is proved and the supposition of previous conspiracy be disproved, or rendered highly improbable to the same extent will the truth of their testimony be established. So far does this principle extend that in many cases except for the purpose of repelling the suspicion of fraud and concert the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement. The considerations which tend to negative any suspicion of concert and collusion between the witnesses are either extrinsic to their testimony such for instance as relate to their character situation their remoteness from each other the absence of previous intercourse with each other or with the parties and of all interest in the subject matter of litigation, or they arise internally from a minute and critical examination and comparison of the testimony itself. The nature of such coincidences is most important are the

natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration. Human cunning, to a certain extent may fabricate coincidences, even with regard to minute points, the more effectually to deceive, but the coincidences of art and invention are necessarily circumscribed and limited whilst those of truth are indefinite and unlimited. The witnesses of art will be copious in their detail of circumstances as far as their provision extends. Beyond this they will be sparing and reserved for fear of detection and thus their testimony will not be even and consistent throughout but the witnesses of truth will be equally ready and equally copious upon all points. *Stanhope on Evidence* cited in *Vort* 53.

**Test of probability**—Sir James Fitzjames Stephen's statement—"That probability is the guide of life is an obvious truth. But the expression has been a commonplace for more than a century and a half, and though there has been abundant discussion of the nature of probability I do not think that more can well be said on this great subject than that a statement is probable to whatever extent it generally resembles the common course of human conduct and of physical nature, that it is improbable to whatever extent it involves any deviation therefrom, and that it is impossible if it contradicts the conceptions upon which all language and thought rest as if it were affirmed that a thing could be in two places at once and that twice two could ever be more or less than four, that it is nonsense unless it can be in some way represented to the mind so as to be the object of thought but I do not know that any rules wide enough to be valuable have been established unless it is in relation to special themes or subjects of inquiry, which are of much value in measuring the amount of it which ought to be ascribed to different propositions of fact. Who for instance, can say how far a common proposition is made probable by the direct assertion of its truth by an unknown person? By what rule can any one be required to believe a person who describes correctly the operations of the electric telegraph and yet be justified in refusing to listen to a ghost story? Why is a Judge required to listen with gravity to conflicting medical theories of the cause of a death, and to state to a jury the grounds on which they are to decide whether a man died of this disease or that and yet to treat with contempt the notion that he died of witchcraft and to reject all evidence tendered to prove it? Probably no more difficult question can be raised and I doubt whether there is any which if fully solved would be of great practical importance." *Stephen's General View of Criminal Law of England* pp 192 193.

**Other tests of Probability** "Evidence to be believed" said *Vice Chancellor Van Fleet of New Jersey* must not only proceed from the mouth of a credible witness but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to the beliefs to the miraculous and is outside judicial cognizance." *Doyger v Van Dyke*, 37 N J 1 q 130, 132. But improbabilities must be distinguished from impossibilities. "A case how unlikely and suspicious so ever in itself may be irresistibly proved by the force of testimony" said *Sir John Nichol*. "Evidence may be so has to substantiate a transaction however improbable for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish." *Saph v Thomson*, 1 Add 166 182. In another case the same learned Judge said "It seems hardly possible on the mere improbability of a statement to discredit the evidence of a witness of good general character deposing firmly and solemnly there must be something amounting to incredibility, something incapable of explanation—not merely that it was improbable that under such circumstances persons in general would have so acted that it is matter of opinion. Different persons act differently in similar circumstances. *Whish v Hesse* 3 Hag 166 659 706. See also *Hise v Sudabonussa*, 11 M I A 177. *Mudhusoodan v Suroop*, 4 M I A 441—7 W R 70, *Nil Kristo v Buchandra*, 3 B L R 15 P C. But the circumstances of a

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case may be such as to make it utterly incredible, although there are confident attestations in support of it." Per Lord Stowell in *The Argo*, 1 C Rob 158 1A. Testimony which is irreconcilable with admitted or well established facts in a case must be rejected as incredible even though it does not categorically contradict the testimony to those facts. *Chamberlain v Wood*, 21 How (U S) 545, 561. *Moore on Facts* § 119.

Where a portion of evidence is untrue. A claim is not to be decided against because it has been foolishly and even wickedly supported by false evidence. That which is true must be sifted from that which is false and if the true which remains is a residue is sufficient to support the claim, it should be awarded. In *Ranee Sunnamoyee v Moharajah Sutties Chandra*, 10 M I A at p 170 the Court observed "It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the appellant or a confirmatory *pattah* produced by her as having been granted by *Woodoo Sudin Sandial* which if received by the Court below, would have concluded the case in her favour. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the *pattah* as a forged instrument and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false evidence or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself, and if the evidence on which their Lordship yet depended in any degree for its credibility or weight on such evidence or document they would have passed as to their conclusion. The fact is not however in the present case their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to tender to Her Majesty." So if a party put in evidence in support of his title documents proved to be forged but the other evidence adduced by him is not impeached the Court in rejecting the forged documents will take the unimpeached evidence into consideration, and if satisfied adjudicate thereon. *Suaji v Chinnai*, 10 M I A 181. *Pattabhiramier v Venkatarou* 7 B L R 142, *Koonjo Beharee v Roy Mothooria* 1 W R 155. *Bengal Indigo Co v Tannee* 3 W R (Act X) 149. *Ailurishna v Bu Chandra* 3 B L R (P C) 13=12 W R (P C) 21 (24). So a defence is not to be entirely disbelieved because false evidence may have been fabricated to meet a false claim if the residue of the evidence is trustworthy and sufficient to destroy the claim. *Wise v Sundooloonissa*, 11 M I A 177-7 W R (P C) 13, *Sreeman Chandra v Gopaul Chunder*, 11 M I A 28. *Muthun Bibee v Bussee Khan*, 11 M I A 213. *Maharajah Royender v Sheopur sun* 10 M I A 438. So the doctrine "*falsus in uno falsus in omnibus*" in this country affords a test of little or no value for it is to be feared that there is almost always a fringe of embroidery to a story however true in the main. *Hanmantoo v Secretary of State* 25 B 257 at p 277. Therefore the Court should bear in mind that the use of fabricated written evidence by a party however clearly established does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth the matters in issue. The parties using such evidence may have brought himself within the penalties of the criminal law but the Court should not in a civil suit inflict a punishment under the name of a presumption. Forgery or fraud in some material part of the evidence if it is shown to be the contrivance of a party to the proceeding may afford a fair presumption against the whole of the evidence adduced by that party or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may perhaps also have the further effect of giving a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far especially in this country where it happens not uncommonly that falsehood and fabrication are employed to support a just cause. *Goribulla kaee v Comodas Roy* 2 W R (Act X) 99. See also *Rameswar v Bharat* 4 C W N 18 P C. *Casper v Kedarnath*, 5 C W N 878 (861).

**Uncontradicted testimony.** Lord Stowell quotes Dr Johnson as saying that "he who tells nothing exceeding the bounds of probability has a right to demand

that they should believe him who cannot contradict him" *Bosuell's Life of Johnson*. "If witnesses come unimpeached in point of general integrity," said *Lord Stowell*, "if any depose with character of firmness in their particular narrations the facts must be received, or there is an end of all judicial inquiry." Human prudence has done its utmost, has done all that it is capable of doing in giving every security that can be afforded to individuals. *Elliott v Elliott* 1 Hig Cons 269, 287. *Dr Lushington* laid it down as the "strict line of all judicial proceeding namely to credit the evidence of respectable persons unless they are contradicted or unless there is something in their testimony to excite a suspicion of the fidelity with which they have deposed." *Collett v Collett* 1 Curt Ec 678. The rights of the people would have no safeguard, and the Courts of Justice would afford no forum for the redress of wrongs, if the unimpeached and uncontradicted testimony of a witness can be overthrown without reason. *Per Gundersleere J* in *Lewis v New York City* 50 Misc (N Y) 53. So "if the tribunal is permitted to discredit or disregard such testimony, there is no safety in the administration of justice and parties might just as well let the result of a litigation abide the cast of a die or a game of chance." *Seibert v Erie R Co* 49 Barb (N Y) 583, 586. It is a "well settled principle of law which is absolutely essential to the security of individual rights that a witness who is unimpeached or uncontradicted must be believed." *Barculo I* in *Roberts v Gee* 15 Barb (N Y) 449, 452. "That, when nothing appears to the contrary, the presumption is to be indulged that an unimpeached witness has testified truly, may be laid down as a principle derived from the experience and knowledge of mankind" said *Judge Boggs* of the Illinois Supreme Court in *Hauser v People*, 210 Ill 253 (Am). In a criminal case triable by a jury the Judge instructed the jury thus: "The witness is unimpeached and uncontradicted and if you think his statement consistent and rational, he is entitled to credit. You have no right to reject what he says as untrue by assuming the existence of some unproved hypothesis or upon any imaginary surmise that by possibility he may be mistaken or untruthful. You may criticize and weigh the testimony as carefully as possible, but when this duty is performed, if it would obtain your credence in the ordinary affairs of life, you have no right arbitrarily and without reason to say you will disregard it." *U S v Harbison*, 13 Int Rev 118.

**Disinterested witness** "A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation, for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds, and the danger of detection, and the risk of temporal punishment may operate as restraints upon the most unprincipled even where motives for veracity of a higher nature are wanting." *Starkie* Li 821. So it is undoubtedly a general rule that when a disinterested witness who is in no way discredited testifies to a fact within his own knowledge, which is not of itself improbable or in conflict with other evidence the witness is to be believed, and the fact is to be taken as legally established so that it can not be disregarded by Court or jury. *Karanogh v Wilson*, 70 N Y 177, 179 (Am).

**Discrepancies between witnesses** "The usual character of human testimony is substantial truth—under circumstantial variety," says *Dr Paley* *Starkie* on Li 511 (Note). The attention of one witness being directed to one part or position of the subject of inquiry, and of another witness to a different point of view of the same thing, or a witness giving different degrees of attention to a single incident Courts expect that there will be a difference at least in the minutiae of their testimonies, and such divergencies constitute no reasonable basis for discrediting their united testimony to the important facts, but tend rather to enhance the credit of the witnesses. *Moore on Facts* § 724 see also *Harani v Ramgopal*, 27 C 639 (P C) = 1 C W N 429 = 2 Bom L R 562. No two witnesses said *Mr Justice Van Burnt* of the New York Supreme Court in *In re Lyddy* 5 N Y Supp 636 (638) "ever described a series of events culminating in the execution of a paper, or in any other fact or incident, that ever agreed in their description of the attending circumstances. So substantial agreement is all that is required." *Aana Aarain v Huree Paulree*, Marshall 436.

- S 59 (P. C.) It is to be expected that what was done and said in an extended conversation will be differently stated by different witnesses. Seldom do witnesses in conversation hear or remember all that was said or receive precisely the same impressions from what they heard and frequently disagree in their recollection of date or of the time of day and in their estimates of short periods of time. *Morse v. Fitts* 8 839. Remoteness of the transaction to which the witness is to testify is sufficient in itself to account for no inconsiderable degree of inaccuracy of recollection. *Leansy v. Knight*, 1 Add. 120, 259. *Hubert v. Moul* 4 Hag. 121 (231). *Williams v. Gould*, 1 Hag. 122. *The Leather Castle* 1 Hag. Adm. 181 390. So too, a witness who is taken before the court may very well speak with greater certainty and definiteness as to the fact than other witnesses who testify at a much later time. *In Jephson v. Swabs* 180 186. Discrepancies will always occur in the testimony of the witnesses when cross-examined to a thousand minutiae, but the rule is not to be applied to the facts of the case. *Turner v. Hand*, 1 Will. Tr. 88 (101).

of what they relate" *Per Solicitor General Sir Robert Gifford, arguendo in 32 How St Tr 573* But to such an argument an Indian Court observed "No doubt, it may be contended that if the witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken, or effectually taken in such cases and discrepancies are not less infirmative of the testimony, because a greater sagacity on the part of the witnesses would have avoided them. *Queen v Kahu Patil, 11 B H C R 146* This argument was also met by *Judge Toth of the Supreme Court of New Brunswick* thus. It may be argued that this shows there was no preconcert between the parties as to what they should tell. In my opinion it proves nothing of the kind. For if it were possible to believe that this story was manufactured it would equally be easy to believe that it was agreed that each witness should vary the account in order to avoid suspicion. *Conmy v Caraque, R Co, 29 N Buns 42, 436*

Sometimes however discrepancies are so startling, as to make it impossible to attribute them to the ordinary sources inattention or want of memory. *Moore on Facts § 724* It is a safe observation of *Sir John Vinhol* that corrupt witnesses may preconcert leading circumstances of a transaction, and that where a conspiracy to commit perjury exists it will more probably and more decidedly be detected upon some broad collateral fact than upon the transaction itself. *Bydges v King 1 Hag Eccl 256*

Oral evidence must be direct

**60** Oral evidence must, in all cases whatever, be direct, that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it,

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it,

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner,

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable

Provided also that, if oral evidence refers to the existence of condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection

**Principle** The first degree of moral evidence and that which is most satisfactory to the mind, is afforded by our own senses, this being the direct evidence of the highest nature. Where this cannot be had as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy for this may not be provable by direct testimony but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to he should be confined to those lying in his own knowledge, whether they be things said or done and

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should not testify from information given by others—however worthy of credit they may be. For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should if possible be subjected to the ordeal of cross examination, that it may appear what were his powers of perception his opportunities for observation his attentiveness in observing the strength of his recollection and his disposition to speak the truth. But testimony from the relation of third persons even where the information is known cannot be objected to this test nor is it often possible to ascertain through whom, or how many persons the narrative has been transmitted from original witness of the fact. *Greenleaf Ev* § 98 "The administration of an oath furnishes some guarantee for the sincerity of the opinion and the power of cross-examination gives an opportunity of testing the foundation and the value of it." *Per Colman J in Wright v Tatham* 7 Ad & E 313=5 Cl & F 689 "It is a general principle in the law of evidence that hearsay from a person not a party to the suit is not admissible, because such person was not under oath and the opposite party had no opportunity to cross examine." *Swift C J in Chapman v Chapman* 2 Conn 348 *Gresham Hotel Co v Manning* Ir R 1 C L 192, 191 notes under § 32 pp 464—467 *supra*

**Hearsay evidence, meaning of—and why it is discarded.** The term 'hearsay' is used with reference to that which is written, as well as that which is spoken and, in its legal sense it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself but rests also, in part on the competency of some other person. Hearsay evidence, as thus described is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better which might be adduced in the particular case is not the sole ground of its exclusion. Its extrinsic weakness its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible. *Per Marshall C J in Yma Queen v Hepburn* 1 Cranch 290, 295 296 *Davis v Wood* 1 Wheat 68 *R v Fusell* 3 T R 411 Subject to these qualifications and seeming exceptions the general rule of law rejects all hearsay reports of transactions whether verbal or written given by persons not produced as witnesses. The principle of this rule is, that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony namely that oral testimony should be delivered in the presence of the Court or a Magistrate under the moral and legal sanction of an oath and where the moral and intellectual character, the motives and deportment of the witness can be examined and his capacity and opportunities for observation and his memory can be tested by a cross-examination. Such evidence, moreover as to oral declarations, is very liable to be fallacious, and its value is therefore greatly lessened by the probability that the declaration was imperfectly heard or was misunderstood or is not accurately remembered or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury in which something more than the testimony of one witness is necessary in order to a conviction for where the declaration or statement is sworn to have been made when no third person was present, or by a person who is since dead it is hardly possible to punish the witness even if his testimony is an entire fabrication. *Thibault on Evd* 271 1 Phill F 205, 206 To the contrary may be added considerations of public interest and convenience forbidding the admission of hearsay evidence. The greatly increased expense and the vexation which the adverse party must incur in order to rebut or explain it the vast consumption of public time thereby occasioned the multiplication of collateral issues tried by the jury and the danger of losing sight of the main question and of the justness of the case if this sort of proof were admitted are considerations of too grave a character to be overlooked by the Court or the Legislature and it remains the question of charging the rule. *Yma Queen v Hepburn* 1 Cranch 290, 296 *per Marshall C J* *Greenleaf Ev* § 98 (a)

**Oath** One of the objections against Hearsay evidence is that it is not given on oath by the person who has got personal knowledge of a fact. But the utility of oaths in any shape has been strongly questioned. *Bentley Jud. Ev.* Bk 2, ch 6. The good man, it is sometimes said, will speak the truth without an oath, while the bad man needs at its obligation. To this the following answer has been given. 'It must be owned great number will speak truth without an oath and too many will not speak it without one. But the generality of mankind are of a middle sort—neither so virtuous as to be safely trusted in cases of importance on their bare word, nor yet so abandoned as to violate a more solemn engagement. Accordingly we find by experience that many will boldly say what they will by no means adventure to swear, and the difference which they make between these two things is often indeed much greater than they should, but still it shows the need of insisting on the strongest security. When once men are under the awful tie and as the scripture phrase has it, have bound their souls with a bond (Numb XXX, 2), it composes their passions counterbalances their prejudices and interest—makes them unmindful of what they promise and careful what they assert, puts them upon exactness in every circumstances, and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words if it were not for the solemnity of this religious act.' *Archbishop Secker as cited in Ram on Facts Best Ev.* § 59.

**Cross examination and confrontation** Another essential requirement of the Hearsay rule as just examined, is that statements offered testimonially must be subjected to cross examination. But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test. The main purpose of confrontation is for facilitating cross-examination. But it also involves a subordinate and incidental advantage, namely the observation by the tribunal of the demeanour of the witness on the stand as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential & it may be dispensed with when it is not feasible. Cross examination however, the essential object of confrontation remains indispensable. It is enough to note here that, so far as confrontation is an indispensable element of the Hearsay Rule it is merely another name for the opportunity of cross examination. *Wigmore* § 1365. The policy of the Anglo-Indian system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of the law. The belief that no safe guard for testing the value of human statements is comparable to that furnished by cross examination, and the conviction that no statements (unless by special exception) should be used as testimony until it has been proved and supplemented by that test, has found increasing strength in lengthening experience. Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross examination have availed to nullify its value. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. A lawyer can do anything with a cross examination,—if he is skilful enough not to impale his own cause upon it. *Wigmore* § 1367.

**Scope of the section** The expression 'it must be evidence' in paras 2 & 3 and 4 of the section means 'the oral evidence must be evidence'. *Whitley Stokes Vol II* p 889. So also the word 'it' after the words 'saw', 'heard' or 'perceived' in paras 2 & 3 and 4 respectively means the 'fact deposed to'. *Neellanto v Juggobandhu* 12 B L R App 18 (19). *Whitley Stokes Vol II* p 889. The first four paragraphs of this section have been supposed to have been intended to exclude that kind of evidence which is called 'hearsay'. *Malby* Lr p 52. The effect of the section is subject to the proviso to exclude opinions given at second hand. *Cum* Lr 11th Ed p 146. The word 'must' in paragraph (1) imposes a duty on the Court to exclude all oral evidence that is not direct whether the party against whom it is tendered objects or not. *Whitley Stokes Vol II* p 889. The three first cases put refer to fact the fourth to evidence of opinion, as for instance evidence of experts under section 45 or of any of the classes of witnesses under section 46. As a general rule witnesses it will be remembered, in their examination in chief must confine their statements to



**S 60.** facts within their own knowledge. There are certain exceptional matters to which they are allowed to express their opinion. See ante. The competency of the witness as to the three first cases is to necessitate the production, as a witness, of the only person who (a) saw (b) heard (c) touched, tested or smelt the fact to which the evidence is required. The evidence in other words must be immediate. It may not be delivered through a medium immediate, second hand or to use the exploded technical language, hearsay. A who saw, heard, etc., must be produced. The fact cannot be proved through the medium of B who did not see himself etc. but is prepared to swear that A told him that he had seen, heard, etc. So with respect to the fourth case, opinion evidence, when such testimony is admissible this section necessitates the production of the witness who holds the opinion it excludes the evidence of any witness who can merely say that he has heard another express such opinion. *Not* *Fit* p 240. This section says that oral evidence must be direct. *Kalathur v Ma* 11 3 Bur L J 172=2 Bang 90. Hearsay evidence is inadmissible to prove a fact which is deposited to on fear etc. but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. *Per* *Utharamanga v Appalachenayulu*, 97 Ind Cas 783=24 L W 227=A I R 1926 Mad 1003. Even if newspapers are admissible in evidence without formal proof the paper itself is not proof of its contents. It would merely amount to an anonymous statement. *Bawa Saur v Emperor* 7 Ind L J 261=58 Ld Cas 22=26 Cr L J 1078=26 P L R 566=A I R 1925 Ind 299.

**Evidence of a person who saw it or heard it.** "The witness must state what he had seen and heard he was an 'oyant et vaillant' Theyer Pre Er 724. Thus a favourite passage found in several works in the 11th century. It seems agreed that what another has been heard to say is no evidence because the party was not on oath also because the party who is affected thereby has not an opportunity of cross examining. *Baron's* *Blodgett v. Hawkins* Pl Cr II, 96, B II, C-46 = 44 *Craig v. Inglesea*, 17 How St Tr 1160, Gr 1 Er 599(a). So *Abbott C J* explained the Hearsay rule as the general rule of not receiving evidence unless upon oath and without the opportunity for cross examination. *Doe v Ridgway* 4 B & Ald 34. So "the general rule is that one person cannot be proved to testify as to what another person has declared in relation to a fact within his knowledge as bearing in the issue. It is the familiar rule which excludes hearsay. The reasons are obvious and they are two. First because the ascertaining of facts does not come to the jury sanctioned by the oath on whose knowledge it is supposed to rest and, secondly, because the party upon whose interests it is brought to bear has no opportunity to cross examine him on whose supposed knowledge and veracity the truth of the fact depends. *Per Shaw C J* in *Warren v Nichols*, 6 Mete 261. The rule is thus stated by *Kent C J* in *Coleman v Southwick*, 9 John 39. Why not produce S to testify what he told the defendant instead of resorting to a bystander who heard what he said. Hearsay testimony is from the very nature of it attended with all such doubts and difficulties and it cannot clear them up. A person who relates a hearsay is not obliged to enter into any particulars to answer any questions to solve any difficulties to reconcile any contradictions to explain any obscurities to recover any ambiguity. He entrenches himself in the simple assertion that he was told so and he eschews the entire burden on his dead or absent author. The plaintiff by means of this piece of evidence would be taken by surprise and be precluded from the benefit of a cross-examination of S as to all those material points which have been suggested as necessary to throw full light on his information. *Wignall v. Pym* 10 L J 100. So hearsay evidence is not receivable when there is better evidence. *Pym v. Oliva* 5 W R Act X Rul 30. It is not intended by this section to exclude circumstantial evidence of things which can be seen heard or felt. *Veri Kan v. Paul v. Juggobhuloo Ghosh* 12 B L R App 18. This rule is applied to testimonial assertions only. It happens in many cases that the very fact in controversy is whether such things were written or spoken and not whether they were true. In such cases it is obvious that the writings or words are not within the meaning of hearsay but are original or independent facts admissible in proof of issues. When the assertion of A that fact X exists is offered

for the purpose of inducing the tribunal to believe that fact X exists because A says that it does. A's utterance is offered testimonially, i.e. as if A were a witness to fact X, and the hearsay rule here requires that A's assertion, to be receivable, must be under oath and subject to cross examination. But if A's assertion is offered not as evidence that the fact asserted in it exists—or, as is sometimes and less accurately said, irrespective of the truth of the assertion,—but in some other aspect—for example, as showing that B heard what A said, or as being a part of a contractual act—then it is not obnoxious to the Hearsay rule and stands or falls according to such other evidential rules as may affect it. *Greenleaf v. Mears* § 100. But so far as testimonial assertions are concerned, "all facts except the contents of documents may be proved by oral evidence" which must in all cases be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testified. *Steph. Intro* p. 144. If therefore A a witness had been told something by B and A were asked what B had told him, the evidence of A would refer to a fact which could be heard and A is a witness who says he heard it; this section, therefore would not exclude it. *Martby v. Evans* p. 52. A statement made by an accused person immediately after a murder of what the deceased told him is relevant as showing his state of mind, but to amount to proof of what the deceased said it must be the evidence of a witness who says he heard it. *Kakar Singh v. Emperor* 25 Cr. L. J. 1005=81 Ind. C. 717=1924 Lah. 733. Section 60 of the Evidence Act says that oral evidence must in all cases be direct. If a person by merely seeing a document possibly a document in a language which he does not understand, or possibly a document which he is unable to read being illiterate, deposes to the contents of the document merely from what other people have told him about it he is giving hearsay evidence. The man who reads out the document to him would certainly be entitled to give evidence of its contents. But another person who repeats what is read out to him is giving hearsay evidence of what would be legitimate secondary evidence were it before the Court. *Kalender Ammal v. Ma Ma*, 84 Ind. C. 175=3 Bur. L. J. 172=A. I. R. 1924 King. 363. Evidence of rumour, reports and information given is mere hearsay evidence and as such wholly inadmissible as evidence of general repute. *Aga v. Crown* 1 B. L. R. 7. The admission of hearsay evidence is prohibited. *Queen v. Kali* 7 W. R. Cr. 2, *Rajoni v. Asan* 2 C. W. N. 672, *Queen v. Putambur* 7 W. R. Cr. 25, *Amam Ali v. King Emperor*, 13 O. C. 309=8 Ind. C. 379=11 Cr. L. J. 631, *Queen Empress v. Aga Ta*, L. B. R. (1872-1892) 350. *Queen Empress v. Laju Bhai*, 1 Bom. L. R. 433, *In re Pathalinga* 2 Weir 762. In order to convict a person under s. 498 I. P. C. mere statements of witnesses that the complainant and his wife lived as husband and wife are not sufficient, it is necessary that the facts constituting a valid marriage should be proved in accordance with s. 60 of the Evidence Act. *Empress v. Arshed Ali* 13 C. L. R. 125.

**When opinion is admissible.** It is admissible evidence for a witness to give his opinion on the existence of a family custom and to state as grounds of that opinion information derived from deceased persons. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. *Gairamudhuja v. Suparamudhuja* 23 A. 37=5 C. W. N. 33. P. C. A person holding the opinion must be called because no one can know that except the person himself and those whom he has informed of it. *Martby v. Evans* p. 53. So when opinion evidence is admissible the witness who holds the opinion must be produced. A witness cannot be allowed to say that he has heard another express such an opinion. *Nort v. F.* 240.

**Proviso I.** There is no previous section under which the opinion of a dead expert can be given in evidence (rule s. 32). According to English law, medical and other treatises are not evidence whether the author be dead or alive. *Collier v. Simpson*, 3 C. & P. 71. Section 45 refers apparently to living witnesses. This novel section however makes any book of science published for sale evidence if the author be dead or under any of the circumstances specified in section 32 which render his production impossible or impracticable. *Nort v. F.*

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210 It must be remembered in regard to foreign law that by s 38 certain books are always admissible. *Mailby J* 53 Under the provisions of the penalty with paragraph of s 57 and of the first proviso of s 60 of the Evidence Act *Jaylor Medical Jurisprudence* may be referred to *Hall v Impress*, 12 G L R 86 *Hurry (Horn v Impress)* 10 C 113, see also *Hove v Hove*, 93 M L J 591 (1 B) *Granade v Com of Calcutta* 22 C W N 745 = 28 C L J 37 = 45 Ind Crs 93 But in all cases such reference is not allowable *Emperor v Purna* 28 C W N 59 So the obligation of the Court to allow pages to be read from treatises is since the passing of the Act, unquestionable, provided (1) that the opinion is that of an expert, (2) that the treatise be one commonly offered for sale, and (3) that the writer cannot be produced without unreasonable delay or expense *Cun Pi* 215

**Proviso II** Proviso 2 relates to those cases in which secondary evidence is permitted to be given on account of the great inconvenience or impracticability of producing the original. Thus inscriptions on walls, monuments, surveys marks and the like are proved by copies or oral testimony. *Mortimer v McCallan*, 6 M & W 68 see also *Cobden v Bolton*, 2 Camp 109, *R v Finney* 6 C & P 359 *Doe v Cole* 6 C & P 349, *Bartholomew v Stephens* 8 C & P 724 *Sayer v Glossop* 2 Exch 109 411, *Jones v Parllon* 9 M & W 65 But productions should not be required where the written characters exist on one thing so firmly fixed to the reality that its removal for production would be impracticable under the circumstances. *Wigmore* § 1214 But when it is removable it ought to be produced if the Court desires its production. *R v Edy Wills* *Cu Ev* 212 In *Jones v Parllon* 9 M & W 65 = 1 Dowl Pr N S 67, production was required of a notice in a carrier's office painted on a board fastened by a string to a nail. In that case *Parle B* laid down the law thus: "The exceptions (cover things) not easily removed as in the case of things fixed in ground or to the free hold for the law does not expect a man to break up his free hold for the purpose of a notice into Court." *Wigmore* § 1214 So power is given to the Court to call for original if the removal of the thing is not a physical impossibility. *Nort Li* 240

## CHAPTER V OF DOCUMENTARY EVIDENCE

**Documentary evidence** There is practically no controversy as to the meaning of the word document, because a definition of the term is given in the Act (*vide s 3 supra*). Stephen defines documentary evidence as "document produced for the inspection of the Court or the Judge." *Steph on Ev* Art 1 Documents being inanimate things, necessarily come to the cognizance of the tribunals through the medium of human testimony, for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses who are said to be living proofs (*probatio viva*). *Best Ev* § 216 The superiority in performance and in many respects in trustworthiness of written over verbal proofs must have been noticed from the earliest time for *audita pevit litera scripta manet*. The false relations of what never took place and even in case of real transactions of witnesses the imperfect recollections and wilful misrepresentations of witnesses added to the certainty of the extinction sooner or later of primary source of evidence by their death—show the wisdom of providing some better or at least more lasting, mode of proof for matters which are susceptible of it and are in themselves of sufficient consequence to overbalance the trouble and expense of its attainment. *Best Ev* § 60 I would sooner trust the smallest slip of paper for truth than the strongest Georgia in Mallin *Cullen* 5 G 1 341 (319) (1m) The memory of men as to facts is not satisfying to the mind as a writing, in an investigation involving past events. *Per Bell J in Hotaler v Parler*, 42 Iowa 80. In *Boucharlat v Maharajah Hitharam Singh* 7 M L A 148 at p 156, *Dr Iushing* observed "It has been also said that this defence stands exclusively upon oral evidence and though to a considerable degree that observation may be

true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon proof of a given instrument, but, there is a clear distinction and not an unimportant one between pleading a written instrument, as in answer to a demand, and the setting up a defence founded exclusively upon oral evidence, for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, might be liable to all the imputations which are in these cases cast upon it, but where the defence is rested upon a written document as a release there is an essential difference, for its genuineness on the contrary, may be shewn by many facts and circumstances very different from mere oral evidence, and, moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence. Oral testimony, depending on the memory of witnesses, is not a reliable as written or documentary evidence. *Per Orton C J in Thomas v Paul* 87 Wis 607 (Am). Recollections are sometimes dim, and impressions deceitful and illusory but written words stand and speak a uniform language and as such documentary evidence is more reliable than oral evidence. *Per Chancellor Kent in Hart v Ten Eyck*, 2 Johns Ch (N Y) 82. So where there is a direct conflict in the oral testimony, documentary evidence such as the correspondence between the parties becomes of paramount importance, if pertinent it should be regarded as controlling and in every way more satisfactory and convincing than the recollection of witnesses as to conversations which occurred a long time before. *J S Toppin Co v M C Laughlin*, 120 Fed Rep 705, 706 (Am).

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Three distinct questions with regard to documentary evidence. There are three distinct questions which are dealt with in the Act in regard to that kind of evidence which is called documentary. First there is the question how the contents of the documents are to be proved. Secondly there is the question how the document is to be proved to be genuine. Thirdly there is the question how far and in what cases oral evidence is excluded by documentary evidence. The first question is that dealt with in these sections, but the matter is also affected by s 59 and also by s 22. Taking s 59 with ss 61 and 64, the result may be stated as follows—The contents of a document must in general be proved by a special kind of evidence called, 'primary evidence' but there are exceptional cases in which it may be proved otherwise. Evidence used to prove the contents of a document which is not 'primary', is called secondary. *Marrby Fr* pp 56, 57.

Proof of contents of documents

**61** The contents of documents may be proved either by primary or by secondary evidence

Primary evidence

**62** Primary evidence means the document itself produced for the inspection of the Court

*Explanation 1*—Where a document is executed in several parts, each part is primary evidence of the document

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it

*Explanation 2*—Where a number of documents are all made by one uniform process, as in the case of printing lithography, or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original

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## Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other but no one of them is primary evidence of the contents of the original.

Secondary evidence includes—

- (1) certified copies given under the provisions hereinafter contained,\*
- (2) copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies,
- (3) copies made from or compared with the original
- (4) counterparts of documents as against the parties who did not execute them,
- (5) oral accounts of the contents of a document given by some person who has himself seen it

## Illustrations

(a) A photograph of an original is secondary evidence of its contents though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, but the copy not so compared is not secondary evidence of the original although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

**Scope of the section 61** This section lays down that the content of documents may be proved either by primary or by secondary evidence, and I understand the rule to mean that there is no other method allowed by law for proving the contents of documents. Section 62 defines the meaning of primary evidence. Section 63 describes what constitutes secondary evidence within the meaning of the Act. *Per Mahmood J in Ram Prasad v. Raghunandan Prasad*, 7 A 138 (713). But this section must be read subject to the rule which exacts original and rejects derivative evidence and prescribes that no evidence shall be received which shows on its face that it only derives its force from some other which is withheld. *See Part B in Doe d. Welsh v. Langfield* 16 M & W 427. *See also Gilbert v. Ross* 7 M & W 102, 106, *Mardonell v. Evans*, 11 C B 930, *per Maule J*, *Best Ev* § 89. *Velus (or Salus) est priore fontes quam derivatos* (It is better to seek the fountains than to follow the rivulets). *C. I* 307 h, *Best Ev* § 89. The terms 'primary' and 'secondary' evidence are used by English law in the limited sense of the original and derivative evidence of written documents, the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely, as when supposed oral evidence is delivered through oral and through various sorts of evidence comprised in practice under the very inadequate phrase

\* See s 76 infra

hearsay evidence *Best* § 89 All private documents must be produced, and the execution of them generally be proved, or their absence must be duly accounted for and their loss supplied by secondary evidence *Greenl Ev* 538

**Primary evidence** Primary evidence is that which is called as the best evidence, or that kind of proof which, under any possible circumstances affords the greatest certainty of the fact in question and it is illustrated by the case of a written document the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. If the execution of an instrument is to be proved the primary evidence is the testimony of the subscribing witnesses if there be one. Until it is shown that the production of the primary evidence is out of the party's power no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed secondary. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract and not to the peculiar circumstances under which the party in the particular cause or trial may be placed. It is a distinction of law, and not of fact, referring only to the quality, and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary but primary. And though all information must be traced to its source if possible, yet if there are several distinct sources of information of the same fact, it is not ordinarily necessary to show that they have all been exhausted before secondary evidence can be resorted to *Greenl Ev* § 84. According to the Indian Evidence Act primary evidence means the document produced for the inspection of the Court (s 62). Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it, and secondary evidence as against the other parties (See s 61, cl 4) *Whitely Stotes Anglo Ind Code Vol II p 290*. The following definition of primary and secondary evidence is given by Lord F. J. in *Lucas v Williams* (1892) 2 Q B 113 116 "Primary and 'secondary' evidence means this primary evidence is evidence which the law requires to be given first, secondary evidence is evidence which may be given in the absence of better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence."

**Secondary evidence** Primary or best evidence is that which affords the greatest certainty of the fact in question, thus a deed or other written instrument is primary evidence of its contents. Secondary evidence is that which is inferior to primary evidence, and which upon its face shows that better evidence exists, thus a copy of a written instrument or the recollection of a witness as to its contents *Burr Jones* § 8 (c). "The distinction between the 'best evidence' rule is first required and the inferior evidence that is allowed when the best is unattainable has come to be designated (apparently through the current usage of it by Mr Christian's *Essays and the Best's treatise*) by the terms primary and secondary evidence. These terms which are in themselves not value-laden factors, are open to serious objections. One is that the rule requiring the production of documents is not a rule requiring evidence but a rule requiring the thing itself to any evidence about the thing, which is not primary evidence, in any significant sense and the term primary evidence is not the true nature of the rule's effect. The other objection is that the rule is understood to group together all rules exacting the production of documents when it is available, it groups rules which are essentially distinct,—for the Hearsay rule and the Attestation rule and the Documentary Original rule cannot be thus united. The result is that the Documentary Original rule cannot be thus united with the Hearsay rule and the Attestation rule. It is abandoned as more likely to confuse than to clarify the system of evidence. *Higmore* § 117."

**Scope of section 62** Primary evidence is that which is called as the best evidence, or that kind of proof which, under any possible circumstances affords the greatest certainty of the fact in question and it is illustrated by the case of a written document the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. If the execution of an instrument is to be proved the primary evidence is the testimony of the subscribing witnesses if there be one. Until it is shown that the production of the primary evidence is out of the party's power no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed secondary. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract and not to the peculiar circumstances under which the party in the particular cause or trial may be placed. It is a distinction of law, and not of fact, referring only to the quality, and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary but primary. And though all information must be traced to its source if possible, yet if there are several distinct sources of information of the same fact, it is not ordinarily necessary to show that they have all been exhausted before secondary evidence can be resorted to *Greenl Ev* § 84. According to the Indian Evidence Act primary evidence means the document produced for the inspection of the Court (s 62). Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it, and secondary evidence as against the other parties (See s 61, cl 4) *Whitely Stotes Anglo Ind Code Vol II p 290*. The following definition of primary and secondary evidence is given by Lord F. J. in *Lucas v Williams* (1892) 2 Q B 113 116 "Primary and 'secondary' evidence means this primary evidence is evidence which the law requires to be given first, secondary evidence is evidence which may be given in the absence of better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence."

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or multiplicate, each of these parts is the writing, because by act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken by the other, (as in the case of *patta* and *labdijut*), except where it is desired to prove specifically the signature. *Hignore* § 1233. In *Philpott v. Chare*, 2 Camp 110, *Lord Ellenborough* said: "If there are two contemporaneous writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered. See also *Doe v. Pulman* (1842) 3 Q B 62, *Colling v. Trevel*, 6 B & C 398, *Roe v. Davis*, 7 East 363. The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary as may be inferred from utterances of *Best C J* in *Munn v. Godbold*, 3 Broo 292. There the learned Judge said: "Where there are two instruments, executed in parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than the other copy, and the party who produces it and avows to whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost and another part be in existence it must be produced, but merely as secondary evidence of the part that was lost." *Hignore* § 1233, see also *Doe v. Wainwright*, 1 New & P 8. *Burchett v. Clarke*, 2 C P D 88, *Mathews v. Smallwood* (1910) 1 Ch 777. Formerly a deed was written on parchment commencing from the middle, the other part was written in a similar way, up and down from the middle. The two were then cut apart in a wavy line so that the two could at any time be identified by merely fitting them together. Hence the term *Indenture*. In such a case each was a counterpart or original as the case might be, according to the form of its execution. *Nort E* 14. In *Ludlam's Will* Lofft 362, *Mansfield L C J* said: "If you cannot prove a deed, by producing it you may produce the counterpart." Where it is the usage to make the document in duplicate or counterpart, the mortgagee taking one and the mortgagor the other, each part would be the primary evidence of the document and secondary evidence would not be admissible until the non-production of both parts has been accounted for. *Manning v. Maughan*, U B R (1892 1896) Vol II, 234.

**Explanation 1.** The expressions executed "in parts" and "in counterpart" in section 62 refer to the mode in which documents are sometimes executed. It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this the document is written out as many times over as there are parties and each document is executed, signed or sealed as the case may be by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary evidence of the contents of the document. *Moff E* p 37.

**Explanation 2 to section 62.** "A printed paper does not differ from a written one in respect to both being copies, they can alike, therefore, only be received as secondary evidence of the original under such circumstances as render secondary evidence admissible for instance if the original is shown to be lost or destroyed or to be in the possession of the opposite party, notice having been given to produce it. There is no guarantee for a printed copy being a truer copy than a written one indeed being a copy at all. *R v. Hallowell*, 12 How St Tr 82. *Nodinh v. Murray*, 3 Camp 228. But there is a far better guarantee for a number of printed paper struck off from the same machine at the same time being correct facsimiles of each other than of a number of written papers for here the draftsman or draftsmen may introduce difference impossible with the machine. In this case each machine made copy is accepted as primary evidence of all the others *inter se* (and not of the original from which they were copied), for instance, if it is desired to prove the publication of a libel in a newspaper any copy of the issue in which the libel appeared would be primary evidence of publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was

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set up, the printed paper would not be primary, but only secondary evidence of the manuscript, and admissible only under the conditions which render the reception of secondary evidence admissible. *Not in 242* Where the accused caused 500 placards to be printed and carried away 25 of them for posting, one of the remainder can be admitted to prove the contents of those posted because every one of those worked off are originals, in the nature of duplicate originals. The reason for this is as they are from the same press they must all be the same. *R v Watson, 2 Stark 116* In that case *Ellenborough L C J* said: 'An order having been given to print 500 copies *Watson* fetched away 25, by this he adopted the printing as done in the execution of an order which he had given, and when he took away 25 out of a common impression, they must be supposed to agree in the contents.' In the same case *Bayley J* said: 'The objection is that without notice to produce the original any other evidence of the contents is but secondary evidence. It appears to me that that is not the case for every one of those worked off are original, in the nature of duplicate originals, and it is clear that one duplicate may be given in evidence without notice to produce the other. If the placards were offered in evidence, in order to show the contents of the original manuscript, there would be great weight in the objection but when they are printed they all become originals, the manuscript is discharged, and since it appears that they are from the same press, they must all be the same.'

**Scope of section 63** The contents of documents must in general be proved by primary evidence and therefore it is the rule that written instruments can not be proved by copies (vide s 61). They are mere secondary evidence and are inadmissible under the general rule unless a basis is laid for the reception of secondary evidence under some of the rules stated in s 65 (*infra*). The rules have been applied to almost every class of documents deeds, negotiable instruments and commercial paper generally, chattel securities and contracts of all kinds. Thus if the original can be obtained, letter press copies are not admissible, nor photographs of writings. The rule has been applied to blue prints. A carbon copy is no more better signed or executed than a letter press copy—as a fact, the signature is not always reproduced on the carbon as it is in the press copy letter which is usually copied after signature. But where a document is executed in counterpart, each party signing only the part by which he is bound, each counterpart is the best evidence against the party signing it and his privies. As to the other party it is only secondary evidence. *Loe v Davis, 7 L R 362, Colling v Trevel, 6 Barn & C 39, Brown v Woodman 6 Car & P 206, Munn v Godbold, 3 Bing 292, De Jones v 209* This section is exhaustive of the kinds of secondary evidence admissible under the Act. Where the terms of a document were proved to be proved by a judgment containing a translation thereof in a case where it was not between the same parties or their representatives in a case where neither the translation of the document nor the statement in the judgment was secondary evidence of the contents of document. *Secretary of State, 43 M L J 37=16 L W 11=A L J 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100* *Secretary of State, 43 M L J 37=16 L W 11=A L J 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 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Clause (1) The term "certified copies" has been defined in s 76 (Copy mentioned in clause (3) are known in English law as examined or sworn copies. Every copy except those mentioned in cl (2) is in strictness an examined copy in the sense that the original and the copy have been examined or compared together by the witness, either in his own act of transcription or by taking some one's transcription and comparing it with the original. But the term examined copy has by tradition come to be associated with a copy made by a private person not the official custodian of the document. Then the terms examined or sworn are used for copies sworn to upon the stand, as correct, in distinction for certified attested or office copies i.e. copies made in the public office by the official custodian where the document is an official one. *Wigmore* § 1273. So certified copies mean copies signed and certified as correct by officials having custody of the originals. They are allowed as evidence under ss 76-78 of the Evidence Act, and are used chiefly to prove entries in register proceedings of corporations and companies, by laws and the like. *Corkle Cas Ev* 323. Certified copy of a Will is admissible in evidence, where the loss of the original evidence is proved. *Fluch Kicheela v Thelu Kicheela*, 85 Ind Cas 394 = 4 I R 1925 Mad 345 = 47 M L J 906, *Baya v Bhamoo*, 4 I R 1924 Nag 202. So a certified copy of a document is sufficient secondary evidence of the existence, conditions and contents of it but not of its execution. *Kasimulla v Gudar Koori*, 82 Ind Cas 306. A judgment turning upon the construction of a document in which there may be references to it, is not the secondary evidence of the contents of the document especially when it appears that it is itself based on secondary evidence of the document given by a party who had the original with him. *Ilva Lal v Ganesh Prasad*, 4 A 406 P C = 9 I A 64 = 11 C L R 109.

Clause (2) Letter press copies and photographs of writings are secondary evidence. *In re Foster*, 34 Mich 21. According to illustration (a) such a photograph would be secondary evidence, 'provided that you can show that the original which you wish to prove was really photographed'. *Nort Et* 21. Illustration (a) refers to the first portion of this clause and illustration (b) refers to the second portion. So under this clause a copy of such copy (compared) would be receivable as secondary evidence of the original and could not be rejected as a copy of a copy. *Id* illustration (b), *Nort Et* 243. This clause is applicable to blue prints (*Luchs etc Wfg Co v Kithledge* 242 Ill 59) as well as to carbon copies as it does not appear to be different kind of copy than that taken in the copying press. *Burr Jones* § 209. All that is required under this clause is that the copies must be made by some mechanical process which would ensure the accuracy of the copy. This accuracy is insured by printing like a graph or photograph. (*Id* Expt 2 of section 2). But an oral account of a photograph or machine copy of the original is not secondary evidence of the original. *Illustration (d)*.

Clause (3) A copy merely as a piece of paper, has no standing as evidence. In order even to be termed copy it must have the support of a witness qualified to state that it represents the contents of the original document. *Wigmore* § 1274. A party who made the copy can swear to its being a true copy. If he is not produced, then a witness must be produced who can swear to his own comparison or as sometimes two witnesses one of whom read the original with the other read the copy or the reverse. But it will save trouble to have the comparison made by one and the same person. *Nort Et* 211. *Illustration (c)* *Gilbert & Co v Young Po v Hi Shue* 81 Ind Cas 373 = 2 R 397, *Fai v Guu Kim* 9 C 99. A copy in short is merely one mode of presenting the testimony of a witness. The witness therefore must be qualified and the general principle of witness qualifications has here certain applications. A general principle for witness qualification is that he must speak from personal observation of the event or thing to be testified to, and that there be in general a witness not qualified to hire his testimony, not on his own personal observation but on imagination or inference or the hearsay of others. Upon this principle then a person who proposes to testify to the contents of a document either by copy or otherwise must have read it. *Wigmore* § 1275.

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*Peterborough v Mordaunt*, 1 Mod 94, *R v Hanon*, 4 C & P 254 256 "But a copy of a copy is no evidence, for the rule demands the best evidence that the nature of the thing admits and a copy of a copy cannot be the best evidence, for the further off a thing lies from the first original truth, so much the weaker must the evidence be" *Gilbert Evidence* 8, see also *Ram Prasad v Raghunandan*, 7 A 738=5 A W N 160, *Secretary of State v Manjeshwar*, 28 M 257 *Ibdul Ghani v Syed Ali*, 54 Ind Cas 941=1 P L I 47, *Rajah Neelammal v Nuseeb*, 6 W R 80 But certainly there is in the nature of a mediate copy nothing that makes it *per se* defective When paper A is copied into paper B and this paper into C the last is in theory as accurate a reproduction as B is There is merely the possibility that an error may have occurred in the second transcription but this possibility exists for the first also, there is merely a doubling of the total number of chances It must be concluded, then that the discrimination if any, against a mediate copy is rather in the nature of a rule of preference requiring first the use of an immediate copy, if one is available *Wigmore* § 1274 This view was adopted by *Justice Story* in *Winn v Patterson* 9 Pct 663, 677 where he observed "The remaining question then, is whether the copy now produced was proper secondary proof, entitled by law to be admitted in evidence The argument is, that it is a copy of a copy, and so not admissible and the original record might have been produced in evidence We admit that the rule that a copy of a copy is not evidence, is correct in itself when properly understood and limited to its true sense The rule properly applies to cases where the copy, is taken from a copy, the original being still in existence and capable of being compared with it, for then it is second remove from the original, or where it is copy of a copy of a record the record being still in existence by law deemed as high as the original for then also it is a second remove from the record But it is quite a different question whether it applies to cases of secondary evidence where the original is lost or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence On this point we give no opinion, because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original" Under section 57 of the Indian Registration Act, (XVI of 1908) all copies of certificates given under that section and signed and sealed by the registering officer are admissible for the purpose of proving the contents of the original See also *Baya v Bhamao*, 78 Ind Cas 865=A I R 1924 Nag 375, *Hurish v Perrett*, 22 W R 503, *Smart v Williams* Comb 247 The reason for the exclusion of such evidence is thus stated in *Stetson v Gulliver*, 2 Cu h 424 425 "If the book of the register would be evidence, a certified copy of it would have the same effect there being very little ground to apprehend any material error that cause and upon consideration of the great public inconvenience that would result from having the books of record removed from their proper place and place of security *Wigmore* § 1275

According to the orthodox English rule a copy of a copy is not a copy in evidence in as much as in the words of *Abraham B. v. Mordaunt* "it is the reception of secondary evidence if that were the case" This is the rule of the shade *Everingham v Rundell* 2 Wm & Anst 257 see also *Tillard v Shebbear* 2 Will- 366, *Laehman v Porter* 2 Duff R 121; 11 M & W 101 follows the English rule in this respect *Stetson v Gulliver* 2 Cu h 424 425 L T 47 So now a copy of a copy is not a copy in evidence as to the contents of the original *Wigmore* § 1275 23 M 257 So since the passing of the Indian Evidence Act, 1872, the rule laid down in *Unala Bahadur v Perrett* 22 W R 503 is no longer applicable *Umora* 6 B L R 502 *Maharaj v Singh* 14 M I A 453 *Pajabamurti v Singh* 14 M I A 453 *Field* p 227 But a copy of a copy is not a copy in evidence as to the parties *Narasayya v Perrett* 22 W R 503 *Konehada v Velupula* 14 M I A 453 *Field* p 227 no objection is taken in the Indian Evidence Act, 1872, that a copy of a copy, is not a copy in evidence as to the parties *appellate Court* *Field* p 227

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*Lochan v Panjit Harmath*, 1 Pat 696, *Chunagai v Dhankar*, 11 B 370, *Lal Shuman v Imrit*, 21 B 591, *Akshori Lal v Ralhal Das*, 31 C 100, *Nautani v Fatima*, 14 Ind Cas 539=216 P W R 1912. A printed copy of the deposition of a party to the former suit made in English, which deposition came up to the Madras High Court in 1900 on appeal, is admissible in evidence. As is the practice of the Madras High Court since 1900 after Government's Pre took up the printing of the High Court papers that before giving the final order for striking off it would be compared with the original *Ganapathi v Sakherayappa* A I R 1929 Mad 187. Section 63, cl 3, second portion i.e. "copies compared with the original will cover this case if the printed copy was compared with the original deposition. See also *Chandreshwar v Bisheswar*, A I R 1927 Pat 61 = 5 Pat 777.

Clause (4) Execution in counter part is a method of execution which is only adopted when there are two parties to the transaction *Markey Et al*. Where a document is executed in counter part, each party signing only the part by which he is bound each counter part is the best evidence against the party signing it and his privies [*Roe v Davis* 7 East 362, *Loring v Willemore* 13 Gray (Mass) 228, *Colling v Piccecel*, 6 Burn & C 398, *Brown v Woodman* 6 Cur & P 206. As to the other party it is only secondary evidence. *Munn v Godbold*, 3 Bing 292=11 Moore 19=2 Car & P 97], and all duplicates must be accounted for before secondary evidence is admissible. *Burr Jones* § 209. The rule that a counter part is primary evidence as against the parties executing it and secondary evidence as against the parties who did not execute it, has no application to the case where neither the lease nor the counterpart is complete in itself but supplements the other. *Baidya Nath v Kamini Kant*, 6 C L J 512.

Clause (5) The oral account of the contents of a document given by some person who has merely seen it with his own eyes but is unable to read it is not secondary evidence of the document, the word "seen" in section 63(5) of the Evidence Act means something more than the mere sight of the document, and the clause contemplates the evidence of a person who having seen and examined the document is in a position to give direct evidence of the contents thereof. *Ghore and others v Chatrapal Singh* 12 A L J 239=23 Ind Cas 11. So where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to be one who has seen the execution of the mortgage within section 63(5) of the Evidence Act. *Jani v Ram Ashori* 66 Ind Cas 557=A I R 1922 All 232. In a subsequent Allahabad case it was also held that under this clause only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. *Ramji Das v Mihir Lal* 71 Ind Cas 654=1923 A 411. But in *Pudar Singh v Brij Mangal*, 73 Ind Cas 654 it was held that as regards the letting in of secondary evidence the word "seen" in section 63(5) includes also 'read over' in the case of a witness who is illiterate and as such cannot himself read it. If it is read over to him it will satisfy the requirements of the section. In *Mihir Lal v Ramji Das*, 80 Ind Cas 959=22 A L J 864, which was an appeal from *Ramji Das v Mihir Lal* 71 Ind Cas 654 the Court consisting of Walsh J C J and Suleiman J in reversing the decision of Daniels J said: 'The question is whether the Judge was entitled to hear and believe the witness's oral account of the contents of the document. The matter came before a Judge of this Court and in a very clear judgment he has held that the District Judge was not so entitled. He rightly says: Under sub section (5) of section 63, only a witness who has himself seen a document is entitled to give evidence of it' and he goes on to say: 'this clearly implies that it must be a witness who could read the document and he follows a decision of Mr Justice Tudball in the case of *Ghore v Chatrapal Singh*, supra. After hearing the matter very fully argued we have come to the conclusion with great respect to these two Judges and we are unable to agree. The critical words in the section are 'seen' it'. The result of the decision would be for example that a highly educated person knowing several languages except German, who had seen an original document in German which had been lost and who was interested in its contents and had had them translated to him by an equally highly educated person who knew German and explained to him phrase by phrase in such a way that the English

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translation of the German contents was imprinted on his memory, could not give the contents of that document in evidence under s 63 although he had undoubtedly seen the document. The question is, has the witness seen the document? The further question whether he is able to give evidence of its contents, is a question of his credibility. With great deference to the opinion of their Lordships, it is submitted that the oral evidence in such a case would violate the well known Hearsay Rule and is clearly inadmissible under section 60 of the Evidence Act. Section 63(5) of the Evidence Act does not overrule the general principle of law that hearsay evidence is ordinarily not admissible. The law says that if it is possible, the document itself must be produced. If the document itself is produced, there can be no possibility of a mistake with regard to its terms. If the document itself cannot be produced, then the law allows secondary evidence of its contents to be given. But it is to be noted that in all forms of secondary evidence allowed by s 63 only one possibility of a mistake exists. The first three sub-sections of s 63 refer to copies made from or compared with the original. In each of the three cases there is only one possibility of a mistake. The 4th sub-section refers to counterparts of documents as against parties who did not execute them. Originally speaking it would be assumed that counterparts of a document would be a copy of the original. Then we have sub-section (5) which says that a person who has seen a document may give his account of the contents of it. Here again there is only one possibility of mistake, namely that the person's memory may play false. It is quite clear that if a person has only seen a copy of a document, there are two chances altogether and therefore evidence given by him could be of a different category to the secondary evidence allowed by law and a person who has seen a copy of a document is not entitled to give secondary evidence of the contents of the original. *Kalender v Meera Lebbai* 3 Bui L J 172=84 Ind Cas 175=A I R 1924 Rang 363. This case was affirmed by the Privy Council in *Ma Wai Kalender Inmal*, 31 C W N 621 (P C)=51 I A 61=25 A L J 65=5 Rang 18=100 Ind Cas 1=29 Bom L R 800. So the two later decisions of the Allahabad High Court reported in 22 A L J 861=80 Ind Cas 937=47 A L J 13 and 73 Ind Cas 651 are no longer good law. The phrase "oral accounts of the contents of a document by some person who has himself seen it" in this clause means oral evidence by some person who has seen those contents that is who had read the document. Evidence that the witness only saw the document and heard it read out by some one else is only hearsay so far as the contents are concerned and does not fulfil the requirements of section 60 as to oral evidence generally, viz., if it refers to a fact which could be seen, it must be evidence of a witness who says he saw it. The subject matter of a document is a fact which can be seen only by reading it. *Ibid*, see also *Ram Paray v Ram Raghubir*, 112 Ind Cas 310 *Plup Li* 511, *Kanyatal v Pyrabai* 7 B 139. Statements of persons who merely heard judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by some one who had read the one or the other. *Maung Chai v Maung Tha*, A I R 1923 Rang 113. A statement made by a party or his authorized agent in a previous suit, in which he refers to a document which is against his interest is secondary evidence of that document. *Rohi Pal v Uday Bhan*, 53 Ind Cas 667. A translation of a document is not secondary evidence. *Ambalavana v Kupparchi* 4 L W 330=35 Ind Cas 20. Where in prior proceedings between the parties one of them admitted the existence and contents of a mortgage deed, such admission constituted a good secondary evidence within the meaning of this clause. *Bahadur v Madho*, 36 Ind Cas 696. An objection to the admission of secondary evidence, if not raised at the time it is admitted cannot be allowed to be raised in special appeal. Where the plaintiff attempted to prove the contents of certain documents by oral evidence, but the evidence fell short of what is required under s 63 of the Evidence Act, only because the witness was not properly questioned it would be unjust to visit the plaintiff with the penalty of the dismissal of his claim, simply on account of the inefficiency of the legal adviser who conducted the case. *Lochan Singh v Hit Narain*, 24 W R 232. Survey and Settlement Report which was based on a

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*jamabandi*, the original of which was not produced and which was not exhibited in evidence cannot be treated as secondary evidence of the contents of the *jamabandi* statement under cl (5) of s 63 or under any other section of the Evidence Act. *Surendra Nath v Kamalhya Naram*, A I R 1930 P C 4. Oral evidence cannot be substituted for any writing, the existence of the content of which are disputed, and which is material to the issue between the parties and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain resolutions were published in the news papers (*R v O Connell*, Arm & T 163), neither can he be questioned as to the content of his account books, but in both these cases the papers and the books, as being the best evidence must be produced. *Taylor* § 400, see also *Bonnery v Sutanath* 24 Bom I R P C 565.

No preference as regards any kind of secondary evidence. "Another general rule says Mr *Taylor* "which governs the production of secondary evidence whether of documents or of oral testimony, is, that the law recognizes no degrees in the various kinds of such evidence. *Doe v Ross*, 7 M & W 102, *Hall v Ball*, 10 L J C P 285, *Brown v Woodman*, 6 C & P 26. *Jeans v Heedon*, 2 M & Rob 486" *Taylor* El § 550. In *Doe v Ross* 7 M & W 102, the question was whether an attested copy of a deed was preferred to the testimony of one who had read it. In answering the question in the negative, Lord Abinger, L C B said "Upon examination of the cases and upon principle, we think there are no degrees of secondary evidence. The rule is that if you cannot produce the original you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better access to the jury from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another." In the same case *Milison B* said "The objection (to secondary evidence) must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case, the existence of an original does not show the existence of any copy nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know nothing but the original and the other side at any trial may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him and he would be bound to account for them all." *Hignett* 1263. Similarly in *Brown v Woodman* 6 C & P 266, *Parke J* said "There are no degrees of secondary evidence." See also *Sugden v Lord St Leonards* L R 1 P D 151 *Brown v Brown*, 27 L J Q B 173, *Doe v Cole*, 6 L J C P 339 *Fisher v Samuda*, 1 Camp 193 *Hensington v English* 8 Ex 274, 279. But in some of the old English cases the rule laid down was otherwise. In *Tudams v Hill* Loft 362 *Lord Mansfield C J* said "If you cannot prove a deed by producing it you may produce the counterpart, if you cannot produce the counterpart, you may produce a copy, even if you cannot prove it to be true copy, if a copy cannot be produced, you may go into the parol evidence of the deed." This rule was also adopted by *Lord Hardwicke* L C in *Ormerbund v Baker* 1 Atk 21 (19), and in *Villiers v Villiers* 2 Atk 27. The English rule on the subject is now settled by *Doe v Ross* *supra* and no preference is now accorded to a copy for proving deeds and other documents. But in America the controversy is not yet set at rest. The following extracts from *Proof of Evidence* § 743 (g) states the controversy admirably. "Whether the law recognizes any degrees in the various kinds of secondary evidence, and requires the parties to show that which is deemed less certain and satisfactory for the purpose of proving the deed, is a question which is not perfectly settled. On the one hand the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence, until the primary is produced for, and it is said that the same reason which requires the production

of a writing if within the power of a party, also requires that if the writing is lost, its contents shall be proved by a copy, if in existence rather than the memory of a witness who has read it, and that the secondary proof of a lost deed ought to be marshalled into first the counterpart, secondly a copy, thirdly, the abstract etc. and, last of all the memory of a witness. On the other hand it is said that this argument for the extension of the rule confounds all distinction between the weight of evidence and its legal admissibility, that the rule is founded upon the nature of the evidence offered and not upon its strength or weakness, and that to carry it to the length of establishing degrees in secondary evidence as fixed rules of law would often tend to the subversion of justice and always be productive of inconvenience. If for example proof of the existence of an abstract of a deed will exclude oral evidence of its contents, this proof may be withheld by the adverse party, until the moment of trial and the other side be defeated or the cause be greatly delayed, and the same mischief may be repeated through all the different degrees of evidence. It is therefore insisted, that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof and where the evidence is not of this nature it is to be received notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory, leaving the weight of the evidence to be judged by the jury, under all the circumstances of the case (4 Monthly Law Mag 265-279). The American doctrine as deduced from various authorities seems to be this, that if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exist the party will be required to produce it, but that where the nature of the case does not of itself disclose the existence of such better evidence the objector must not only prove its existence but also must prove that it was known to the other party in season to have been produced at the trial. It is believed that the rule laid down in *Doe v Ross* 7 M & W 102, is more philosophical and harmonizes better with the progress of the more enlightened jurisprudence of the age on the subject of the admissibility of evidence—that is to curtail and limit the objections to the competency and let the evidence in to go to the jury to judge of its weight or credibility. In every case where a party kept back a more satisfactory kind of evidence that was in his power to have produced and within his knowledge it would operate strongly against such as he had offered of less certainty, with the jury. *Lewis v St Antonio* 7 Tex 283 (315) (1m), *Wigmore* § 1268.

Proof of documents  
by primary evidence

**64 Documents must be proved by primary evidence except in the cases herein-after mentioned**

**Principle** A writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed, or its absence is otherwise satisfactorily accounted for. *Lynch v Clark* 3 Salk 151. "The reasons are simple and obvious enough as dictated by common sense and long experience. They may be summed up in this way. (1) As between a supposed literal copy and the original the copy is always liable to errors on the part of the copyist whether by wilfulness or by inadvertence, this contingency wholly disappears when the original is produced. Moreover the original will contain, and the copy will lack, such features of handwriting, paper, and the like as may afford the opponent valuable means of learning legitimate objections to the significance of the document. *Wigmore* § 1179. In *Steyner v Drottach* Skinner 623 Holt C 1 said that though an original may be evidence yet a copy would not, for it is liable to the mistake of the transcriber. As between oral testimony, based on recollection, and the original the added risk almost the certainty exist of error of recollection due to the difficulty of carrying in the memory literally the tenor of the document. *Wigmore* § 1179. See also *Slatterie v Pooley* 6 M & W 661, *Doe v Ross* 7 M & W 102, *Layton v Rogers* 1 P & F 391 96, *Incent v Cole*, M & M 257, *Macdonnell v Evans* 11 C B 912.

**Origin of the Rule** The rule that if one would prove the contents of a writing, he must produce the writing itself or show a legally sufficient reason for

**S 64** not doing it, is often called the 'Best Evidence Rule'. This phrase is an old one. During the latter part of the seventeenth century and the whole of the eighteenth while rules of evidence were forming, the Judges and text writers were in the habit of laying down two principles, namely, (1) that one must bring the best evidence that he can and (2) that if he does this, it is enough. These principles were the beginnings in the endeavour to give consistency to the system of evidence before juries. They were never literally enforced,—they were principles and not exact rules, but for a long time they afforded a valuable test. As rules of evidence and exceptions to the rules became more definite, the field for the application of the general principle of the 'Best Evidence' was narrowed. But it was often resorted to as a definite rule and test in a manner which was very misleading. This is still occasionally done as when we are told in *McAnnon v Bliss*, 21 N. Y. p. 219 that 'it is a universal rule founded in necessity, that the best evidence of which the nature of the case admits is always receivable. Always the chief example of the Best Evidence principle was the rule about proving the contents of a writing. But the origin of the rule was older than the Best Evidence principle and that principle may well have been a general one from the rule which appears itself to be traceable to the doctrine of proof. This doctrine required the actual production of an instrument which was set up in pleading. In like manner it was said, in dealing with the jury, that a jury could not specifically find the contents of a deed unless it had been exhibited to them in evidence. And afterwards when the jury came to hear testimony from witnesses, it was said that witnesses could not undertake to speak to the contents of a deed without the production of the deed itself.' *Thayer Cases* 2d Ed. 778-779.

**Scope of the section** The rule is that the best evidence must be used in a case. It can be had first the original if that cannot be had you may be let in to prove it any way, and by any circumstances the nature of the case will admit. This extends not only to deeds but to records so far I mean as they may be given in evidence to a jury for in point of proof it is another thing. But for the law requires a proper foundation to be laid, and two things are necessary. First to prove that such a deed once existed, and there is sufficient evidence that such a deed, to a certain intent did once exist by the answer that has been read which I do not rely on as evidence of all the uses of the deed, but as an admission that such a deed and uses something of that nature once existed. The next step is to show some ground that the deed is lost or, being in the hands of an adversary's hands cannot be come at. *Per Lord Chancellor in Whitfield v Jausset* 1 Ves. 387. In *Grant v Gould* 2 H. Bl. p. 104 Lord Loughborough said "That all Common Law Courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree. The rule as to the use of deeds as evidence is founded partly on the rules of common law but modified to some extent by the registry system established here by Statute. The theory is this that an original deed in its nature is more authentic and better evidence than any copy can be, that a copy in its nature is secondary and therefore in all cases original deeds should be required if they can be had. *Per Shaw C. J. in Commonwealth v Emery*, 80 (4th). "The general rule was that the contents of a writing or document or portable article could not be proved without its production or without showing it to be in the possession or power of the prisoner or opposite party and on notice to him to produce it. *Per Channell B. in Regina v F. & F. & F.* 336. So the contents of every written paper are according to the well established rules of evidence to be proved by the paper itself and by that alone if the paper be in existence. *The Queen's Case* (per Abbott C. J.) 2 B. & B. 294. The reason of the rule is thus stated in *Dr. Leyfield's Case*, 10 Co. Rep. 92 (a). And therefore every deed ought to approve itself and to be proved by others—approve itself upon its showing forth to the Court in two manners: (1) As to the composition of the words be sufficient in law and the Court shall judge that (2) that it be not raised or interlined in material points or place (3) that it may appear to the Court and to the party if it was, upon conditional limitation of power of a revocation in the deed. And the same are the reason of the law that deeds pleaded in Court shall be showed forth to the Court."

So when the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents. *Per Coleridge J* in *R v Francis*, L R 1 C C R 128 (182). But this rule should not be applied so broadly as to require the production of any thing which is not a document. The rule is applicable to all kinds of writings. The original doctrine of proof affected only records and instruments under seal and applied in civil cases only, but by a gradual development the rule requiring production in evidence came to be settled as including in its scope any and every kind of document from a record or a deed to a letter or a memorandum and is applicable equally in criminal and civil cases. *Wigmore* § 1183. It should be added that the series of English rulings in which it was held in certain prosecutions for sedition that the former bearing inscriptions alleged to import treasonable purpose need not be produced (*Jude Fletcher's Trial* 18 How St Tr 353, *Lord George Gordon's Trial* 21 How St Tr 513, *R v Hunt* 1 State Tr N S 171, *R v Duchurst* 1 State Tr N S 529, 42 591, *R v Fussey* 6 C & P 81, 86, *R v Stephens*, 3 State Tr 1189, 1196) must be regarded as wholly un sound. The very difference that existed, in some of the trials in the testimonies of different witnesses as to the inscription's precise terms, and the materiality in such trials of these differences should indicate the propriety of applying the rule, within discretionary limits and it may be thought that those rulings would to day not be followed even in England. *Wigmore* § 1182. *R v Hinley* 1 Cox Cr 13. *Butler v Mountgarret* 6 H L C 639.

The contents of every written paper are according to the ordinary and well established rules of evidence, to be proved by the paper itself and by that alone if the paper be in existence. The rule was so stated by the Judges on the occasion of the trial of *Queen Caroline* 2 Brod & B 286 (1820). The only exception to it may be divided into the following classes (each of which is dealt with below) — (1) Where the written document is lost or destroyed. (2) Where it is in the possession of the adverse party who refuses or neglects to produce it, (3) Where it is in the possession of a party who is privileged to withhold it and who insists on his privilege. (4) Where the production of the document would be on physical grounds, impossible, or highly inconvenient. (5) Where the document is of a public nature and some other mode of proof is specially substituted for reasons of convenience. *Roscoe Cr Ev 10th Ed p 3*.

**65** Secondary evidence may be given of the existence, condition or contents of a document in the following cases —

Cases in which secondary evidence relating to documents may be given

(a) when the original is shown or appears to be in the possession or power —

of the person against whom the document is sought to be proved, or  
of any person out of reach of, or not subject to, the process of the Court, or  
of any person legally bound to produce it,  
and when, after the notice mentioned in section 66, such person does not produce it,

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest,

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents



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cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time,

- (a) when the original is of such nature as not to be easily movable,
- (c) when the original is a public document within the meaning of section 74,
- (c) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence,
- (d) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.
- (a) (c) and (d) any secondary evidence of the contents of the document is admissible.
- (b), the written admission of the contents of the document is admissible.
- (e) or (f) any other evidence of the contents of the document is admissible.

In cases (a) and (d) my secondary evidence of the contents of the document is admissible  
In case (b), the written admission is admissible  
In case (e) or (f), a certified copy of the document is admissible  
In case (c), a certified copy of the document is admissible

In case (b), the written admission is admissible  
In case (c) or (f), a certified copy of the document, but  
other kind of secondary evidence, is admissible  
In case (g), evidence may be given as to the  
the documents by any person who is shown to be  
who is shown to be a person who has seen the documents

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents

Principle The contents of a document must in general be proved by a special kind of evidence called primary evidence but there are exceptions cases in which it may be proved otherwise *Malby Li 57* The exception is that rule which is the most universal namely that the best evidence the nature of the case will admit shall be produced this objection to it (the rule) is only another form of expression for the idea that when you lose the higher proof you may offer the next best in your power The case admits no better evidence than that which you possess if the superior proof has been lost without your fault The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against it beyond their control it only means that you cannot guard against an inferior proof in relation to it *Per Porter J in Thomas v Thomas 114* 116 118 *Hipmore § 1192* The various classes of cases with which the following sections deal are but related instances of this general feature that production of the writing itself is not required if production is under the circumstance not feasible That the document is lost detained by the opponent held by a third person physically inaccessible legally inaccessible practically inaccessible or otherwise unavailable without great inconvenience—all the circumstances mentioned in the general notion that production is not feasible *Hipmore § 1192*

Scope of the section Secondary evidence of the contents of a document is admissible if and only if the non-production of the original is first accounted for as to being it within one or other of the exceptions provided in this section. *Archbold* 145-146 (1911) 11 A 71 P C. So the first condition of the right to secondary evidence of the contents of a document is the accounting for the non-production of the original. *Bhudeeswaray Hiranay* 6 C 721 (S C) 1911 13 P C 1. *Id. v. Inda Vener* 1 C L R 15, *Immer* 1 P 23 W P 209 (P C) 2 I A 87. *Waccer* 14 A 1.

*Kumar* 11 W R 228, *Gow v Huce* *Kishore* 10 W R 338 *Ishan v Bhipub*, 5 W R 21, *Ustoorun v Mohun*, 21 W R 333, *Roopmungoor v Ramlal*, 1 W R 145, *Yafce Zooden v Meher* 11 W R 213, *Sheoram v Ramlal*, 1 W R 248, *Muhammad Abdul v Ibrahim*, 3 B H C R A C J 160. A writing is the best evidence of its contents and must be introduced unless it has been lost or destroyed, or its absence is otherwise satisfactorily accounted for. *Lynch v Cleve* 3 Salk 154. In its modern application the best evidence rule amounts to little more than the requirement that the contents of a writing must be proved by the introduction of the writing itself unless its absence be satisfactorily accounted for. In its origin the rule known as the 'best evidence' was something entirely different. In fact it related to all classes of evidence, and was a broadening rather than a narrowing rule. It meant that the best evidence of which the nature of the case would permit was receivable. It has been pointed out by *Prof. Thayer* that this rule has been the subject of a very peculiar development. (*Vide the origin of the rule under S 64*). As now understood, the rule is one relating to writings only. It extends to all writings however and is not confined to those which relate to matters required by law to be in writing. *McKelvey's Ex* § 272. This section is applicable to both Civil and Criminal proceedings and thus is a relaxation of the rule of English Law which requires stricter proof in criminal than in civil proceedings and under which it was decided that in the former the original registers of births deaths marriages, etc. must be produced and that copies will not be sufficient. *Field's Ex 7th Ed* p 218. *Whitley Stokes*, Vol II p 92. The exceptional cases in which secondary evidence is admissible are contained in s 65. *Markby's Ex* p 57. A copy of a document should not be admitted in evidence until all legal means have been used to obtain the original and a party's denial in pleading of the possession of the document will not justify the omission of the process the law provides for his testimony and his being called to produce the original deed. Where an original *pattah* relied on cannot be produced secondary evidence is admissible but the Court ought to be satisfied that it gives a true version of the contents of the document, and that there is sufficient evidence of its execution. *Sookram Soolul v Ramlal* 9 W R 248. The non production of an original document from a record must be satisfactorily accounted for before a copy can be looked at, and such copy should be shown to be accurate before it can be used. *Roheela v Dindyal* 21 W R 257. see also *Rampibantal v Nandalal* 2 W R Act X Rul 43. *Prossano v Chunder* 23 W R 241. *Ismail v Doorga*, 21 W R 262.

A copy of a disputed document can not be taken as evidence without proof that the original is out of the power of the person producing the copy. Admitting the existence of the original is not admitting the correctness of the copy. *Mussamat v Rutton* W R 1864 186. A *lohdunee* can not be admitted as secondary evidence in substitution of the certificate of sale except where the absence of the certificate is well accounted for and no better evidence could be had. *Ustoorun v Mohunlal* 21 W R 333. Oral evidence to prove the contents of a letter (not then produced nor called for) is inadmissible on the ground that it involves the giving of secondary evidence of the contents of a document without satisfying the conditions required to be fulfilled by this section. *Kameshwar Pershad v Mananulla* 26 C 53=2 C W N 649. When certain collections of rents were sought to be proved by entries made by *Patuani* in his list as the result of his enquiry and inspection of receipts. Held that the list would merely be secondary evidence of the contents of the receipts and that it was inadmissible unless the conditions laid down in s 65 of the Evidence Act were satisfied. *Sant Ram v Ram Manorath* 111 Ind Cas 943. Certified copies of registered deeds evidencing private transactions are admissible only if a case for reception of secondary evidence has been made out. *Badwa Pam v Uba* 111 Ind Cas 752=9 Cal L J 428. A mortgage bond over properties situate in India was executed in England. Before it was registered in India it was lost. The mortgagee instituted a suit to recover the money by enforcing the personal covenant only. Held that the secondary evidence of the mortgage deed was admissible. *Herbert Francis v Mahomed Uba* 105 Ind Cas 702. This section provides an alternative to the bond holder in cases where for various reasons production of the original is

**S 63** impossible but if a bond is in existence production is not dispensed with by it. section *Mahomed Zafar v. Zahur Husain*, 24 A L J 964-97 Ind Cas 812-13 A I R 1926 A 741. An extract from the Register of applications in respect of minors and lunatics is not admissible as secondary evidence of a statement as to the date of birth made in an application for appointment of guardian. *Gulul Chand v. Baldeo* 5 Pat L T 403. This section has no reference to cases where mere secondary evidence of the document has not been tendered but to the document itself which is put in as secondary evidence of facts which have to be proved *abundant*. Hence newspapers are not secondary evidence of facts narrated by them. *Baua Sarup v. The Crown* 88 Ind Cas 22-7 Lah L J 264-26 P L R 366. Bonafide impossibility of producing original must be proved before secondary evidence can be admitted. *Rangappa v. Rangaswami* (1923) M W N 232-88 Ind Cas 249. Secondary evidence of a document may be given when the party offering that evidence cannot for any reason not arising from his own default or neglect produce the original in reasonable time. The question of allowing secondary evidence depends on the discretion of the Court and where it has been decided by the Judge of first instance his conclusion should not be overruled except in a clear case of miscarriage of justice. Production of secondary evidence does not dispense with proof of the execution of the original document. *Chunha Mal v. Rafeem Basthi*, 71 Ind Cas 568. Where in a suit on bond loss of bond was alleged and the defendant denied execution of the bond, plaintiff need not prove loss of bond. *Benu Madhab v. Ram Lakhan* A I R 1925 Oudh 100. Where a suit is based on a lost *bahu* the loss must be strictly proved and a police Sub Inspector's report is not a sufficient proof of such loss. *Asa Ram v. Sukha Singh*, 4 Lah L J 416. *Banu v. Sula*, 4 Lah L J 418. Where the plaintiffs sued for a declaration that certum surven non vult was kept joint at a partition between the ancestors of the parties, relying upon a certified copy of a partition deed passed between the parties, and the copy of which was produced showed that the original document was produced in Court in a previous suit. Held the Court could rely on the certified copy as showing the terms of the partition, there being no reason to doubt owing to the lapse of time that the certified copy retained on the file of the previous suit was a correct copy of the original. *Chudasma v. Thalhasong* A I R (1922) Bom 177.

Where no reasons are shown for the non production of the original of a mortgage a suit on a copy of the document is bound to fail. *Bharon v. Hindu* (1922) Nag 119-67 Ind Cas 247. Secondary evidence of a document is evidence of its contents and oral evidence is to the terms of a mortgage which have been reduced to writing is not evidence of the contents of the document. *Maug 1e Du v. Maung Po* 66 Ind Cas 360.

It is primarily one for the trial Court to decide whether a case has been made for the reception of secondary evidence. The Appellate Court however is justified in holding that secondary evidence of a lost deed is admissible when the lower Court has rejected it. *Rameswar Lal v. Raj Kuman*, 5 Pat L W 16-17 Ind Cas 838-9 (1918) Pat 156.

When a party in possession of an unregistered deed of sale of property valued at Rs. 100 in value did not produce it before the Court and was unable to give a satisfactory account for it. Held that secondary evidence of the contents of the deed was inadmissible. *Domas Bva Medhi v. Kandi Kohla* 62 Ind Cas 441. A landlord is bound by the statement in a sale proclamation as to the rate of rent payable in respect of a tenancy advertised for sale at his instance in execution of a decree for arrears of rent. If the sale proclamation is not forth coming after the sale the sale certificate may be accepted as secondary evidence of what was specified in the sale proclamation as the rate of rent payable. *Yli v. Zamindari v. Fathull* 62 Ind Cas 60. But secondary evidence of an inadmissible document is not competent. *Kalliani v. Nambiar* 28 M L J 266-28 Ind Cas 69. *Nataraj v. Ramabhalra* 29 Ind Cas 83. *Emporer v. Khetri* 1, A 300.

**Document** Document means a document admissible in evidence. *Wheeler v. St. Lee* Vol II p 592. This section deals with the proof of the contents of a document in evidence. *Khetter Chunder v. Khetter Paul*, 5 C 22 (1877)-6 C L J 119. If a document is inadmissible in consequence of

not being registered or not being properly stamped, secondary evidence cannot be given of its existence. *Whitley Stiles*, Vol II p 892

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**Time for objecting to the admission of the secondary evidence.** A Court copy of a title-deed was filed without objection on behalf of the plaintiff, but objection was taken during the argument that the plaintiff had not shown any of the statutory grounds for the admission of such secondary evidence. It was held that the defendant's allowing the copy to be marked without objection would not stop him from afterwards objecting to it. The copy should not have been marked until evidence had been given which made it receivable. *Krishna Dass v Multamali* 3 M L T 297. Objection to evidence must be made before its reception but not afterwards. *Anderson v Taylor* 70 P R 1866. *Uppa v Puddapalle* 33 Ind Cas 188. The rule is firmly established that no objection should be allowed to be taken in an appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection. *Juan v Juan*, 88 Ind Cas 541=29 P L R 155=A I R 192 5 Lah 347, *Ma The Ah v Ma Ai Pa* 3 Bur L J 193=192, Rang 113. *Vingawa v Ramappa*, 5 B I R 708=28 B 94, *Ha al v Van U B R* (1897 1901) Vol II 382. *Ubar Ali v Bhynal* 6 C 666. *Kamtochan v Harinath* 1 P L T 397=67 Ind Cas 628, *Su at v Han* 59 Ind Cas 461. *Zaiddin Latima*, 11 Ind Cas 539=216 P W R 912. *Madhavi v Gaganendra* 9 C W N 11. *Chinnaji v Dular* 11 B 320. *Kishori v Ralhal* 31 C 155. *Rhody v Prasanna*, 28 C 142. *Shahada v Secy of State*, 34 C 108 (P C)=6 C L J 678. *Hasmattul v Harimohan* 34 Ind Cas 942, *Mahabir v Iltia Rai* 1 W R 12, *Gour v Kanhya* 2 W R 237. *Igreedo v Mahomed*, 10 W R 267. *Kashinath v Mahesh* 25 W R 166.

**Unstamped documents—secondary evidence of.** Secondary evidence of the contents of a document which was liable to stamp duty but unstamped, cannot be admitted on payment of a penalty. *Kopasa v Shamu* 7 M 440. *Baleo v Javam* A W N 1899 210. *Mathoorai v Peary Mohun* 4 C 259=2 C L R 409, *Ma Fin U v Maung Aung Hmuc* U B R (1897—1901) Vol II 365. *Sheikh Akbar v Sheikh Khan*, 7 C 256=8 C L R 528, *Maung Aet v Maung Hmo*, U B R (1897—1901) Vol II 367, *Sudar Kuar v Chandrauati*, 4 A 330=A W N 1832 55. *Hualal v Shankar* 45 B 1170. *Suami v Sundrara* (1911) 2 M W N 166, *Doraisami v D* 87 Ind Cas 382, *Maung Po v Maung Gui* 101 Ind Cas 198=A I R 1927 R 109. The provisions, made by the Stamp Act for the case of deeds either unstamped or insufficiently stamped have no application when the original deed which ought to have been stamped has not been produced. It is not permissible to pay penalty or require endorsement by Collector on a copy of unstamped or insufficiently stamped document and to offer the same as secondary evidence of the terms of the original. *Penlata v Sri Junjanti* 4 C W N 117. *Aruma Chellum v Ola gippah*, 4 M H C R 312. *Ragharachari v Rangachari* 4 Mys L J 144. A distinction must be drawn between the admissibility of the evidence and the manner of proof.

**Section 65 and Registration Act, s 49.** The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under s 49. *Janardhan v Janardhan* 101 Ind Cas 839=A I R 1927 Nag 214. Where a party comes into Court resting his claim on a written title which the law requires to be registered he cannot when he has failed to register, and is in consequence unable to use his title deed turn round and say, 'I can prove my title by secondary evidence. It would be useless to have a compulsory Registration Act if such a course were open to the suitors'. *Yonmohinee v Bishen Mojee* 7 W R 112. See also *Sheikh Ruhmtoolah v Sheikh Shatrutoollah* 1 B L R 58=10 W R 51 (F B), *Gangabisa v Tularam* 5 N L R 70=2 Ind Cas 244. *Mahomed v Allah Dutta* 95 Ind Cas 444=27 P L R 268. *Kalluni v Nambiar* 23 M L J 266. Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given in evidence. *Nataraja v Ramabhadra*, 23 Ind Cas 853, see also *Kanduru v Idam Sahib* 25 Ind Cas 661.

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Section 19, Limitation Act—Whether excludes secondary evidence of acknowledgments lost or destroyed. Section 19 of Act IX of 1908 corresponds to section 20 of the Limitation Act of 1871 which runs as follows: "When the writing containing the promise or acknowledgment is undated evidence may be given of the time when it was signed. But, when it is allowed to have been destroyed or lost, oral evidence of its contents shall not be received." So in earlier cases the question arose whether that section modified section 65 of the Evidence Act. In *Shambunath v. Ramchandra*, 19 C 57 where such a question arose the Court observed: "When that Act (IX of 1871) was passed the present Evidence Act was not in existence, and there was no section in any Act relating to evidence defining clearly the cases in which secondary evidence of a document could be given, but it was known law that amongst the ground which authorized the admission of secondary evidence was the loss or destruction of the original. In the sentence just read, the only case referred to is the destruction or loss of document. The effect clearly was to exclude oral evidence of an acknowledgment if tendered on either of the grounds but nothing was said about the case where the document is in the possession of the opposite party, or is a public document, or beyond the jurisdiction of the Court, or the other cases in which secondary evidence of the contents of a document may ordinarily be given. Then came the Evidence Act. That Act has defined the cases in which secondary evidence is admissible. Then came the Limitation Act of 1877 with which we are now dealing. The language of s 19 is altogether different from the language of the prior Act of 1871. The language of the prior Act of 1871, so far as oral evidence is concerned was necessarily in direct conflict with s 65 of the Evidence Act. According to the Evidence Act secondary evidence is admissible of the contents of a document generally if the original is lost or destroyed but according to the Act of 1871 oral evidence of the contents of an acknowledged document would not be admissible in such a case. The words now used are different. In Act XV of 1877 the words used are: 'When the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed but oral evidence of its contents shall not be received.' One branch of the law of Evidence is that already referred to. It is contained in s 61 and the following sections of the Evidence Act and it determines the cases in which secondary evidence may be given of the contents of a document not produced. Another branch of that law is contained in s 91, and the following sections. It deals with the question how far oral evidence, or evidence of oral communications may be given to vary control, or add to the effect of a document. The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence to alter the effect of documents might not exclude oral evidence of the date of an undated document, where the date is an essential matter. Accordingly it is said that oral evidence of the date of the document may be given. The paragraph then proceeds: 'but oral evidence of its contents shall not be received.' These words were introduced with a 'but' and they speak not of secondary evidence but of oral evidence. We do not think it ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repealing s 65 of the Evidence Act so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause guarding against the possibility that the prior words interfere with the general rules as to oral evidence further than the express words require.' So where an original acknowledgment is proved to have been lost secondary evidence of its contents may be given. *Harjiv v. Kahir*, 11 C. 192. See also *Chithu v. Narayan*, 15 M. 191. But see *Shambunath v. Ramchandra*, 12 B. 268. This controversy has been set at rest by Act IX of 1908 section 19(2) which runs as follows: "Where the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed but subject to the provisions of the Indian Evidence Act 1872 oral evidence of its contents shall not be received." A statement by mortgagee recorded at settlement in the muti taluqa Chhapra mu. arian to the effect that it

mortgage is still redeemable would if signed or marked by the mortgagee, clearly be an acknowledgment under s 19 of the Limitation Act. When the detailed record of such statement has been destroyed in the course of weeding of records, an entry in the index to the *must i tangih i hangu i mirarian* made by a certain party taken together with the summary of that statement to be found in the settlement superintendent's order, is good and sufficient secondary evidence of the contents of such statement. *Mohayuddin v Nouio* 5 P W R 1911=16 P L R 1915

CLAUSE (A)

**Original in the possession or power of the Adversary** When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him (see *Irum v Leier* 2 F & I 269 *R v Hunter* 4 C & P 125) *banker* (*Patridge v Cook* Ry and M 156), *deputy* (*Daphn v Ill* 3 Bing 164), *agent or servant* (*Baloney v Ritchie* 1 Stark 338 *Sinclair v Stevenson* 1 C & P 582 585), but not a stakeholder (*Perry v May* 1 M & R 279), as in *Knight v Martin* Gow R 103), nor person under whom the adversary justifies in an action of trespass (*Evans v Sweet*, Ry & M 53) and such party refuses to produce it either after notice or when notice is executed the other party may, in civil and criminal cases, provided that it had satisfied Stamp and Registrar on law give secondary evidence of its contents *Phyp Fr and Id* 436. The words used in this section are 'possession or power'. So it is enough for this purpose if the opponent has the control, whether technically named possession or not. *Wignore* § 1200. It seems that the wording of this section is taken from *Perry v May* 1 Moo & Rob 280, where *Littledale J* said "The instrument need not be in the actual possession of the party, it is enough if it is in his power, which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him. So it is clear that the document need not be actually in the personal custody of the opponent himself, it is enough if it be held by a third person on the opponent's behalf and subject to the opponent's demand. *Wignore* § 1200. So wherever it is in the possession or power of the opposite party and he refuses to produce it after notice secondary evidence is receivable. *R v Watson* 2 T R 201. *Malbul Ali v Masnah Bibi*, 3 B L R C A 54. *Greesh Chunder v Ramlal* 1 W R C R 45. The rule applies to criminal cases equally with civil. *R v Flautoy* 10 Cox Cr 579 582. The reason why secondary evidence is admissible in such a case is thus given by *Bulle J* in *Ill Gen v Le Merchant* 2 F R 201 note "It was likewise said in support of the motion that the reason why copies are permitted to be evidence in common cases is because the party who has them is his custody and does not produce them is in some fault for not producing them it is considered as a misbehaviour in him in not producing them and therefore in criminal cases a man who does not produce them is in no fault at all and for that reason a copy is not admitted. But I do not take that to be the rule, it is not produced upon any misbehaviour of the party, or considering him in fault but the rule is this the copies are admitted when the originals are in the adversary's hands, for the same reason as when the originals are lost by accident the reason is because the party has not the originals to produce. It is clear says *Prof Wignore* that this notion of detention by the opponent as an excuse for non production, involves three essential elements (a) possession, or more broadly, control by the opponent, (b) demand or notice, made to him by the proponent, signifying that the document will be needed and (c) failure, or refusal, by the opponent to produce them in Court. Only when these three circumstances co exist can it be said that the document is unavailable because the opponent detains it. *Wignore* § 1199.

It has already been stated that the documents need not be in actual possession of the opponent. It is enough if it is in his power to produce it. *Perry v May*, 1 Moo & Rob 280. So "the possession of the plaintiff's attorney is the possession of the plaintiff, though they might perhaps be subpoenaed it is not necessary to subpoena them when the principal is a party to the suit it is sufficient to give the party notice. *Per Pollock C J* in *Irum v Leier* 2 F & I 296. It is immaterial that the document is out of the jurisdiction of the Court, if it is held there on behalf of the opponent. *Cutter Town v*

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*Clements v. Cr.* App 291, *Wignore* § 1200 In such a case the only question which comes for the decision of the Court is whether sufficient time has been allowed to the opposite party to produce the said original. When a document is proved to have been in the possession of the opponent, very recently, the presumption is that it is still in his possession. *R v. Hunter*, 4 C & P 1. Nor, in fairness, should a transfer shortly before notice served be an excuse if the opponent did not duly advise the proponent, at the time of notice that he had transferred it. *Wignore* § 1200, *contra*, *Wright v. Bunyard*, 2 F & F 193, 191. Before a secondary evidence is admissible under this section the opponent's possession of the document in question must be shown somehow. *Knight v. Martin* Gow 103 *Whitford v. Putin*, 10 Bing 395, *Shape v. Lant* 11 A & F 905. Of this fact very slight evidence will raise a sufficient presumption when the documents exclusively belong to him, or regularly ought to be in his custody according to the course of business. *Taylor* § 440, *see also* *Ajoodha v. Fshawee Dyal*, 10 W R 219, *Bluhaneswar v. Hanaran*, 6 C 720 = 5 C L R 337 P C. So where a bankruptcy certificate was proved to have been obtained for the defendant the Court presumed that it had come into his possession. *Henry v. Leigh*, 3 Camp 502 *Robb v. Starkey*, 9 C & K 113. If papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession. *R v. Thistledown*, 33 How St Tr 757. The rule is the same in criminal cases. *Perry v. May*, 1 M & R 211. *Langton v. Reynolds* 13 Jur 963. A party served with notice cannot evade its effect by subsequently putting with the document. *Knight v. Martin*, Gow 104. *Nott* 246. It would seem that when a party has notice to produce a particular instrument traced to his possession he can not object to prove evidence of its contents on the ground that previous to the notice, he had ceased to have any control over it unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it. *Smirlean v. Stevens* 1 C & P 585 586 *per Best* C J. *Taylor* § 440. The presumption of receipt that it follows from the mailing of a letter duly addressed and stamped should suffice to show possession and the sufficiency of the evidence is a question of law for the Judge. *Henry v. Mitchell*, 2 Moo & Rob 366.

The production of a certified copy of the registered deed is sufficient proof when the original of that deed is in the possession of the opposite party. *Mt. Saliman v. Halim Muldam*, A 1 R 1928 All 394. This section lays down that secondary evidence may be given of the contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. This section does not require that in all cases it must be definitely proved that the document is in possession of the other side against whom it is sought to be proved. It is sufficient if it is proved that the document appears to be in his possession. *Zubunnis v. Bishad* 2 O W N 405 = 12 O I J 341 = 89 Ind Cas 241 = 1 L R 192 Oudh 791. Where a letter deed is in the possession of the defendant and he is failed to produce it though summoned twice to do so secondary evidence of the contents is admissible. *Judhia v. Talsi Ram* 67 Ind Cas 830 = 1 L R 1922 Pat 417, *Mal Behary v. Lal Mohan* 19 Ind Cas 767. When the original is presumed to be in the possession of the opposite party and when the opposite party knows that he is required to produce it secondary evidence of its contents may be given. *Duarla Singh v. Ramanand* 41 A 792 = 17 A L J 711 = 51 Ind Cas 275. *see also* *Mussamat Saleha Bibi v. Oudh Commercial Est.* 1 Ind Cas 671. In a suit for redemption when the mortgagee is in possession of the mortgaged land and fails to produce it oral evidence is admissible under s. 65 (a) read with proviso (2) of s. 66 of the Evidence Act. *Mt. Saliman v. Mt. Gurur* 6 Bur L 1 72 = 31 Ind Cas 892. Sections 65 and 66 must be read together and the party must not be presumed to have knowledge that he could be required to produce an original document or as to dispense with the need of a new one to produce until the original is shown or appears to be in the possession of the person against whom the presumption is drawn. *Per H. J. J. in* *Munir v. Didi* 1 Ind Cas 328.

Of any person out of the reach of or not subject to etc. This clause includes cases where the document is in possession of any person who is out of

the reach of, or not subject to the process of the Court. In such case secondary evidence of the contents of such a document can be given without giving notice to that person to produce the document [Vide s 66 (b)]

According to English law the mere fact of the non immutability of the possession to legal process should not of itself excuse non production. Legal process cannot avail to obtain a document held out of the jurisdiction but four possible forms of effort exist, any one or more of which may be deemed proper by a Court before excusing for non production. If the precise whereabouts of the document is unknown, search may be made. If the possessor be ascertained he may be requested to appear with the document, or he may be requested to deliver the document for the use at the trial or his deposition may be taken with a copy furnished by him annexed to it. No one or more of these efforts could be required as a fixed rule nor do the Courts seem to make any such fixed requirement. The rulings fall in three general groups. In the first group the Courts require that an effort of some sort be made its nature depending more or less on the circumstances of the case. *Boyle v Wiseman* 10 Exch 647 *Ward v Murray* 1900 Times, Mar 5 cited Phip p 248. In the second group, the Courts either by express decision or by failing to mention any requirement, excuse the non production although no such effort has been made the mere fact sufficing that the document is out of the jurisdiction. *Bruce v Atchlopoto*, 11 Exch 129 134. *Purnaby v Barthe* L R 42 Ch D 287, 291. In the third group the effort actually made is declared to be sufficient without laying down any rule as to its necessity. *Wignore* § 1213, see also *Crispin v Daghioni*, 32 L J P & M 109. Ordinarily, being filed in another Court is not sufficient reason for non production. *Gow Monce v Hulse Kishore* 10 W R 338. But according to ss 65 and 66 no proof of notice to produce is necessary for the admission of secondary evidence of its contents before commissioners in a place beyond the jurisdiction of the Court is using the Commission. *Rali v Gan Kim* 9 C 939. So also secondary evidence of a document can be admitted without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court. *Hananand v Ramgopal* 27 C 639 (P C) = 27 I A 1 = 4 C W N 429. Section 86 of the Evidence Act lays down that if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. The section 86 however does not exclude other proof, for under ss 65 and 66 of the Evidence Act secondary evidence may be given of public documents without notice to the adverse party when the person is out of reach of or not subject to the process of the Court. *Hananand v Ram Gopal*, 2 Bom L R 562.

As regards the meaning of the expression 'of any person not subject to the process of the Court' there is some conflict of opinion. According to *Mr Stoles* these words are intended to include the case of a person not legally bound to produce the document on account of privilege and who refuse to produce it. *Stoles Anglo Indian Code*, Vol II p 892 citing *Miles v Oddy* 6 C & P 737, *Morston v Dwyer* 1 H & T 31. In order to understand whether this clause includes that rule of English law it is worth our while to know the English law on the subject. The English law on this subject is thus briefly stated by *William Wills* in his *Law of Evidence*. Secondary evidence is admissible whenever the original is in the possession of a stranger to the proceedings who attends in Court with the document and there lawfully refuses to produce it on some ground of privilege claimed by him either in his own right or as agent acting on the instructions of other. The usual and proper course of the party who seeks to give evidence of the document is to compel the attendance in Court of the person who has possession of the document by means of *subpoena duces tecum* but if he should voluntarily attend with the document and should lawfully refuse to produce it secondary evidence will be equally admissible. *Doe v Clifford*, 2 C & K 148, *Dwyer v Collins* (1852) 7 F & 632. If on the other hand he attends but without the document and *subpoena duces tecum* has not been served on him or not been duly served this is a fatal objection to the admission of secondary evidence is the party not doing all that lay in his power to procure the production of the original



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(*Hibberd v Knight* 2 L & 11) If the person so refusing is merely agent for another by whose instruction the production is withheld the fact that the principal does so refuse may be proved in several ways. He may himself attend the Court upon a subpoena and then and there refuse (*Newton v Chaplin*, 10 C B 36) or may attend voluntarily and do the same (*Doe v Clifford*, 2 C & K 41), but it will be sufficient for the admission of secondary evidence if the agent himself can prove that he has had express instructions from his principal not to allow the production of the document. *Phelps v Price* 11 & B 439. *Hill v The 2nd Ed* pp 399, 400. In such a case according to the English law the contents of a document can be proved by secondary evidence. But for the purpose of identification of the secondary evidence with the original, the person withholding production of it may be compelled to produce it, provided no part of the contents is disclosed. In the case of deeds and wills identification is generally effected by an inspection of the endowment containing particulars of the instrument. *Phelps v Price* 11 & B 439. *Doe v Clifford*, 2 C & K 41. 118. *Hill v The 2nd Ed* 401. *Mills v Gaddy* 6 C & P 723, 737, *Calver v Guests* (1895) 1 Q B 739. But according to clause (f) of proviso of section 66 no notice is required when person in possession of the document is out of reach of or not subject to the process of the Court. So it cannot be said that this clause includes the English rule just mentioned.

**Lawful non production by third person—English law.** Historically, the excuse for non production was one of the earliest to be established. Under the doctrine of privity it was well settled that privity was not necessary of an instrument belonging to a third person for the reason that the proponent had not any means to obtain the deed. *Woods v Dyer* 29 (b). *Ex parte Langdon*. *Dyer* 277 a. *Stoddard v Hampton* 110 Car 111. *Gray v Fielder* Cro Car 209. *Huntingdon v Mildman* Cro Jack 217, *Wigmore* § 1211. So "where a person is an utter stranger to a deed there in pleading he is not compelled to shew it." *Bull v Nis* Prius 252. So if the person possessing the document is by reason of privilege not compellable to produce then is the same reason for admitting other evidence of its content as if its production were physically impossible because the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial. *Per Pollock C B in Sayer v Glossop* 2 Exch 409 410. Merely obedience to a notice to produce the document will not however let in secondary evidence thereof (*Jessup College v Gibbs*, 1 Y & C Ex R 156), the witness must be justified in his refusal, for otherwise the party has no remedy except as against him (*R v Tranfaetely*, 2 E & B 944), and even a justified refusal will not let in secondary evidence of certain documents protected by public policy. *Phipps v The 3rd Ed* 489. When the documents are in the possession of a third party, he should be served with what is called a subpoena duces tecum i.e., a summons to attend the trial as a witness and bring the documents with him (Vide Order 16, rule 1 of Act V of 1908 = s 159 of the Old Code). The person on whom such a subpoena duces tecum has been served is bound to obey it so far as attending the trial and bringing the documents with him are concerned (*Vide* s 162 *infra*) but he will not be compelled to produce them if the disclosure might subject him to criminal penalty or forfeiture (*Vide* s 130 *infra*). So a party will not be required to produce the muniments of title to his estates (*Taylor* § 458 464 section 130 *infra*) nor will his solicitor to whom they have been entrusted (*Hibberd v Knight* 2 Exch 11. *Doe de Gilbert v Ross*, 7 M & W 102. *Volant v Sayer*, 13 C B 231) and in either case independent secondary evidence of their contents may be given. *Per Hill J in R v Leatham* 3 F & E 658 663. *Best Ev* § 216. So it is a well established rule of law that the productions of a privileged document is excused. *Per Hill J in R v Leatham* 3 E & E 658 663. The principal may of course waive his privilege (*Wells v More* Ry & M 390) after which the agent's refusal to produce would no longer be lawful unless based on some independent and just claim of privilege in himself (*Doe v Ross* 7 M & W 102). Neither principal nor agent thus claiming privilege is compellable to give oral or secondary evidence of the contents of the privileged document but if such evidence is voluntarily given it is admissible even though it is given by an agent without the authority of his principal. *Warston v Daunes* 6 C & P 381. *Hibberd v Knight*, 2 Ex

11, *Wills Et 2nd Ed* 400 As section 65 contrains the exceptional cases in which secondary evidence is admissible, it is apprehended that no secondary evidence is admissible under the Indian Evidence Act, if the party in possession of the document withholds it under §§ 130 and 131 of the Act

Of any person legally bound to produce it As regards this clause *Justice Maibby* says 'If, however, we are to take the words of any person legally bound to produce it in cl 3 of s 65 (1) as they stand, there is no necessity to take any steps to procure the production of the document, as secondary evidence of it at once becomes admissible I can hardly believe that this is what was intended I think it probable that the word 'not' has been here omitted by mistake, and that the case intended to be dealt with here is the case of a person who though within the reach of the Court, is not legally bound to produce the document Several such cases are mentioned in ss 121 131 This could be quite intelligible and in accordance with the English Law' *Maibby Et 28* But *Justice Field* thinks it otherwise This clearly covers a document which is unjustifiably withheld by any person, thus differing from English law on the point But if a person summoned to produce a document objects to do so and his objection is upheld by the Court it seems equally clear that such a document does not fall within the words of this section It may be, however, that the Courts will admit secondary evidence in such a case upon the general principles of the English law and the decisions of the English Courts upon this subject *Field Et 7th Ed* 215 It is but a corollary to the general rule in question that nothing is to be added to or to be taken from a Statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express *Per Tindal C J* in *Everett v Wells* 2 M & G 277 *Per Lord Eldon* in *Davis v Marlborough* 53 R R 29, *Per Lord Westbury* *Exp St Sepulchre* 33 L J Ch 375 *Re Cherry's Estate*, 31 I J Ch 351 *Marvell* 25 It is strong thing said *Lord Mervyn*, 'to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do' *Thompson v Gould* 79 L J K B 911 We are not entitled said *Lord Loreburn* 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself' *Fellers v Evans* 79 L J K B 955 So it is clear that this clause should not be interpreted by introducing the word 'not' before the words 'legally bound to produce it'

Under rules of strict interpretation it appears that this clause intends to make a departure from the English rule which does not allow secondary evidence of any document improperly withheld It may be that the party calling for the document which has been improperly withheld, has its remedy against the party so withholding the document in separate suit for damage or he may be punished for contempt of Court but such remedy may give very inadequate relief where the party withholding is a pauper and the loss to be suffered for the non production of the document is considerable Moreover that will give rise to multiplicity of suits It is also not desirable to deprive a party to produce secondary evidence of a document, simply because a third person refuses to produce the original of the document wilfully or perhaps fraudulently There may be in addition the danger of the collusion between the opposite party and the party withholding such document In England where a third person has some legal right to the document, which renders his refusal proper or where he refuses to produce the document on the ground that it might tend to incriminate him it is held that secondary evidence is allowable, since the party has done all in his power to have the original produced (*Doc v Ross* 7 M & W 102 *P. L. & C* at page 121 *Hills v Oddy*, 6 M & W 664) and there seems to be no good reason why the doctrine should be different when the third person continually refuses to produce the document *Whitely's Et* § 271 It is also often said says *Prof Wigmore* 'that where the third person is hostile and fraudulently detains the document this fact itself suffices to excuse non production, though such an instance is perhaps often equally well disposed of by the doctrine of loss, or of the opponent's possession by the hands of an agent Where neither of the above situations exist and the case is an ordinary one of possession by a third person, it is clear that a demand at least must have been

made and the question is to which a difference of opinion exists: who is to give the compulsory price of law should also have been invoked by *subpoena*. A number of Courts seem to lay down the fixed rule that *subpoena* is necessary (i.e. *Winstleton* 6 L R 236, *Hutford v Linton* 10 B & C 191) direct decisions to the contrary are rare. The great number of rulings give no definite solution and seem to have been based on the circumstances of the case in hand. The truth is that while for the purpose of the general rule it is better to require the production of *subpoena* yet in the discretion of the Court it is not to use a *subpoena* provided a demand has been made, the residence of the witness is fatal if in view of the nature of the document, the residence of the possessor and his relations to the case the risk of collusion, and other circumstances of *subpoena* the possession is recalcitrant and refuses to obey the process. *Higmore* § 1212. So according to *Providence* the rules of law laid down by *Higmore* § 1212. So according to *Providence* & C 11, 156 where he said: You could not have proved it by secondary evidence unless the document had been in the possession of a party not bound to produce it. (The third person refused) it is true, at his own peril but he has no remedy except against him and by *Earle J* in *R v Lisle* 10 B & C 940 where he said: The law does not admit the disobedience of a party as a sufficient excuse for not giving primary evidence of the contents of a document where the person served is punishable for his disobedience or absurd and would not be followed to day. The Indian Legislature has followed the same rule and is such there is no necessity of applying the rule not in this class between the words 'person' and 'legally' in order to cover a contingency for which no provision has been made in the Act itself.

**When after notice to opponent he does not produce it.** Various reasons have been assigned as to why previous notice to the opponent is necessary before secondary evidence of a document is allowed. In *Swales v Hubbard* 4 Esp 203 Lord Ellenborough said: The reason of giving notice to check a person from giving in evidence what was a false copy. But it is giving of notice is not a sufficient safeguard against the contemplated dishonesty. The proponent's copy may still be false. In *Hou v Hall* 14 East 274 276 Lord Ellenborough said: We see the good sense of the rule which requires previous notice to be given. We see that he may not be taken by surprise. See also *Dar v Dyer* 10 Dudley 62 64. The answer to this is first that in general no party is obliged to guard against surprise, his opponent by warning him of intended evidence. Secondly that if here the purpose were to give the opponent time to discover evidence impeaching or confirming the document the notice should allow for such an investigation yet the law is clear that only time enough to produce the document need be allowed and thirdly that if in fact he is not surprised it is in law still no excuse for not giving notice. *Higmore* § 1202. The first proposition is that he cannot and shows that he cannot because the opponent has it and will not bring it in but the essential proposition that the opponent will not bring it in can be supported only by showing that the opponent has been requested to do so and has failed to comply with the request. If we translate the requirement that we shall immediately appreciate the significance of the notice as a demand for the future production by the opponent and the notice of demand is necessary, in Byron Pirkles word (in *Dyer v Collins* 1 Rich 639) merely to exclude the argument that the party has not taken any reasonable means to procure the original which he must do before he can be permitted to make use of secondary evidence. *Higmore* § 1203. So next must be served on him or his attorney to produce it because otherwise it cannot appear that the procurator might not have had the original if he had chosen to call for it. *Per Tilghman C J* in *Com v Messinger* 1 Binn 273 274. *Per* *Wilton v Harris* 2 L R 519 *Doe v Morris* 3 A & J 46 50. The rule for giving notice is very admirably stated by *Porter J* in *Wat v Lion* 9 M & L 167 (168) where he said: The elementary principle, which requires

that the best evidence the nature of the case permits of shall be produced, refuse, to a party permission to give secondary evidence of a written document on the ground of its being in possession of his adversary, until he has shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be given. *Wignore* § 1202, see also *Maungsan v Subramaniam*, 12 Ind Cas 861. But no notice to the opposite party to produce the original is necessary to render secondary evidence admissible where the opposite party from the nature of the case must have known that he would be required to produce the original. *Syed Mahammad v Nam Varam* 7 C L J 90. When it is found that the defendant in whose favour an instrument of mortgage ought to be, denies that he has it, secondary evidence is admissible. *Teju Mal v Zilphalari Sha* 49 P R 1992.

### CLAUSE B

Written admission as to the contents of an original document. Section 22 lays down that oral admissions as to the contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under this section. The present clause provides that a written admission is admissible as proof of a document even though the original is in existence and might be but is not produced. *Cun Er* 221. The result seems to be this—The written admission may always be proved. The oral admission can only be proved in cases stated in s 65 (a) (c) and (d). *Malby Er* 59. Admissions as to the contents of written documents are often made by the parties in their pleadings or their pleadings at the hearing and the section under consideration do not seem to have any application to such admissions which are governed by s 38. *Ibid*. So a party's admission as to the contents of a document, not made in the pleadings but in a deposition is a secondary evidence and cannot supply the place of document itself. *Sheil Ibrahim v Parbati Hari*, 8 B H C R A C J 163 (164). This section deals with evidentiary admissions which must be in writing. Secondary evidence in the nature of admission by vendors as to sale of immovable property in favour of the vendee cannot, in the absence of condition mentioned in cl (b) of section 65 be admitted. *Safar Ali v Mohesh* 23 C L J 122=34 Ind Cas 956. In a suit for redemption of mortgage the mortgage deed was not produced. Secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of the mortgagee which mentioned something about the mortgagee in suit. The writer was not proved to be an agent of the mortgagee authorized to make an acknowledgment of liability on his behalf. The document did not describe him as an agent of the mortgagee nor did it bear his signature but merely a seal purporting to be his. It was previously attested in the settlement Court as a forgery. It was produced for the double purpose first, as secondary evidence of the mortgaged deed under s 65(b) secondly to the limitation under section 19 of the Limitation Act. Held that the document was no secondary evidence of the existence of the mortgage as it did not fall within the category of writings described in clause (b) of section 65 of the Evidence Act. *Gajraj v Balaji* 11, 20 Ind Cas 62. This clause has no application where the original document is inadmissible for not being registered or properly stamped. *Dueth v Krishnaswami*, 6 M 117. *Sambayya v Gangayya* 3 M 308, *Damodar v Attamaram Babai*, 12 B 443 (446). Where the record of the statement of the accused is not admissible, secondary evidence thereof could not be given. *Queen Empress v Iram*, 9 M 221. In rejecting such evidence *Parlei I* at p 240 observed: 'Reference is made by the Sessions Judge to s 65 of the Evidence Act, the words appearing in cl (b) in that section being quoted, but for the reasons above stated I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statement by each accused can be held to constitute an admission in writing for this purpose—in respect of the contents of the previous statements.

### CLAUSE (C)

When the original has been lost or destroyed. The loss or destruction of a writing, if satisfactorily shown opens the door for the admission of secondary



Where after search an original *labuliyat* can not be found, a copy of such *labuliyat* is admissible in evidence *Jiban Kati v Mammala* 49 Ind Cas 1006 The Court should be very strict before admitting secondary evidence in insisting on strict proof of the loss of a document like a mortgage or a special power of attorney authorising the creation of a mortgage *Jaspal Rai v Deri Dayal*, 32 Ind Cas 399 But the question whether or not sufficient proof of search for or loss of, an original document to lay a ground for admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and his conclusion should not be overruled except in a clear case of miscarriage *Ma Park v Ma Anai*, 34 Ind Cas 153=9 Bur L T 174 The plaintiff filed a suit on the basis of a hypothecation bond alleging the original to have been lost and produced only a copy The defendant alleged that the original was not lost but suppressed as there was an endorsement on the bond showing payment of Rs 200 by him to the plaintiff Held, that, although the execution of the bond was not expressly admitted in written statement yet the plea of payment and its endorsement on the bond amounted to an admission of the execution of the bond and the plaintiff could maintain the suit on a copy of the bond without proving the alleged loss *Mulla v Deo Kaman*, 11 A L J 731=20 Ind Cas 955 In a suit for rent the plaintiff produced a copy of the rent deed on the allegation that the original had been lost In the written statement the defendant admitted the execution of the deed but later on in his statement before the Court, denied it Held, that the subsequent denial must be taken to have altered the proceedings contained in the written statement, and the claim on the copy could not be maintained without proving the loss of the original *Muhammad v Hamududdin* 11 A L J 731=21 Ind Cas 81 A registered copy of a mortgage deed is a secondary evidence of the mortgage deed and is admissible in evidence when a case is made out for the admission of the secondary evidence *Sri Ram v Ram Lal*, 11 A L J 255=18 Ind Cas 878

**Loss and destruction of original—sufficiency of search** The word ‘destruction’ signifies that the thing no longer exists, while the word ‘loss’ merely that it can not be discovered Nevertheless, for practical purposes, the two come together for consideration in this rule In the first place the moment that the destruction becomes questionable at all (i.e. when not proved by eye witnesses of burning or tearing the inquiry is raised whether the search for it has been sufficient, and in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist and thus assimilates the case to one of destruction Thus, the great question to which so many Judges have devoted so much pains—the establishment of a test for the sufficiency of proof of loss—includes practically not only the cases of loss in the narrower sense but also the cases in which destruction is more or less expressly put forward as the reason for non production *Higmore* § 1191 The question thus resolves itself into an inquiry as regards the sufficiency of the search But in this connection it should be borne in mind that all evidence is to be considered with regard to the matter with respect to which it is produced Now it appears to be a very different thing whether the subject of the enquiry be a useless paper which may reasonably be supposed to be lost or whether it is an important document which the party might have an interest in keeping, and for the non production of which no satisfactory reason is assigned where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient *Per Abbott C J in Breuster v Seuell* 3 B & Ald 296 *Freeman v Arkell* 2 B & C 191 *Higmore* § 1194 So in this respect there is great difference between valuable and valueless documents It is a fair presumption that a man will keep all documents which may with any degree of probability be of present or future value to him, and that he will on the other hand throw away or destroy those which have served their end and are never likely to be required for any purpose whatever In the former case it is reasonable to exact proof of a very careful search whereas in the latter very slight evidence tending to show loss or destruction will suffice *Hill F 2nd Ed* p 398 What is proper search or enquiry must depend on the particular

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circumstances of the case *Ibid* So "the evidence of a document being lost, upon which secondary evidence may be given of its content, may vary much, according to the nature of the paper itself, the custody it is in, and indeed all the surrounding circumstances of the particular matter before the Court and the jury. A paper of considerable importance, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper which no body would be likely to take care of. What inquiry will do? I think, in cases of this sort [there the loss was of a newspaper, known as 'the Non conformist' from a club] if sometimes after its publication, it is not found in the place where it ought to be, if it be anywhere, no search is necessary among the members of the club, or persons who frequent the club room. It may be taken to be lost, if it cannot be produced from the place where it ought to be found." *Per Pollack C B in Garthe Cole v Mal*, 15 V & W 319, 329. In the same case *Alderson B* said, 'The question whether there has been a loss, and whether there has been sufficient search must depend very much on the nature of the instrument searched for. If we were speaking of an envelope, in which a letter has been received and a person said, 'I have searched for it among my paper. I cannot find it,' surely that would be sufficient. But with respect to an old newspaper which has been at a public coffee room if the party who kept the public coffee room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposed it has been taken away by some one that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B', then I should have said he ought to go to A. B. and see if A. B. has not got that which it is proved he took away. As it seems to me the proper limit is, where a reasonable person would be satisfied that they had bona fide endeavoured to produce the document itself, and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper.' All that is required is that the party producing the document by secondary evidence must have used all reasonable means to obtain the original. *R v Morton & M & S* 48, *Gully v Exeter & Bing* 290, *Doe v Clifford* 2 C & K 448, 451. *Quiter v Jorss*, 14 C B N S 747, 750, *R v Arnold* 7 Q B 612, 649, *Pardoe v Price*, 13 M & W 269, *R v Gordon* 2 L J M C 19. So proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. The question is always one of due diligence in the effort to procure the original before evidence of its contents is resorted to. As a general rule the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case naturally suggests, and which were accessible to him. *Johnson v Arncliffe*, 42 N J L 451, 454 (Am). *Higmore* § 1194. *Kingstone v Inglis*, 8 East 278. *R v East* 14 Fy 6. *D & R* 153. *Maung Pan v Ma Burn* U B R (1892—1896) Vol II, 34. If any suspicion hangs over the instrument or there are circumstances tending to excite a suspicion that it is designedly withheld the most rigid enquiry should be made into the reasons for its non production. *Johnson v Arncliffe* supra. It follows properly, that the determination of the sufficiency of the search and in general of the proof of the fact of loss should be left entirely to the trial Court's discretion. *Higmore* § 1194. *Taylor* L J § 23 (a). There must be evidence of the search of the originals before copies and other secondary evidence are admitted. Whether or not sufficient proof of search for or loss of, an original document to lay a ground for the admission of secondary evidence, has been given is a point proper to be decided by the Judge of the first instance, and not treated as depending very much on his discretion. His conclusions should not be overruled except in a clear case of miscarriage. *Hanprya Devi v Jukunni* D D 19 C 133—191 A 79 P C, *Choutham v Khem Chand*, A I R 1929 Sind 7. In *R v Kentworth*, 7 Q B 612 649 *Denman L C J* said "I think that we collect from *R v Morton* the only rule, namely that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that to use the words of *Bigby J in I v D mo* 'a bona fide and diligent search was made for the instrument when it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is sufficient

factory, whether the search has been made 'bona fide,' where there has been due diligence and so on. It is mere waste of time on our part to listen to special pleading on the subject. *Wigmore* § 1194. *Ma Nyein v Mayin*, U B R (1897-1901) Vol II, 363. Where the original of a document could not be traced, but a certified copy taken at a time when it had been filed at a Court of law is produced and its custody is satisfactorily proved, secondary evidence is admissible and there is also a presumption of genuineness. *Lakhan v Tulsi* 39 C L J 90=28 C W N 1033. Copies of documents for the originals of which no proof was given of search cannot be received as secondary evidence. *Meer Usudoollah v Beeby Imaman* 5 W R P C 26=10 M I A 19, see also *Roopmanjoorce v Ramlal*, 1 W R 144, *Pandu v Bapudas* A I R 1929 Nag 288.

## CLAUSE (D)

When the original is not easily moveable. Secondary evidence is admissible on account of the great inconvenience and impracticability of producing the original. Therefore, inscriptions on walls, monuments, surveyor's works and the like are thus proved by copies or oral testimony. *Mortimer v McCallan*, 6 M & W 68. Similarly notices warning to trespassers affixed on boards may also be proved by secondary evidence, since they cannot conveniently, if at all, be produced in Court. *Taylor* § 438, see also *R v Forsey* 6 C & P 81. *Cobden v Bolton* 2 Cramp 108, *Doe v Cole* 6 C & P 359, *Bartholomew v Stephens* 3 C & P 728, *Bruce v Nicolopolo* 11 Ex R 129. The reason for this exception is thus stated by *Parke B* in *Jones v Taitton*, 1 Dowl Pr N S 625, 626, where he said: "The exceptions (cover things) not easily removed as in the case of things fixed in the ground or to the free hold, for the law does not expect a man to break up his freehold for the purpose of bringing a notice into Court." A remarkable illustration of this rule was furnished in the case of a man, who was convicted of writing a libel on the wall of the Liverpool goal on mere proof of his handwriting. Mentioned by *Lord Abinger* in *Martimer v McCallan supra Taylor* § 438. But the evidence must show that the writing cannot without great difficulty be removed or produced in Court. *Jones v Taitton* 9 M & W 675=11 L J Ex 267. Evidence has been admitted of the inscription on a tomb stone giving the date of death. *Smith v Patterson* 95 Mo 525=8 S W 567. There is a class of writings of so transient a nature that the Court may readily assume that they cannot be produced in Court and to which secondary evidence may be allowed, such as inscriptions and addresses on travelling trunks. If the production of the thing on which the inscription is found is indispensable, it would be impossible to proceed in many cases. If a sign were painted on a house it would hardly be contended that the house would have to be produced, nor can it be for wagons, boxes, tombstone, and the like on which one's name may be written. *Kansas etc Rail v Miller*, 2 Colo 440, *Burrell v North*, 2 Car & K 679. While Courts in the administration of the law of evidence should be careful not to open the door to falsehoods they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labour and expense to the parties and delay the progress of the remedy—itsself a serious evil—without giving any additional safe guard to the interests of justice. *Chiquot v United States* 3 Wall (U S) 114, *Burr Jones* § 205(b). But to prove incription on a coffin plate the coffin plate should be produced as it is removable. *R v Edge Hills Cir Ct 5th Am Ed* 212. "If a document be deposited in a foreign country," says *Mr Taylor* "and the laws or established usage of that country will not permit its removal secondary evidence of the contents will be admitted, because in that case as in the case of mural inscriptions it is not in the power of the party to produce the original." *Union v Tarnum* 1 C M & R 227, 291, 292, *Boyle v Wiseman* 10 Ex R 647. *Taylor* § 438. *Mr Whitley Stoles* thinks that such a case is not provided for unless perhaps by the latter part of clause (c). But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at all. It seems that the case would fall under paragraph (iii) of clause (a) in as much as it is in the power and possession of a person who is out of the reach and not subject to the process of the Court. *Woodroffe Ct 5th Ed* p 519. Secondary evidence, of the ab tract



**THE INDIAN EVIDENCE ACT**

circumstances of the case. *Ibid.* So "the evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much according to the nature of the paper itself, the custody it is in and indeed all the surrounding circumstances of the particular matter before the Court and the jury. A paper of considerable importance, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper which no body would be likely to take care of." What inquiry will do? I think in cases of this sort [there the loss was of a newspaper known as the Non-conformist from a club] if sometime after its publication it is not found in the place where it ought to be, if it be anywhere no such is necessary among the members of the club, or per one who frequents the club room it may be taken to be lost if it cannot be produced from the spot where it ought to be found. Per Pollack C B in *Garthe Cole v Udal* 13 W L R 319 320 In the same case Alderson B said "The question whether there has been a loss and whether there has been sufficient search must depend very much on the nature of the instrument searched for. If we were speaking of an envelope in which a letter has been received and a person said 'I have searched for it among my papers' I cannot find it surely that would be sufficient. If the party who kept the public coffee room had searched for it there, where it ought to be if in existence, and where naturally he would find it and says he supposed it has been taken away by some one that seems to me to be amply sufficient. If he had said 'I know it was taken away by A B, then I should have said so.' Ought to go to A B and see if A B has not got that which it is proved he took away." As it seems to me the proper limit is where a reasonable person would be satisfied that they had bona fide endeavoured to produce the documents themselves and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper. All that is required is that the party proving the document by secondary evidence must have used all reasonable means to obtain the original. *R v Morton* 1 M & S 48, *Gully v Exeter* 1 Bing 290, *Dickinson v Grey* 2 C & K 148 451, *Quiter v Joiss*, 14 C B N S 747, 750, *R v Knolly* 7 Q B 612 619, *Pardoe v Price* 13 M & W 269 *R v Gordon*. So proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. The question always one of due diligence in the effort to procure the original before evidence of its contents is resorted to. As a general rule the party is expected to show that he has in good faith exhausted all the sources of information and means of discovery which the nature of the case naturally suggests and which were accessible to him. Johnson v Arnume 42 N J L 431, 44 D & H 153. *Manning Pan v Ma Bum* Inglis 8 East 278 *R v Laithbury* 6 King 119. So proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. The question always one of due diligence in the effort to procure the original before evidence of its contents is resorted to. As a general rule the party is expected to show that he has in good faith exhausted all the sources of information and means of discovery which the nature of the case naturally suggests and which were accessible to him. Johnson v Arnume 42 N J L 431, 44 D & H 153. *Manning Pan v Ma Bum* Inglis 8 East 278 *R v Laithbury* 6 King 119. It follows properly that the determination of the sufficiency of the search admitted in evidence of the fact of loss should be left entirely to the discretion of the Court's discretion. *Hignmore* § 1191, *Taylor Et* § 23 (n). There must be evidence to lay a ground for the admission of secondary evidence has been given as a point proper to be decided by the Judge of the first instance and treated as depending very much on his discretion. His conclusions should rest on a clear case of miscarriage. *Harrieta Debi v Pukmin* Del 19 C 133=19 I A 79 P C Choulham v Allen Chand A I R 1979. In *K v Keelworth* 7 Q B 612 619, Denman L C J said "I think that we collect from *R v Norton* the only rule, namely that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that to use the words of *L J's* in *L v Dingo* a bonafide and diligent search was made for the instrument when it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is satisfactory."

factory, whether the search has been made *'bona fide'*, where there has been due diligence, and so on. It is mere waste of time on our part to listen to special pleading on the subject." *Wigmore* § 1191, *Ma Nyein v Mayun*, U B R (1897-1901) Vol II 363. Where the original of a document could not be traced but a certified copy taken at a time when it had been filed at a Court of law is produced and its custody is satisfactorily proved, secondary evidence is admissible and there is also a presumption of genuineness. *Lalhan v Tal* 39 C L J 90 = 28 C W N 1033. Copies of documents for the originals of which no proof was given of search cannot be received as secondary evidence. *Meej Usudoolah v Beeby Inaman* 5 W R P C 26 = 10 M I A 19. see also *Ropomunpoore v Ramlal*, 1 W R 114, *Pandu v Bapudas*, A I R 1929 Nag 288.

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65. which by section 32 of the Factory and Workshop Act 1901 (*Idu C*) must be affixed in the factory, can be given as the original cannot be removed. *Owner v Beecham Spinning Co Ltd* (1911) 1 K B 105=83 L J K B 11. Under this clause any kind of secondary evidence is admissible.

### CLAUSE (E)

When the original is a public document. When the original is a public record under section 74, secondary evidence of its contents is admissible under this clause. In this case the secondary evidence is admissible even where the original is in existence. *Krishna Kishori v Kishori Lal*, 14 C 491. The exception is based upon considerations of convenience. *Mark L 5, L Hennell v Lyon* 1 B & Ald 182, 184. Lord Ellenborough said "The production of copies in evidence is founded upon a principle of great public convenience in order that documents of great moments should not be unduly and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in Courts not of record copies of which are admitted, though not strictly of a public nature." In the same case *Abbott, J* said "It is a general principle that copies are receivable in such case, without the originals from the great inconvenience which would result if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents would be wanted at different places at the same time." Similarly in *Jones v Bow* 17 Cowp 17 Lord Mansfield allowed the Journals of the House of Lords to be proved by secondary evidence "for the inconvenience would be endless if the Journals of the House of Lords were to be carried all over the Kingdom." In every case, the reason for accepting secondary evidence of public documents is the "great inconvenience of removing them." *Per Pollock C B in De Robertis* 13 M & W 520 530 see also *Coons v Reuel* 11 Tex 131. Therefore when the law is laid down that you cannot remove the document in which the writing is made, you are entitled to the next best evidence." *Abinger L C B in Mortimer v McCallan*, 6 M & W 58 69, *Wigmore* § 1715.

Under this clause a certified copy of the document, but no other kind of secondary evidence is admissible. But this rule applies to cases in which the public document is still in existence on the public record and not where it has been destroyed. *Kolandan v Kumhunn*, 6 M 80. When a public document has been proved to be lost and it is also proved that no certified copy of the document is available secondary evidence other than a certified copy is admissible as long as the original is in existence. No secondary evidence other than a certified copy is admissible. *Syad Pashah v Gulab Shah*, 63 P R 1878, *Krishna Rao v Muthangi* 28 Ind C 808. A certificate of sale granted under the Civil Procedure Code is a document of title but is not a public document under the Evidence Act so as to allow secondary evidence of it to be given under clause (e). *Jasany v Hanibhai* 2 Bom L R 533. Probate of a Will is not proved by the production of the original Will. A copy of the probate granted in Australia is admissible in evidence in India such a copy is the copy of the Will and of the endorsement made thereon by the Registrar of probate showing that the Will has been filed and proved in Court granting the probate. The Will when so recorded and endorsed is a public document under section 74 of the Evidence Act which may be proved by secondary evidence under section 6 (e). *In the matter of Adiya* 11 Ind C 261.

An entry in a public document such as a settlement record can be proved only by the original or by a certified copy. *Ram v Mahi*, 71 Ind C 83, 1 A I R 1923 J 150. Canal *parchas* issued to tenants giving the name of the tenant in connection with his holding come under the definition of public documents and can be proved by production in original. *Chatterpol v Lachman* 1 R 1 A 152 (Ind). A certified copy of a *Robokari* is admissible in evidence. *Latha Nath v Emperor* 22 C W N 712=16 Ind Ca 689=19 Cr I 719.

### CLAUSE F

Certified copy permitted by the Act. Secondary evidence of the contents of a document is admissible when the original is a document of which a certified

copy is permitted by this Act, or by any other law in force in British India. The words "to be given in evidence" mean to be given in evidence in the first instance without having been introduced by any other evidence. *Hurish v Prosunno* 22 W R 303. A registered deed of sale is not a document of which a certified copy is permitted by this Act or by any other law in force in British India to be given in evidence. *Ibid*, *Munnam v Naynum*, 11 Ind Cas 50, *Harari Lal v Vanno*, 10 C P L R 59, *Bhadua v Akbar*, 103 Ind Cas 752. Section 57 of the Registration Act provides that all copies given under that section shall be admissible for the purpose of proving the contents of the originals, but that clause was not intended to override the provisions of the Evidence Act. *Raj Gobordhan v Nasiban* 7 Oudh Cas 365. So a basis must be laid for the introduction of secondary evidence by proving the loss or destruction etc of the original under this section before the original of a registered document can be proved by a certified copy under s 57 of the Registration Act. *Hurish v Prosunno* 22 W R 303, *Ma Yun Ma Bok*, A I R 1929 Rang 277. In *Harari Lal v Vanno supra* it is held that the copies referred to in section 57 of the Registration Act are not copies of the original documents but copies of the entries made in the registers. See also *Radha Kisan v Manuari* 17 C P L R 161. So under this clause certified copy of a registered document is not admissible in evidence. *Sansa Rao v Ghari* 13 C P L R 94. The issue of a certified copy of income tax returns to a person not entitled to inspect is forbidden by s 54 of the Income Tax Act and consequently such a copy is admissible in evidence of a public document. *Anwar Ali v Fa al Ahmad* 3 Bur L J 191=2 Rang 391=1925 Rang 84. Certified copies of the original can be given in evidence by the Bankers Books Evidence Act (XVIII of 1891) *vide s 1 of that Act*. So also where a power of attorney has been properly deposited in the High Court, under section 4 of the Powers of Attorneys Act (VII of 1882), a certified copy of that instrument so deposited shall, without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court. *vide s 4 (d) of the Powers of Attorneys Act*, (VII of 1882). This clause only allows certified copies as secondary evidence. But when the original is lost or destroyed any secondary evidence is admissible. *Kunnath v Fayoth* 6 M 80, *In re Ala and the Brenhildu*, 5 C 588. *Chandresuar v Bishesuar*, A I R 1927 P 61=101 Ind Cas 289=5 P 777. *Harinand v Ram Gopal* L R 37 I A 1=27 C 639 P C. *Ananda v Secretary of State* 43 C 973=20 C W N 373. Other secondary evidence is also admissible where the document satisfies the condition of the next clause. *Ram Sundar v Chandresuar*, 34 C 293.

# CLAUSE (G)

When the original consists of numerous documents. This provision is for the saving of public time. If the point to be a certain were, for instance the balance in a long series of accounts in a merchant's books evidently great inconvenience would arise and much public time will be wasted if a witness were compellable to go through the whole of the books and to make his examination and calculation before the Court. *Sponsor v Berlin* 3 Camp 310. He is allowed therefore to do this before he comes to be sworn, and then to give the general result of his scrutiny. *North v 248 1 Phil Ev 433 Taylor § 462; Green v 563 (h) Wigmore § 1230*. In *Boston v Danna* 1 Gray 83, 89 104. *Bignell I* said: "It appears to us that questions of this sort must necessarily be left very much to the discretion of the Judge who presides at the trial. It would doubtless be inexpedient in most cases to permit *ex parte* statements of facts or figures to be prepared and submitted to the jury. It should only be done where the books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements."

In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence it was the only mode of attaining to an intelligible view of the cause before the jury. *Wigmore § 1230*. The most commonly recognized application of this principle is that by which the state of pecuniary accounts or other business transaction is allowed to be shown by a witness's schedule or *summa Vexel v Sefton*, 2 Stark 274, 276. *Gardner Peckage Case*, Le Merchant's P

S 65 61, *Johnson v. Kershaw*, 1 De G & S. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912,

61, *Johnson v Kershaw*, 1 De G & Sim 260, 264. So also, in trying an action of infringement of copyright in such a way as to be conveniently compared *Lewis v Fullerton*, 2 Beav 68. *Mauman v Legg* 2 Russ 385 398, *Wignore* § 17. A witness may speak as to the insolvency of a party at a particular time from an inspection of his books. *Meyer v Seston*, 2 Stark 274. This exact answer however will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause though such letters have since been destroyed if the object of the examination be to elicit from the witness the impression which they produced on his mind with reference to the degree of friendship subsisting between the writer and a third party. *Topham v Greig* 1 C & Kir 320, *Taylor* § 462. "So a witness" says *Taylor* "if he has inspected the accounts of the parties though he may not give evidence of their particular contents will be allowed to speak to the general balance with *Taylor* § 462. But most Courts," says *Prof Wignore* "require, as a condition for placing the accounts in hand in order that the correctness of the evidence may be tested by inspection, that the man thus summarily testified to shall if the occasion seems to require be placed in Court or at least be made accessible to the opposite party in order that the material for cross examination may be available. If denied or that the material for cross examination may be available. *Wignore* § 1230. See also *Johnson v Kershaw* 1 De G & Sim 260.

[illegible]

*Dost Mohammad*, A I R 1925 Lah 231=78 Ind Cas 451 Evidence may be given as to the general results of arguments when they consist of numerous documents and accounts. Though their use is *tantamount* to assisting the Court of law in the examination of the Revenue Records yet it is an abuse of their functions to require them to give oral evidence of the contents of a document such as record of a *Muafi* enquiry which ought to be examined in original by the Court itself. *Gulam v Mussamat Hussan* 2 Lah L J 714

## 66 Secondary evidence of the contents of the documents

Rules as to notice referred to in section 65, clause (a), shall not to produce be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney or pleader,] such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

- (1) when the document to be proved is itself a notice,
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it,
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force,
- (4) when the adverse party or his agent has the original in Court,
- (5) when the adverse party or his agent has admitted the loss of the document,
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court

**Principle** The production of the original document is not required if production is under the circumstances not possible. Notice must be served on the party in possession of the document or his attorney to produce it because otherwise it cannot appear that the prosecutor might not have had the original if he had chosen to call for it. *Per Tithman C J in Com v Messenger* 1 Bing. 273 274. The party who is producing secondary evidence must show by giving notice to the party in possession of the original that he has used every exertion in his power that the best evidence might be had. *Per Porter J in Abot v Rion*, 9 Mart La 465 467. But where the rule of notice is satisfied, no notice is necessary. *Wigmore* §§ 1203 1204

**Scope of the section** This section embodies the law of notice, which must be given before secondary evidence can be received under section 65 clause (a). This section corresponds to section 34 of Act II of 1855 which applied only to one of the cases contained in section 65 (a) namely, that where

\*These words in section 66 were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 6

**S 66** the document was out of the reach of the process of the Court. Taking the section with clause (a) of section 65 notice must be given where the document is in (a) the possession or (b) the power of the person against whom it is to be proved or (c) where it is in the possession of a person legally bound to produce it. No notice is necessary where a person is out of the jurisdiction of the Court subject to the process of the Court. *Nort 1 r p 251*. The cases arising under the requirement involve two sets of questions: the necessity of the notice and the procedure of giving notice. Under the first head may be considered the order cases in which the rule of notice is not applicable, cases in which the rule is satisfied, cases in which, by exception notice is dispensed with. *Waggoner v. § 1202*. Where it is in the hands of the adverse party, all that is required is order to lay the foundation for secondary evidence is a reasonable demand on him to produce it. *Bradford v. Case*, 24 in *Clayton & Rep v. Thayer* (1871) 1 Ex p 780. In *Saltern v. Melnish*, Ambler 217, Lord Hurdwell in all cases proof by a copy and there are several rules by which evidence, even proof may be given of the contents of a deed: 1st it is ground sufficient, to say that the deed is in the hands of the opposite party and that he had notice to produce it and does not. The rule of law is that the best evidence must be given which the nature of the case will admit, and in no case is that rule contrived with greater latitude than in cases of this sort. If the writing is in the hands of a party and the party refuses to produce it, the writing itself may be regarded as unavailable and other evidence of its contents may be received. The refusal of the party in whose possession the document is to produce it is treated as making the document unavailable for the party who wants to use it, and the party is allowed to prove its contents otherwise, and this is so even though he may have obtained a statutory order compelling production. *Mc Lam v. Hancock* 17 Mo 19 (*Am*) *Greenl Ev* 563 (c). In order to put the party in default of having refused production it is usually necessary that he should have been notified that the document in question will be needed at the trial. But notice is not necessary in the following cases namely, (1) where the instrument to be proved is itself a notice to quit or notice of dishonour of a bill of exchange; (2) where from the nature of the action the defendant has notice that the plaintiff intends to charge him with possession of the instrument as for example in trover of a bill of exchange. *Jolley v. Taylor* 1 Camp 143, *Scott v. Jones* 1 Crant 865, *Bucher v. Jarret* 3 B & P 143. (3) Where the adverse party has obtained possession of the document fraudulently, as where, after service of a subpoena duces tecum the adverse party had received paper from the witness in fraud of the subpoena. *Leeds v. Cool* 1 Esp 256. *Neally v. Greenough* 1 N H 325. (4) Proof that the adverse party or his attorney, has the instrument in Court renders notice to produce it unnecessary. *Dwyer v. Collin* 1 Exch 639. (5) Similarly no notice is necessary where the adverse party will be his agent admits the loss of the original. In such a case the party will be admitted to give secondary evidence of its contents. (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court no resort to legal force is of service. *Greenl Ev* § 563 (e). The above rules are applicable both in civil and criminal cases. It will comparatively seldom happen that documents are required to be produced at a criminal trial and notice will consequently have but seldom to be issued. *Nort Ev* 251. Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for but no objection was raised to the giving of the evidence. *Held* that this was secondary evidence of the contents of a document and could not be given without satisfying the conditions of section 65 of the Evidence Act. Section 66 renders it legally inadmissible, although no objection was raised to the giving of it. *Kameshwar v. Amanut illa* 26 C 53=2 C W 561. Each partner should be served with the notice contemplated by s 66 of the Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books that are proved to be at the time in his custody or under his control, the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied. *Pridm Luba v. Mohendra* 34 C L J 405. Before secondary evidence of any document can be given a notice to produce the original must be given, *Maung Po v. Ma*

*Shue* 2 Rang 377=A I R 1925 Rang 7 Oral evidence of the contents of a letter neither called for nor produced is inadmissible under this section though no objection may be taken to the giving of that evidence and no subsequent dispensing with the notice can operate to make it admissible. *Prufulla v Emperor* A I R 1930 Cal 209=50 C L J 598

**Secondary evidence of the Contents** "Secondary evidence of the contents means apparently not of the existence or condition of the documents" *Hutley Stokes*, Vol II p 893

**Party—Meaning of** The word 'party' means not only adversary in the cause, but also a stranger legally bound to produce the document *Hutley Stokes*, Vol II p 893

**Such notice to produce as is prescribed by Law** According to English practice an adversary in the cause is given a notice to produce the document in question while a stranger in possession of the document be served with a *subpoena duces tecum* to produce it *Bull v Loveland*, 10 Pick 14 The notice may be directed to the party or his attorney and may be served on either *All Gen v Le Merchant* 2 F R 201 note, *Houseman v Roberts* 5 C & P 391 But on the fact it may not be sufficient to serve it upon the attorney *Alfalo v Fourdriner* M & M 334, *Byrne v Harey* 2 Mo & Rob 89 But as to the time and place of the service no precise rule can be laid down except that it must be such as to enable the party under the known circumstances of the case, to comply with the call *Rogers v Custance*, 2 Mo & Rob 179, *Sicque v Buchanan*, 10 A & L 598, *Lloyd v Mostyn* 2 Dowl Pr N S 476 Generally if the party dwells in another town than that in which the trial is had a service on him at the place where the trial is had or after he has left home to attend the Court, is not sufficient *George v Thompson* 4 Dowl 636, *Forster v Pointer* 9 C & P 718 As regards the time of service *Vide Holt v Miers* 9 C & P 191, *R v Katson* 20 Fng L & Eq 590 But if a party has gone abroad leaving the cause in the hands of his attorney it will be presumed that he left with the attorney all the papers material to the cause and the notice should therefore be served on the latter *Bryan v Wagstaff*, 2 C & P 125 The notice also, should generally be served previous to the commencement of the trial *Hughes v Budd*, 8 Dowl 315, *Furkin v Richards*, 9 C & P 478 *Gibbons v Powell* 9 C & P 631, *Bate v Kinsey* 1 C M & R 38 If the writing is in a third person's control, and the person is within the jurisdiction, it cannot be said to be unavailable for the party desiring to use it, until he has by *subpoena duces tecum* resorted to the power of the law to obtain it, so that the mere fact of the third person's possession or of notice to him, or demand upon him, is insufficient to excuse non production. *R v Castleton* 1 T R 236, *Whitford v Triton*, 10 Bing 397, *Green P* § § 563 (d) 563 (e) But it is clear from clause (a) of section 65 as well as section 66 that a notice prescribed by law is only required to be served both on the adversary or on a third person In India the procedure for giving such notice is laid down in Civil and Criminal Procedure Codes (*Vide Civil Pro Code Order XI* rules 15 16 17, 18, Order XVI, rules 5 6 7 8 9, 10 18 *Criminal Procedure Code* ss 91 to 98 48.) In the original side of the High Court where the English practice is followed a *subpoena duces tecum* will have to be issued in case of strangers *Vide Woodroffe P* 8th Ed 523 Where no notice is prescribed by law, such notice will be served as the Court considers reasonable under the circumstances of the case

\*It may be difficult to lay down any general rule as to what the notice ought to contain says *Mr Taylor* 'since much depends on the particular circumstances of each case but that this much is clear first that no mis-statement or inaccuracy in the notice will be deemed material if it be not really calculated to mislead the opponent (*Juice v Flistob* 1 F & L 258 *Graham v Oiles*, 11 262) and next that it is not necessary by condescending minutely to dates contents parties, etc., to specify the precise document intended Indeed it may be dangerous to do so since if any material errors were to creep into the particulars, the party sought to be affected by the notice might urge, with possible success that he had been misled thereby If enough is stated on the notice induce the party to believe that a particular instrument will be called for this will



be sufficient *Rogers v Custance* 2 M & Rob 181. Taylor § 443. The notice to produce need not be minutely descriptive and the Courts will not entertain frivolous or technical objections to its validity, if it points out, with sufficient distinctness, to the adverse party the documents which he is required to produce and received by the plaintiff between the years 1837 and 1841, both inclusive, also all book papers etc relating to the subject matter of this cause. (*Morris v Hulse* 2 M & Rob 192) and letters written by the plaintiff to the defendant relating to the matters in dispute in the action' (*Jacob v Lee* 2 M & Rob 330) and also all accounts relating to the matters in question in this cause' (*Poyser v Custance* 2 M & Rob 179) have been held sufficient notice to produce any documents reasonably included in the description. (*Pouell F*, pp 679 680, contra by the later case of the *Queen's Bench* in *Rogers v Custance* supra. But the case of *Jones v Edwards* M & W 139 is not affected by this decision. Taylor § 440. But in the subpoena duces tecum the party is bound to specify the particular documents of which he requires the production at the hearing, he is not entitled to fix him in general terms as if it were a bill of discovery or even a notice to produce, as he is not entitled to exist on a witness who is no party to the proceedings the burden which this would involve. *Lee v Angus*, L R 1 Eq 19. *Burchard v McTearlane* (1891) 2 Q B 241 247, 251. Where a parish woman is living with her brother service of summons on him instead of on the woman herself would constitute notice as is required by this section. *Durgawati v Jagannath* A I R 1929 All 680.

**Effect of production or non production after service of notice.** If a party refuses to produce the papers required such a circumstance is not of itself evidence against him it merely entitles the other party to give secondary evidence. *Cooper v Gibson* 3 Camp 363, *Lawson v Sherwood* 1 Stark 315. The refusal to produce them is however matter for observation to the jury. *Semb* Ld 1. *Lyndhurst C B* in *Bate v Kinsey* 1 C M & R 41. But see *Doe d Budge v Hutehead* 8 A & E 571. If the party giving the notice declines to use the papers when produced this though a matter of observation will not make it evidence for the adverse party. (*Sayer v Auteken* 1 Esp 210) though it is otherwise if the papers are used or inspected by the party calling them. *Wilson v Bourne* 1 C & P 10. *Phorane v Haulledge* 5 Lsp 235. Notice to produce papers will not entitle the party who gives it, to cross-examine a witness, as afterwards use the original either to contradict the secondary proof. (*Doe d Thompson v Hodgson* 12 A & E 135) or to show that there are other things which he ought to be called. (*Lawson v Allen* 3 Stark 74, *Edmond v Challias* 7 C B 113) or to refresh the memory of a witness. (*Till v Ainsworth* 1847) or it seems for any purpose. (*Collins v Garbon* 2 F & F 41. *Doe v Hodgson* 12 A & E 135). He is in effect bound by any legal and satisfactory evidence produced on the other side. *Shoolram v Ramlal*, 9 W R 218. *North* Ld 232.

**Proviso para (1).—When the document to be proved is itself a notice.** A notice to produce a notice is not necessary before using a copy. The proviso of the exception is thus stated by *Gibson J* in *Eisenhart v Staymal* 14 S A 153 156 (Am). "Every written notice is for the best of all reasons to be provided by a duplicate original for if it were otherwise the notice to produce the original could be proved only in the same way as the original itself and the fresh need it would be constantly arising ad infinitum to prove notice of the preceding notice so the party would at every step be receding in a series of circles." *Illmore* § 1206. See also *Phillipson v Chase* 2 Camp 111. But this consideration can well be made in the case of one kind of notice only namely the notice to produce. In England the rulings have been in great conflict though the exceptions seem also to have included the cases of a notice of a third of dishonour and a Lindell's notice to quit. *Had*. There also this exception

appears to have been originally adopted in regard to notices to produce, for the obvious reason that if a notice to produce such papers were necessary, the series of notices would become infinite. *Philpott v Chase*, 2 Camp 111, per Lord Ellenborough. See also *In re Turner* (1910) 1 K B 346. The Judges however subsequently extended the exception to many other notices, partly perhaps from a misapprehension of the ground on which the doctrine rests, partly from the experienced inconvenience attendant on a strict observance of the rule requiring notice, partly because the secondary evidence that is usually offered of a notice is a copy of the paper sent which partakes in great measure of the character of a duplicate original (*Kine v Beaumont* 3 B & B 291) and chiefly because it constantly happens that the opposite party is well aware from the nature of the action, that he will be charged with the possession of the original document. *Colling v Freueel* 6 B & C 399, 400, *Robinson v Brown*, 3 Com B 754, *Taylor* 11 § 150. In *Roberts v Bordshaw*, 1 Stark 228 no notice was required for a letter telling of a bill's dishonour in as much as it "was in the nature of a notice." But a notice to surety of default of the principal was not held to be a 'mere notice'. *Gore v Ware* 2 Stark 174. A notice of a bill's dishonour was held to be a notice. *Adland v Pearce*, 2 Camp 599. But in case of a notice to a drawer of the acceptor's non payment, notice to produce was required. *Langdon v Hulls*, 5 Lsp 156. In *Suan v Lewis* 2 C M & R 261, by all the Judges, notice was held not necessary for notice of dishonour. See also *Kine v Beaumont* 3 B & B 288. In India by clause (a) of the proviso notice is dispensed with when the document to be produced is itself a notice. In America apart from the above single instance (i.e. notice to produce a notice to produce) most Courts from time to time recognize that the case of a notice—notice to quit, notice of dishonour, notice of suit and the like—is to be governed merely by the general principle namely, where the pleadings by implication give notice to produce the notice no express notice to produce it is necessary, but otherwise it is required. *Wigmore* § 1206.

**Proviso para (2)**—When the adverse party must know that he will be required to produce it. If from the nature of the action or indictment, or from the form of the pleadings, the defendant must know that he will be charged with the possession of an instrument and be called upon to produce it no notice to produce need be served upon him. *Colling v Freueel* 6 B & C 398, 399. 'Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument there can be no necessity for giving him any other notice.' Per Le Blanc J in *Hou v Hall* 14 East, 274, 277. This principle is accepted in a variety of cases. *Wigmore* § 1205. It naturally suggests itself that there are cases in which formal notice to produce would be idle, as in the case of an action for wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written character appeared and it is on that account that the general rule that notice to produce must be given before secondary evidence can be received of the contents of a paper in the possession of the adverse party does not apply in those cases where the nature of the proceeding and pleadings are such as to notify the party that he is charged with the possession of the instrument and that its production is necessary. *Continental Insurance v Rogers*, 119 Ill 474 (Am). Thus in an action for trover for converting a bond a bill of exchange, or other writing (*Scott v Jones* 4 Trunt 865 *Hou v Hall*, 14 East 275, *Bucher v Worral*, 3 B & P 143) or in a prosecution for stealing any document (*R v Belles* 1 Lev 297, *R v Brennan* 3 Craw & D C C 109, *contra R v Farr* F & F 336) the counsel for the prosecution or the crown may at once produce secondary evidence of its contents even though the defendant should offer to produce the document itself. *Whitehead v Scott* 1 M & Rob 2 *Taylor* § 452. In an old case of trover *Spencer C J* said 'After reviewing all the cases we hold that in an action of trover for bonds or notes no notice to produce the thing sought to be recovered was necessary, and that where the form of action gives the party notice to be prepared to produce the instrument if necessary to falsify the evidence of the other party it is not necessary to give notice to produce instrument. These principles apply directly in this case. The form of

pleading, we must presume, gave the plaintiff notice, that he had received and in his possession obligation amounting to more than 150 dollars he was forced then to come prepared to produce them. *Hardy v Kretzinger* 17 Johns (N Y) 293. We also read *Gamble* 10 A & I 597, *R v Fluorthy* 10 Cox Cr 55 (182). No notice to produce is necessary in an action to recover the amount of a forged note which has been returned to the defendant. (*Luellett v Clark* Latt & Co's Ex (179), in an action against a carrier for non delivery of a writing (*Jolley v Tz* 1 Camp 113) in an action against a telegraph company for failing to deliver telegram (*Reliance Lumber v Western Union Tel Co*, 41 Am Rep 63). In an action for conspiracy in restraint of trade no notice to produce the alleged agreement is necessary (*State v Deany* 65 Kan 292) nor is a notice required under the conditions of a contract in writing in an action for breach of warranty of machinery (*Nicholas & Co v Charlebois* 10 N D 146). In an action in contract it is held that the pleadings imply notice as to the orders and letters constituting the contract. *Zipp v Colchester* 12 S D 218 (Iowa). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Kelner v Sarage* 20 Me 199) or the action is brought on a written contract in possession of the defendant which is fully described in the complaint. *Dana v Conat*, 30 Vt 246. *Burr Jones & Co* with the others which he has disposed of or retained in his possession he had no effect that, if practicable to procure it, evidence will be given of the counterfeit character and of having passed them as true. It is notice in law for which a party is as much bound both in civil and in criminal cases as by not in effect. Notice in fact is notice in form. *Pei Baldwin J in U S v Doeblen* 1 Bold W 519, 2 (Iowa). It seems settled therefore that on a charge of larceny or of forgery, express notice is necessary and the principle would also extend to other charges but the nature of the charge will determine the application of the principle. *Wigmore* § 1207. *R v Hauorth* 1 C & P 251 256. But in an action for person with intent to defraud the insurer notice to produce the policy was required. *R v Kilson* 6 Cox Cr 139. See also *R v Fluorthy*, 10 Cox Cr 579 (182). If the maker of a note or cheque or the acceptor of a bill does not as defendant in an action deny by his plea the making or acceptance the plaintiff who is not bound to produce the instrument as part of his case since it is admitted on the record may object to the defendant's giving secondary evidence of its content, for the purpose even of identification unless a notice to produce has been duly served. *Gooder v Dimow* 3 Q B 356. *Dwyer v Collins* 21 L J Ex 226, Toph.

Secondary evidence of mortgage cannot be given unless notice to produce is given to the mortgagee clause (2) not applying to a case against mortgagee. *Maung Po v Ma Shue* 81 Ind Crs 373 = A I R 192, Ring 7. *Ma Le v Ma Shue* U B R 1907 1th Cr Ev 13. but see *Dimonath v Rama Rai*, 6 P 101. 97 Ind Crs 318 = 1926 P 512. In another case it is held that in an action to redeem when the mortgagee is in possession of the mortgage deed and fails to produce it oral evidence is admissible under s 65 (a) read with proviso (1). Section 66 of the Evidence Act. *Mh Amun v Mh Gurb* 9 Bur J 1, 1923 31 Ind Crs 893. See also *Bhadr Singh v Mahadeo Singh* 36 Ind Crs 696. *Sahn* 17 A I J 711. *Duarka v Jamanand* 41 A 592 = 51 Ind Crs 37. No notice to defendants to produce the original was necessary to render secondary evidence admissible where the defendant from the nature of the case must have known that they would be required to produce the original. *Mahammad v Namnarain* 7 C L 7 90. It is doubtful if a *pro forma* defendant who is not interested in suit property or in the decision of the case is an adverse party within the meaning of proviso (2). *Durgabati v Jagannath* A I R 1929 All 650. Proviso para (3)—When the opponent has obtained fraudulent possession of it, etc. The opponent's fraudulent suppression of a document in the

possession, or of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent) should be exempt from the requirement of notice, because this suppression amounts to a refusal to produce, and the only object of a notice is to make it clear that the opponent's failure to produce amounts to a refusal. This exception is generally recognized *Hugine* § 1207. Thus in *odium spoliatoris* a notice need not be given to the adverse party to produce a paper of which he has fraudulently or forcibly obtained possession, as where, after action brought, he has received it from a witness in fraud of a subpoena duces tecum *Letts v Cool*, 4 Esp 256 *Taylor* § 453. The same rule is applicable when the loss was by stealing instigated by the opposite party. *Doe v Lees* 7 Bing 724. No notice is necessary where a lease which has once been used in evidence in the litigation was sent out of the state by the counsel of the party against whom it was used without the consent of the other party. *Mitchell v Jacobs* 17 Ill 235. If the document was obtained by the adverse party from the one seeking to use it by fraudulent or forcible means of any character (*Gray v Kernahan* 2 Mills Const (S C) 65) such as obtaining a deed for the alleged purpose of recording it (*Davis v Spooner*, 3 Pick Mass 284), or a conspiracy by which a letter was taken from its possessor (*Medy v People* 49 Ill App 218) it is not necessary to give notice to produce writing. A defendant having put in evidence what purported to be a letter to himself, signed by the plaintiff, and having asserted that this was all of the letter which he received at that time though at other times he had received other letters from the plaintiff it was proper for the Court to allow the plaintiff to show that the paper produced did not contain the whole of the letter as written and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters. *Robinson v Cutter*, 163 Mass 377, *Burr Jones* § 223.

**Proviso para (4)**—When the adverse party has the original in Court a notice to produce is rendered unnecessary by proof that the adverse party or his solicitor has the original instrument in Court for the object of the notice is not—as was formerly thought (*Bate v Kinsley* 1 C M & R 38, *Cook v Hean* 1 M & Rob 201, *Doe v Grey*, 1 Stark R 284 *Exall v Patridge* *ibid*)—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial and thus to secure the best evidence of its contents. *Taylor* § 456. In *Dugan v Collins* 7 Ex Ch 639, an action was brought by the indorsee against the acceptor of a bill of exchange, to which the defendant pleaded *inter alia*, that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron, the defendant proceeded to prove his plea, and for that purpose gave evidence of the gaming and swore that the only bill he ever gave to the drawer of the bill which was declared on was by way of payment of the debt then incurred. The defendant's Counsel, being required to prove that the identical bill declared upon was that which was given on that occasion called for the bill which the plaintiff's counsel declined to produce. The plaintiff's attorney having admitted that the bill was in his possession and in Court, the defendant's counsel called for its production which being refused he then offered to give secondary evidence of its contents. The plaintiff's counsel objected that there ought to have been a previous notice to produce and the Lord Chief Baron after consulting the Judges ruled it in favour of the defendant. In that case Lord Chief Baron Parke said: The next question is whether the bill being admitted to be in Court proof evidence was admissible on its non production, or whether a previous notice to produce was necessary. On principle the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial, though the document is in Court is too late. But if it be merely to enable the party to have the document in Court, to produce it if he likes, and if he does not, to enable the opponent to give proof evidence,—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence) then the demand for the production of

## III INDIAN EVIDENCE ACT

S 66 pleading we must presume that he had received, and he in his possession, obligations amounting to more than 100 dollars, he was then to come prepared to produce them, *Harden v Kretzinger*, 17 Johns (N Y) 293. It is also held in *Gamble* 10 A & I 597, R v *Fletcher* 10 Cox Cr 57 (182) No notice to produce is necessary in an action to recover the amount of a forged bill (Jolley v Taylor 1 Crimp 113) in an action to recover the amount of a forged bill (178) in an action against a carrier for non-delivery of a writing (Jolley v Taylor 1 Crimp 113) in an action against a telegraph company for failing to deliver a telegram (Helme Lumber v Western Union Tel Co., 41 Am Rep 67) In an action for conspiracy in restraint of trade, no notice to produce the all agreement is necessary (State v Draney, 65 Kan 292) nor is a notice required under the conditions of a contract in writing in an action for breach of warranty of machinery (Nicholas & Co v Charlebois, 10 N D 146) In an action in contract it is held that the pleadings imply notice as to the orders and letters connected with the contract (Zipp v Colchester, 12 S D 218 (1m)) So the rule is the same where the writing is a proper matter of defence and the adverse party is not understood that it will come in question (Helmer v Sarago 20 Me 197), or fully described in the complaint (Dana v Conal, 30 Vt 246 Burr Jones, 225) If the note he is charged with forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession he had not in effect that if practicable to procure it, evidence will be given of the counterfeit character and of having passed them as true. It is notice in law to either party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form. It is notice in law to either party is as much bound both in civil and in criminal cases as by notice in effect. (1m) It seems settled therefore that on a charge of larceny or of forgery express notice is necessary and the principle would also extend to other charges but the nature of the charge will determine the application of the principle. Wigmore § 120. R v Hauorth 4 C & P 251 256 But in an action for person with intent to defraud the insurer notice to produce the policy was required. R v Kilson 6 Cox Cr 139 See also R v Fletcher, 10 Cox Cr 579 (182) If the maker of a note or cheque or the acceptor of a bill does not as defendant in an action deny by his plea the making or acceptance of the bill, who is not bound to produce the instrument as part of his case since it is admitted on the record may object to the defendant's giving secondary evidence of its content, for the purpose even of identification unless a notice to produce has been duly served. Goodered v Brown 3 Q B 356) *Dayer v Collins* 21 L J Ex 220, 125 § 452

Secondary evidence of mortgage cannot be given unless notice to produce is given to the mortgagee clause (2) not applying to a case against mortgagee. *Maung Po v Ma Shue* 84 Ind Crs 373=A I R 192, Ring 7. *Ma Le v Shue* U B R 1907 1th Cr Iv 13 but see *Dunonath v Rama Rai*, 6 P 100 97 Ind Crs 348=1926 P 512 In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgage deed and he to produce it oral evidence is admissible under s 65 (a) read with proviso (1) to section 66 of the Evidence Act. *Ma Amun v Ma Gurh*, 9 Bur L J 32=311 Cas 892 see also *Bhadur Singh v Mahadeo Singh* 36 Ind Cas 696 *Sahn v Sheo A W N* 1888 147 *Darfa v Ramchand*, 41 A 592=51 Ind Cas 77 17 A I J 711 No notice to defendants to produce the original was necessary to render secondary evidence admissible where the defendants from the nature of the case must have known that they would be required to produce the original. *Mahammad v Ammarain* 7 C L 790 It is doubtful if a *pro forma* declaration who is not interested in suit property or in the decision of the case is an adverse party within the meaning of proviso (2) *Durgabati v Jagann* A I R 1925 All 650

Proviso para (3)—When the opponent has obtained fraudulent possession of it etc The opponent's fraudulent suppression of a document in

possession, or of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent) should be exempt from the requirement of notice, because this suppression amounts to a refusal to produce, and the only object of a notice is to make it clear that the opponent's failure to produce amounts to a refusal. This exception is generally recognized *Higgin* § 1207. Thus in *odium spoliatoris* a notice need not be given to the adverse party to produce a paper of which he has fraudulently or forcibly obtained possession as where, after action brought, he has received it from a witness in fraud of a subpoena duces tecum *Leeds v. Cool*, 4 Fsp 256 *Taylor* § 433. The same rule is applicable when the loss was by stealing instigated by the opposite party *Doe v. Lees* 7 Bing 724. No notice is necessary where a lease which has once been used in evidence in the litigation was sent out of the state by the counsel of the party against whom it was used without the consent of the other party. *Mitchell v. Jacobs*, 17 Ill 235. If the document was obtained by the adverse party from the one seeking to use it by fraudulent or forcible means of any character (*Gray v. Kenaham*, 2 Mills Const (S C) 65) such as obtaining a deed for the alleged purpose of recording it (*Davis v. Spooner* 3 Pick Mass 284), or a conspiracy by which a letter was taken from its possessor (*Medley v. People*, 49 Ill App 218) it is not necessary to give notice to produce writing. A defendant having put in evidence what purported to be a letter to himself, signed by the plaintiff, and having asserted that this was all of the letter which he received at that time, though at other times he had received other letters from the plaintiff it was proper for the Court to allow the plaintiff to show that the paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters *Robinson v. Cutler* 163 Mass 377, *Burr Jones* § 223.

**Proviso para (4)**—When the adverse party has the original in Court A notice to produce is rendered unnecessary by proof that the adverse party or his solicitor has the original instrument in Court for the object of the notice is not—as was formerly thought (*Bate v. Kinsey* 1 C M & R 33 *Cook v. Hearn*, 1 M & Rob 201, *Doe v. Grey*, 1 Stark R 284 *Exall v. Pittridge*, *ibid*)—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it, if he likes at the trial, and this to secure the best evidence of its contents. *Taylor* § 456. In *Dwyer v. Collins* 7 Ex Ch 639 an action was brought by the indorsee against the acceptor of a bill of exchange to which the defendant pleaded, *inter alia*, that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron the defendant proceeded to prove his plea, and for that purpose gave evidence of the gaming, and swore that the only bill he ever gave to the drawer of the bill which was declared on was by way of payment of the debt then incurred. The defendant's Counsel being required to prove that the identical bill declared upon was that which was given on that occasion called for the bill which the plaintiff's counsel declined to produce. The plaintiff's attorney having admitted that the bill was in his possession and in Court, the defendant's counsel called for its production which being refused he then offered to give secondary evidence of its contents. The plaintiff's counsel objected that there ought to have been a previous notice to produce and the Lord Chief Baron after consulting the Judges ruled it in favour of the defendant. In that case Lord Chief Baron Parke said: The next question is whether the bill being admitted to be in Court previous evidence was admissible on its non production, or whether a previous notice to produce was necessary. On principle the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial, though the document is in Court is too late. But if it be merely to enable the party to have the document in Court, to produce it if he likes, and if he does not to enable the opponent to give prior evidence—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence) then the demand for the production at the

**S 66** pleading, we must presume, gave the plaintiff notice that he had received, and had in his possession, obligations amounting to more than 150 dollars, he was found then to come prepared to produce them' *Hardin v Ketsinger*, 17 Johns (N Y) 293. See also *Head v Gamble* 10 A & P 597, *R v Fluorothy* 10 Cox Cr 575 (1852). No notice to produce is necessary in assumption for non delivery of papers, (*Jolley v Taylor* 1 Camp 143) in an action to recover the amount of a forged bank note which has been returned to the defendant (*Lucett v Clait* Litt & Sel Cas Ky (178) in an action against a carrier for non delivery of a writing (*Jolley v Taylor* 1 Camp 143) in an action against a telegraph company for failing to deliver a telegram (*Michigan Lumber v Western Union Tel Co*, 44 Am Rep 620). In an action for conspiracy in restraint of trade, no notice to produce the illegal agreement is necessary (*State v Drenny* 65 Kan 292) nor is a notice required under the conditions of a contract in writing in an action for breach of warranty of machinery (*Nicholas & Co v Charlebois* 10 N D 146). In an action in contract it is held that the pleadings imply notice as to the orders and letters constituting the contract (*Zipp v Colchester* 12 S D 218 (1m)). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Hebner v Sarage* 20 Me 199), or the action is brought on a written contract in possession of the defendant which is fully described in the complaint (*Dana v Conat*, 30 Vt 246 *Burr Jones* § 223). If the note he is charged with forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession he had notice in effect that, if practicable to procure it, evidence will be given of their counterfeited character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect, and either is sufficient. *Per Baldum J in I S v Doeblen* 1 Bold W 519, 521 (1m). It seems settled therefore that on a charge of larceny or of forgery no express notice is necessary and the principle would also extend to other charges but the nature of the charge will determine the application of the principle. *Wymore* § 120; *Ex v Hinworth* 1 C & P 254 256. But in an action for arson with intent to defraud the inurer notice to produce the policy was required. *Ex v Kitson* 6 Cox Cr 159. See also *Ex v Fluorothy* 10 Cox Cr 579 (1852). If the maker of a note or cheque or the acceptor of a bill does not as defendant in an action deny by his plea the making or acceptance the plaintiff who is not bound to produce the instrument as part of his case since it is admitted on the record may object to the defendant's giving secondary evidence of its contents for the purpose even of authentication unless a notice to produce has been duly served (*Goulden v Ironmonger* 3 Q B 356) *Deyers v Collins* 21 I J P 225, *Taylor* § 122.

Secondary evidence of mortgage cannot be given unless notice to produce is given to the mortgagee clause (2) not applying to a case against mortgagee. *Murray Pox v M. Shore* 84 Ind Cas 373 = A L R 192, Rang 7. *M. Pox v M. Shore* 1 B R 1907 4th Qr 1 v 13. but see *Dimonath v Jama* 1 m, 6 P 102 = 97 Ind Cas 385 = 1926 P 12. In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgaged land and fails to produce it, oral evidence is admissible under s (5) (a) read with proviso (2) to section 16 of the Evidence Act. *M. Jinnah v M. Gaur* 9 Bur L 1 102 = 11 Ind Cas 892. See also *Pokhar Singh v Mohd. Singh* 36 Ind Cas 696, *Sahu v Sita* A W N 1888 147. *Drake v Lammont* 11 A 792 = 1 Ind Cas 250 = 17 A L J 711.

No notice to defendant to produce the original was necessary to render secondary evidence admissible where the defendant from the nature of the case must have known that they would be required to produce the original. *See M. Jinnah v M. Gaur* 9 Bur L 1 102 = 11 Ind Cas 892. It is also held that in the absence of a party or in the absence of the case in fact on a relevant party within the meaning of proviso (2) *Drake v Lammont* 11 A 792 = 1 Ind Cas 250 = 17 A L J 711.

**Proviso 2a (3)**—When the opponent has obtained fraudulent possession of the document, the opponent's fraudulent possession is not a bar to the

possession, or of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent) should be exempt from the requirement of notice, because this suppression amounts to a refusal to produce, and the only object of a notice is to make it clear that the opponent's failure to produce amounts to a refusal. This exception is generally recognized *Wigmore* § 1207. Thus in *odium spoliatoris* a notice need not be given to the adverse party to produce a paper of which he has fraudulently or forcibly obtained possession, as when, after action brought, he has received it from a witness in fraud of a subpoena duces tecum. *Leeds v Cool*, 4 Esp 256. *Taylor* § 453. The same rule is applicable when the loss was by stealing instigated by the opposite party. *Doe v Rees* 7 Bing 724. No notice is necessary where a lease which has once been used in evidence in the litigation was sent out of the state by the counsel of the party against whom it was used without the consent of the other party. *Mitchell v Jacobs*, 17 Ill 235. If the document was obtained by the adverse party from the one seeking to use it by fraudulent or forcible means of any character (*Gray v Kernaham*, 2 Mills Const (S C) 65) such as obtaining a deed for the alleged purpose of recording it (*Davis v Spooner* 3 Pick Mass 284), or a conspiracy by which a letter was taken from its possessor (*Medley v People*, 49 Ill App 218), it is not necessary to give notice to produce writing. A defendant having put in evidence what purported to be a letter to himself, signed by the plaintiff, and having asserted that this was all of the letter which he received at that time, though at other times he had received other letters from the plaintiff, it was proper for the Court to allow the plaintiff to show that the paper produced did not contain the whole of the letter as written, and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters. *Robinson v Cutler*, 163 Mass 377. *Burr Jones* § 223.

**Proviso para (4)**—When the adverse party has the original in Court a notice to produce is rendered unnecessary by proof that the adverse party or his solicitor has the original instrument in Court for the object of the notice is not—as was formerly thought (*Bate v Kinsey* 1 C M & R 38. *Cook v Hearn*, 1 M & Rob 201, *Doe v Grey*, 1 Stark R 284. *Exall v Patridge*, *ibid*)—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it, if he likes, at the trial, and this to secure the best evidence of its contents. *Taylor* § 456. In *Dwyer v Collins* 7 Ex Ch 639, an action was brought by the indorsee against the acceptor of a bill of exchange, to which the defendant pleaded, *inter alia* that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron, the defendant proceeded to prove his plea, and for that purpose gave evidence of the gaming and swore that the only bill he ever gave to the drawer of the bill which was declared on was by way of payment of the debt then incurred. The defendant's Counsel, being required to prove that the identical bill declared upon was that which was given on that occasion called for the bill which the plaintiff's counsel declined to produce. The plaintiff's attorney having admitted that the bill was in his possession and in Court, the defendant's counsel called for its production which being refused he then offered to give secondary evidence of its contents. The plaintiff's counsel objected that there ought to have been a previous notice to produce, and the Lord Chief Baron after consulting the Judges ruled it in favour of the defendant. In that case Lord Chief Baron Parke said. The next question is whether the bill being admitted to be in Court prior evidence was admissible on its non production, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it then no doubt a notice at the trial, though the document is in Court is too late. But if it be merely to enable the party to have the document in Court, to produce it if he likes, and if he does not to enable the opponent to give prior evidence,—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence) then the demand for the production at the



**S 66** trial is sufficient. If this (the former) be the true one, the necessity of the reasonable length of notice would not be the time necessary to procure the document a comparatively simple inquiry but the time necessary to procure evidence to explain or support it a very complicated one depending on the nature of the plaintiff's case and the document itself and its bearing on the case and in practice such matters have never been inquired into but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleads the best evidence of its contents and a request to produce immediately is quite sufficient for that purpose if it be in the Court. It would be a scandal to the administration of the law if the plaintiff's objection had prevailed. *Wigmore Case* 14 227.

**Proviso para (5)** When the adverse party or his pleader has admitted loss of the document. The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document the object being to know a demand and refusal to produce. So the requirement of notice does not apply to the proponent unless he is proceeding on the theory that the opponent has possession for example if he is accounting for the document as lost or destroyed and not as in possession of the opponent notice is unnecessary. It follows that where the document is admitted by the opponent to have been destroyed or lost or even out of his possession no notice is necessary, for it is no longer a case of opponent's possession but of loss. *Wigmore* § 1203. In such a case the notice could be nugatory. *Ex v. Hurnth* 1 C & P 24. *Foster v. Pointer* 9 C & P 718. *Hou v. Hill* 11 East 276. *Doe Spatty* 3 B & Ad 152, *Taylor* § 15. A party however can not under this exception call witnesses to prove the destruction of a document that has been traced into the hands of his opponent and then show its contents by secondary proof without serving a notice to produce because notwithstanding evidence to the contrary the document may still be in existence and at any rate the opponent may dispute the fact of its destruction. *Doe v. Morris* 3 A & J 16. *Taylor* § 15. Where by the proponent's evidence the document is traced to the opponent's hands—as by the presumption from mailing—and the opponent denies the receipt of it then even taking the opponent's testimony at its highest value the whereabouts of the document becomes unexplainable mystery, and the case is virtually one of loss, so that the proponent should be allowed to prove the contents without having given notice while if we take the opponent's testimony as false and assume that he has in truth received the document, his denial is express refusal to produce which equally puts the plaintiff in the position of being equally unable to obtain the document so that notice is unnecessary. *Wigmore* § 1203.

**Proviso, para (6)**—When the person in possession of the document is out of the reach of, or not subject to the process of the Court. Section 65 lays down that secondary evidence may be given of the existence condition or contents of a document, when the original is shown or appears to be in the possession or power of any person who is out of the reach of or not subject to the process of the Court and when after the notice mentioned in section 66, such person does not produce it. There is therefore a clear legislative enactment that notice or a reasonable notice must be given, but that is qualified by a clause (6) which dispenses with notice. *Mr. Jackson* argues that there must be evidence of a refusal to produce the original document. I do not see that that is required by the Act at all and I do not think that it is requisite. *Per Norris J in Ralli v. Gurukim* 9 C 939 (944). So secondary evidence of the contents of a letter is admissible under section 66(6) when the opposite party is out of the jurisdiction and did not comply with the summons to produce the document and when the service of notice upon his pleader who appeared for him at the last moment at the hearing of the suit would have been nugatory. *Mellus v. Vicar Apostolic* 2 M 290. In *Harmand v. Ram Gopal* 27 C 639 (648)=3 C W N 429 *Lord Hobhouse* said. His proof of the *Sikhur* records

is secondary evidence, and by sections 65 and 66 of the Evidence Act secondary evidence may be given of public documents, which they are under section 71 without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here. See also *Hunnund v Ram Gopal*, 2 Bom L R 562.

**Court may dispense notice in a fit case.** It will be observed that under this section besides the specified cases in which notice is not required, the Court has power of dispensing with the notice 'in any case in which it thinks fit.' This is a relaxation of the procedure in force in English Court. *Cun Li* 225. An express waiver of notice by agreement of counsel *pro lite* or other wise, suffices to exempt from notice, and there may be an implied waiver. A special exception is sometimes provided for the benefit of seamen. *Wignost* 1207. Under section 66 of the Indian Evidence Act a certified copy of a mortgage deed is admissible in evidence only after notice is given to the party in possession of the original to produce the same. But under the proviso to s. 66 the Court can dispense with notice for sufficient reason as for instance where the mortgagee denies the existence of the mortgage itself. *Dinanath v Ram Rau* 97 Ind Cas 348 = A I R 1926 Pat 512 = 6 Pat 542. Where it appeared that the original letters were in the possession of parties interested in opposing the plaintiff's claim but the plaintiff did not take steps to call upon them to produce them. Held that there being no question of the genuineness of the document these steps should have been waived by the Court and the document admitted in evidence under s. 66 of the Evidence Act. *Habram v Hemnath*, 19 C W N 1068.

## 67 If a document is alleged to be

Proof of signature and handwriting of person alleged to have signed or written document produced

signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting

**Principle.** The introduction in evidence of a writing is not accomplished when the document is produced in Court. There is still a preliminary matter to be attended to before the writing can be received. This is the authentication of the writing or the proof of its genuineness. *McLachlin's Li* §§ 277-279. Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A letter or a contract contains upon itself no indications of ownership, when it is claimed that *Doe* wrote it or rode it all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship, and the perception that this element is nevertheless missing and must still be supplied is likely not to occur. There is a natural tendency to forge it. Thus it has constantly to be emphasised by the judicial requirement of evidence to that effect. Thus it is that in the tradition of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine merely on the strength of this purport, there must be some evidence of the genuineness or execution of it. *Wignost* § 2130, *Horne v. Tolson*, 25 How St Tr 78. *Pfaff v. Vanbatenburg*, 2 Camp 439.

**General Principle of Authentication.** The foundation on which rests the necessity of authentication is not any artificial principle of evidence but an inherent logical necessity. Thus if as a part of some facts asserted *Doe's* letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by *Doe*—thus a letter alone without the fact that it is *Doe's* is not receivable simply because it is not the thing offered. By one of the many rules of Evidence *Doe's* letter may be admissible but whatever the particular rule of Evidence may be, the element of *Doe's* connection with the letter is logically

**S 67** assumed in all. This logical element, and all the mental tendency to forget the importance of proving it exists wherever any personal connection with a corporeal object is assumed in the offer. The necessity of authentication, therefore applies equally well to chattels—to a knife, a horse, a coat etc. whenever it is asserted to be connected with a person. This process of authenticating chattels is ordinarily referred to as identifying them, but the two ideas are distinct, and different principles of evidence are applied. *Identification* presupposes that two objects, apparently different, have been referred to and the issue is whether they are in fact one and identical not separate objects. *Authentication* however presupposes a time a place, or other known conditions. Thus, the object itself, when offered is not relevant unless it is the object that was in fact thus associated with those conditions. Hence the evidencing of those conditions is necessary, and the principle of authentication requires that some evidence connecting the object with those conditions be introduced before or at the time of offering the object itself. *Ugmore* § 2129

**Scope of the section** Besides the question which arises as to the contents of a document there is always the question, when it is used as evidence, is it what it purports to be? In other words is it genuine? The evidence upon this point is dealt with in ss 67–73 *Marl by Li* 60 Sections 67 to 73 of the Evidence Act govern cases both of primary and secondary evidence. *Kasimullah v Gudar Koeri*, 82 Ind Cas 306. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum, such as the entry in a diary mentioned in s 32 (b) it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter, it must be shown who wrote it, or at any rate who signed it for a signature to a document turns the whole document into a statement by the person who signs it. If it is an agreement it must be shown who executed it. *Marl by Li* p 60. Direct evidence of the hand writing is not necessary under this section. *Neellanta v Juggobundhoo* 12 B L R App 18. This section does not require the subscribing witnesses to a document necessarily to be produced. Nor does the Act require the writer of a document to be examined as a witness. *Abdoool Ali v Abdoool Rahman*, 21 W R 429. The proof of hand writing and signature under this section must be by any of the recognised modes of proof, and, amongst others, by statements admissible under s 32 of the Evidence Act. *Abdulla v Gumbai*, 11 B 690. The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of “proved”. That definition of the word “proved” must be read along with s 67 of the Act until it is proved that the signature purporting to be that of the executant is in the hand writing of the executant the Court cannot proceed to consider whether the execution is proved. In other words section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. *Salail v Mt Tanur Bano* 107 Ind Cas 564=A I R 1928 A 303. But it was never intended by s 67 of the Evidence Act that direct evidence of handwriting was always necessary but that section merely stated with reference to deeds what was the universal rule in all cases that the person who makes an allegation must prove it and lays down no new rules as to the kind of proof to be given. It was never intended by s 60 either to exclude circumstantial evidence of a thing which could be seen, heard or felt. Where the signatory of a risk note admitted having signed it held that the fact of execution of the document was properly proved. *Karali v The East Indian Railway* 48 C L J 32=111 Ind Cas 792=A I R 1923 Cal 493.

Under s 67 of the Evidence Act no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved. *Jogannath v Dhuraya* 5 O L J 191=16 Ind Cas 279. Under this section a document can be proved by any witness. *Nambemmal v Raghava Chariar*, 71 Ind Cas 390. Where a register

alleged to belong to a particular association is produced in order to prove that certain members of the association took part in a meeting of the association and put their signatures on register in token of attendance it must be proved by oral testimony that the register was in fact a register of attendance kept for the purpose of recording the names of the persons who were present at meeting on a date appearing over their names and it must further be shown that the signatures were in fact those of the persons whose names so appeared *Sarup Singh v Emperor* 83 Ind C 22=1925 Lah 299 In delivering the judgment *Esforde J* said "There is no evidence as to who wrote down the names which appear on the page in question It is suggested that the names or signatures were written out by the persons themselves under the date which appears at the heading of the paper But no witness has been produced to identify these signatures The learned Sessions Judge has considered that the mere fact that a person's name appears on such a document is proof that he signed it It is obvious that when this register was produced it was necessary to show by oral testimony that it was in fact a register of attendance kept for the purpose of recording the names of the persons who were present at a meeting on the date appearing over their names The next essential step was to show that the signatures were in fact those of the persons whose names so appeared This is done in most cases by producing the writer himself but as in the present case the writers were the accused persons and could not give evidence some persons ought to have been produced who actually saw the signatures being written, or a person who was acquainted with their handwriting to prove those signatures or they could have proved by comparing the handwriting of the signatures in question with any writing proved to the satisfaction of the Judge to be genuine As no witness was called to testify to this document in any way whatsoever, it is obvious that these essential requirements were not attempted to be fulfilled The document accordingly is not admissible in evidence in the absence of oral proof of its nature and authorship, and even if it were admitted it does not prove the presence of the petitioners at the meeting in the absence of proof of the identity of their signatures" A certificate is not admissible in evidence if the writer of the certificate is not produced in Court and examined as a witness *Peter v Mahomed*, 22 Ind C 651 The ordinary method of proving handwritings are (1) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 17 of the Evidence Act, (2) by a comparison of the handwriting as provided in section 73 of the Evidence Act, and (3) by admission of the person against whom the document is tendered A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear *Per Moolerjee J in Sarojini v Hanu Das*, 26 C W N 113 at p 119, see also *Gunga Pershad v Inderjit*, 23 W R 390 P C To prove the execution of a bill of sale executed in their favour by the plaintiffs' father the defendant called a *Kazi* who deposed that the vendor came before him accompanied by witnesses, and acknowledged the execution of the deed which was then registered The lower appellate Court found it was sufficiently proved On special appeal to the High Court it was contended that the execution was sufficient direct evidence of the handwriting of the executant was not necessary under section 67 *Nallanto v Jagabandhoo* 12 B L R Ap 18, see also *Haria v Manal Chand* 27 Ind C 866, *Lahuri v Bala*, 77 Ind C 793=18 N L R 85

**Signature** Signature is a formality which is almost universal Sometimes, but less rarely, sealing is substituted for signature, and sometimes both are used If a person cannot write and has no seal, he generally makes a mark, and some other person writes his name *Mark P* p 60 All that is required is that the signature must be by a person who is conscious of his act a mere mechanical movement of the hand is not sufficient *Kalee Tara v Nohin* 21 W R C R 81 The signature may be stamped *Jenkins Gainsford*, 3 Sw & Tr 93 The signature must be made with the intention of executing a document *Re Meyer* (1903) P 353 An assumed name or initial may be considered as a mark *In bonis Savory*, 15 Jur 1012, *In bonis Redding*, 2

**S 68** Roberts 339, *Nauab Sher Muhomed v Dy Commissioner*, 58 Ind Crs 131=7 O L J 106 A mark is a mere symbol and does not convey any idea to a person who notices it, often even to the person who makes it. *Nimal v Saratman*, 2 C W N 612=25 C 911, *Rajendra v Jogendra*, 11 M I A 67 The use of pen and ink is not necessary for signing. *Jenkins v Gainsford*, 3 Sw & Tr 93 In that case *Sir Cresswell Cresswell* said Whether a mark is made by a pen or some other instrument cannot make any difference neither can it in person make a difference that a facsimile of the whole name was impressed on the Will instead of a mere mark or cross The mark made by the instrument or stamp was intended to stand for and represent the signature of the testator In the case where it was held that sealing was not signing, the seals were affixed by way of a signature So execution of a document can be made by affixing a mark on it *Taylor v Denning* 3 Nev & P 228, *Baler v Denning*, 8 Ad & Ell 94, *Donely v Broughton*, (1891) A C 135

**68** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence

Proof of execution of document required by law to be attested

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied" \*

**General Nature and Policy of these Rules** The general notion of preference which insists that a particular witness shall be called before another can be called rests on the supposed excellent position of that particular witness to obtain knowledge of the matter more accurately than any other person His opportunities of knowledge it must be supposed have been not only better than those of others but so much better that it would be a palpable risk of injustice to proceed in the trial without endeavouring to obtain him Moreover such a rule should be applied only where the class of witnesses thus preferred can be designated with some precision and certainty, because the duty required to call him must in fairness be able to know beforehand in order to summon them, the person or persons to whom the rule will be applied by the Court on the trial Finally, such a rule obviously assumes nothing as to the precise nature of the witness's testimony He may on appearing affirm or deny the existence of the fact in question, he is required to be used but without any assumption that he will say the one thing or the other thing and merely with the assumption that whatever he can contribute will be worth hearing In other words, such a rule is a rule imposed by the law by way of insuring a supply of trustworthy testimony which otherwise the partisan interests of either side may fail to furnish *Higmore* § 1266

**History of the rule** As regards the requirement says *Professor James Bradley Thayer* that the proof of the execution of an attested document must be by the witnesses if they can be had this, also, has a clear and very old origin Such persons belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law who were once the only sort of witnesses that could be compelled to come before Court Their allowing themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to such a compulsory summons. Proof by witnesses

\* This proviso has been added by the Indian Evidence (Amendment) Act, 1926 (XXXI of 1926)

could not be made by those who merely happen casually to know the fact. However exact and full the knowledge of any person might be, he could not, in the old Germanic procedure, be called in Court as a witness, unless he had been called at the time of the event as a pre-appointed witness. It was a part of such a system and in accordance with such a set of ideas that witnesses formally allowed their names to be written into deeds in large numbers. When jury trial, or rather proof by jury, as it originally was came in the old proof by witnesses was joined with it, when the execution of the deed was denied, and the same process that summoned the twelve, summoned also these witnesses. The phrase of the precept to the sheriff was *summone duodecim* (etc., etc.) *cum aliis*. The presence of these witnesses was at first as necessary as that of the jury. Great delays and embarrassments attended such a requirement where the number of witnesses might be so great the jury was cumbersome enough in any way. Accordingly in 1318 the presence of the witnesses was made no longer absolutely necessary, they must still be summoned, but the case might go on without them. After another century and a half the process against the witness became no longer a necessity. It was not issued unless it was called for. After still another century, in 1562-63 process against all kinds of witnesses was allowed, requiring them to come in not with the jury or as a part of the jury, but to testify before them in open Court, and then the old procedure of summoning such witnesses with the jury seems to have died out. Such process against witnesses says *Cole* (1 Inst 6 b published in 1628) referring to the old process 'has vanished'. There was never a time when such witnesses, the regular transaction witnesses, could not in one way or the other be summoned and compelled to come in. As regards ordinary witnesses to the jury, compulsory process seems not have existed before 1562 (*St 5 Eliz c 9 s 6*). Since 1318 the attendance of the transaction witnesses might be dispensed with if they could not be got, but the necessity of summoning them existed for most of this long period. As late as the early part of the eighteenth century it was doubtful whether a deed could be proved at all if the attesting witnesses came in and denied it. Half a century later *Lord Mansfield*, while reluctantly yielding to what he stigmatized as a captious objection, that you must produce the witness declared that it is a technical rule that the subscribing witness must be produced and it cannot be dispensed with unless it appeared that his attendance could not be produced. And still a generation later, in 1815 *Lord Ellenborough* (in *R v Harringworth* 4 M & S 350) in asserting the same thing savagely thrust out all arguments against this doctrine, and slammed the door on them. 'The rule' he said 'is universal that you must first call the subscribing witness. If any general rule is to prevail, this is certainly one that is as fixed formal and universal as any that can be stated in a Court of Justice.'" *Thayer Prel Tr Ev* pp 502, 503.

**Reason and Policy of the old Rule.** Strictly speaking there is no sufficient reason to maintain the original rule as stated by *Lord Ellenborough* (in *R v Harringworth* 4 M & S 350), as a part of the new and ratiocinative system of evidence that began to be formed by the end of the 1700's. So on this point there is considerable difference of opinion among the great Judges. Not being able to make a departure from long tradition, insufficient and inconsistent reasons for enforcing the rule have been laid down in support of it. The rule is thus stated by *Lord Ellenborough* L C J in *R v Harringworth* 4 M & S 350. In as much as they are plighted witnesses, the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming'. See also *Barnes v Trompously*, 7 T R 265. In *Gerapuli v Wieler* 10 C B 690, 696 his attendance was insisted upon because 'he is the witness agreed upon between the parties'. *Whyman v Garth* 8 Exch 803. Some of the Judges assigned the reason of the rule to the convenience of cross-examining an attesting witness as to the circumstances of the execution. In *Manners v Portan* 1 Esp 241, *Manley* L C J said. The rule was founded on the principle that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument. The same reason is reiterated by *Le Blanc J* in *Call v Dunning* 4 Exch 54 where he said "A fact may be known to the subscribing witness not within the

**S 68** knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." See also *per Illust J in Abbott v Plumble* 1 Doug 216. The objections to this reason are numerous. First it is inconsistent with the rule itself, for the rule applies even where fraud, duress, and time are not in issue and even where the maker himself is competent as a witness. Again the attesting witness is in practice not usually a person who knows anything about the circumstances preceding the document's execution or knows more than any other person who by being present could be a qualified witness. Finally if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person to call the witness, if he desires him. So this rule has no justification in its original broad form. *Wignmore* § 1288.

Reason of the departure from the old rule, and Principle underlying the section. "We do not purpose to meddle with the preappointed evidence of execution required either by the Legislature or by persons creating powers but we think it deserving of serious consideration whether this formal proof of the execution of written documents may not in other cases be dispensed with, where the execution is either admitted or capable of other proof. The principle on which the necessity for producing the attesting witness rests is that the witness is supposed to be conversant with all the circumstances under which the deed was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction, the instrument having been prepared a clerk, a servant or a neighbour is called in to attest it. Added to which as parol testimony is not admitted to contradict or vary the terms of a written instrument the occasions are few indeed where the evidence of the attesting witness goes further than to prove the execution of the writing. On the other hand the necessity of calling the attesting witness, where the execution of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into is often attended with difficulty and expense and sometimes leads to the defeat of justice. Cases have occurred where in tracing a title numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds though their execution was not really in dispute and the handwriting to all might have been proved by a single witness and doubtless would have been admitted but for the difficulty which it was thought could by the existing rule be thrown in the way of the party alleging title. It also sometimes happens in the course of a cause that the adversary's case renders it necessary to give in evidence a document which it was not supposed would be required, or a document is produced by a witness on his *subpoena* which turns out contrary to the expectation of the party requiring it to be attested the attesting witness is not at hand yet the signature of the party might be easily proved or the witness producing the instrument may have heard him admit the execution nevertheless the document cannot be received and the party requiring it loses his cause. When the genuineness of the document is not really in dispute it is clear that the parties ought not to be limited to any particular witness to prove the execution. When the genuineness is in dispute the party producing it will be sure to call the attesting witness and the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that except in cases where the evidence of attestation is requisite to the validity of the instrument an attesting witness need not be called. *Common Law Procedure Commission Second Report* (1853) p 23, *Wignmore Cases* Fr p 246.

**Attestation of documents—calling of witnesses.** No document can be used in evidence unless its genuineness has been either admitted or established by proof and this proof should be given before the document is accepted. Sections 65 to 72 lay down some elaborate provisions as to the calling of attesting witnesses when the genuineness of the document has to be proved. *Varley* Fr 61. Those sections have no direct bearing on the question as to whether the attestation was according to law. *Balrisha v Varan Sha* 13 N L R 21. Section 72 lays down that an attested document not required by law to be attested, may be proved as if it was unattested. Section 68 is applicable to cases where a

document is required by law to be attested *Kumar v Ghugi* 109 Ind Cas 57 But even in such a case it is not necessary to call an attesting witness in proof of the execution of the document, not being a will required by law to be attested, unless its execution by the person by whom it purports to have been executed is specifically denied *Lalho Tevari v Lalhkoeri* 101 Ind Cas 622 = A I R 1927 Pat 403 To prove wills required by law to be attested, an attesting witness should always be called, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence *Tula Singh v Gopal Singh* 1 P L J 369, *Karimulla v Gudar*, 82 Ind Cas 306 Where all the attesting witnesses are unavailable, it is sufficient to prove the hand writing of one and the execution of the document by other evidence (*Id* s 69) But execution of a document will be sufficiently proved when it is admitted by the party himself who has executed the document (*Id* s 70) So also where a document is thirty years old the Court may in its discretion presume the genuineness and due execution as well as attestation of the document (*Id* s 90) The Court shall presume also that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law (s 89) This presumption cannot be rebutted by the party who has not produced it, after due notice, in as much as he cannot use it afterwards as evidence without the consent of the other party or the order of the Court (s 164) When the attesting witness denies the execution of a document or does not recollect it its execution may be proved by other evidence (*Id* s 71)

**Scope of section 68** The object of placing more than one attestation upon a document whether at the parties voluntary instance or by requirement of law is ordinarily not to demand the combined testimony of all at the trial but merely to provide by way of caution a number of witnesses, so that the contingencies of death, removal of residence and the like may be guarded against and one witness at least may be available But a main object in statutes requiring attestation is in element of validity is to surround the act of execution with certain safe guards the object of securing evidence for litigation is a secondary one *Wigmore* § 1304 In *Wright v Tatham* 1 A & E 3, 23 *Tindal C J* said "It may be observed, however that the Statute of Frauds did not look primarily to the mode of proving the Will when contested, but to the security of the testator at the time of the execution of the Will the statute intending that three witnesses should be in the nature of guards or securities to protect him in the execution of his Will against force or fraud or undue influence The proof of the Will by the three witnesses supposing it should afterwards come in contest only is incidental and secondary benefit, derived from the mode of attestation It is well settled that in an action at law it is sufficient to call only one of the subscribing witnesses, if he can speak to the observance of all that is required by the statute" *Doc v Lewis* 7 C & P 574 In *Bullen v Michel* 4 Dow 297, 331, *Lord Eldon* said "They usually call one witness leaving it to the other side, if they think proper, to call the other witnesses According to English common law the rule was the same so far as other documents required to be attested were concerned *Holdfast v Douling* 2 Str 1251 But in English Courts of Chancery, the practice seems to have been to call all the required number of attesters at least unless the Chancellor's discretion was exercised to the contrary *Wigmore* § 1304 see also *Ogle v Cool* 1 Ves Sr 177 *Grayson v Allinson* 2 Ves Sr 454 460, *Binfield v Lambert* 1 Dick 337 *And v Butler* 1 Dick 337 *Powel v Cleaver*, 2 Bro C C 449 504 *Fitzherbert v Fitzherbert*, 1 Bi C C 231, *Carrington v Payne* 5 Ves Ir 404, 411 *Bootle v Blundell* 19 Ves Ir 491 *Wichelsea v Wanchope*, 2 Russ 441 *Tatham v Wright* 2 Russ & Wyl 1 & 16 According to section 68 of the Evidence Act to prove the execution of a document required by law to be attested, at least one of the attesting witnesses must be called to prove the execution of the document if any such witness be available A proviso to this section has been added by Act 31 of 1926 Now it is not necessary to call the attesting witness in proof of the execution of a registered document, not being a Will unless its execution by the person by whom it purports to have been executed is specifically denied *Lalho Tevari v Lalhkoeri*, 101 Ind Cas 622 = A I R 1927 Pat 403 This section applies only to cases where a document is required to be attested There is no rule of law in force



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in the Punjab which requires *bahis* entry to be attested at all *Kanwar Ram v. Ghazi*, 108 Ind Cas 57 = A I R 1928 Lah 118. A mortgage deed signed by the mark-man was attested by three witnesses. In a suit on mortgage its execution was not specifically denied but the plaintiff sought to prove the same. Two of the attesting witnesses having been dead the third was called, but he deposed that he attested the deed in the absence of the executant. It appeared however that one of the attesting witnesses who were dead had appeared before the sub Registrar and attested the mark by the executant. The execution was also spoken to by the writer of the document who was examined as a witness. Held that under this section it was not necessary to prove the attestation because the execution of the mortgage was not specifically denied. *Yalub Khan v. Gulzar Khan*, 52 B 219 = 30 Bom L R 565 = 111 Ind Cas 287 = A I R 1928 Bom 267. An account book is not a document which required by law to be attested and this section has no application to a case in which such account book is produced in evidence. *Emperor v. Anboda Prasad* A I R 1930 All 38. There is no law which requires the attestation of a sale deed so far as the Punjab is concerned. This section has therefore no application to sale deeds in that province. *Maharaja of Faridkot v. Anant Ram* A I R 1929 Lah 1. Out of the three attesting witnesses being alive the plaintiff called one witness and when he failed the plaintiff proceeded to prove the document by other evidence. Held there was full compliance with the provisions of ss 68 and 71. *Hanson Ali v. Gurudas Kapali* A I R 1929 Cal 188 = 33 C W N 248 = 49 L L J 16. Where no attempt is made to prove a mortgage deed either by calling in an attesting witness or even by putting any question to the scribe of the deed, who was examined as a witness, regarding the attesting witnesses or attestation, the document cannot be used as evidence. *Juan v. Dalip Singh*, A I R 1929 All 389 = 27 A L J 588. The amendment by Act 31 of 1926, is a provision relating to procedural law and not a substantive law and therefore must be taken to be retrospective in operation. *Thayammal v. Muthu Kumar Swami* A I R 1929 Mad 881. Where the executant of a mortgage deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attestation in s 3 of P Act and to the varied mode of proving a registered document as amended by s 68 Evidence Act, it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. *Parumal v. Abdul* A I R 1929 Sind 235. To satisfy the requirement of this section an illiterate attesting witness who put his mark in the mortgage deed can be called. *Chuanjial v. Poona* 12 A L J 1114. Sections 68 to 71 of the Evidence Act deal with the manner in which the fact of execution may be proved by witnesses or by admission and have no direct bearing on the question as to whether the attestation was according to law. The sections proceed on the assumption that the attesting witnesses referred to are attesting witnesses within the meaning of the law requiring the document to be attested. If the fact that there are any valid attesting witnesses is denied it has to be proved like any other disputed fact. If the execution is admitted no other proof of mere execution is required and if the document on its face purports to have been attested by the required number of attesting witnesses and if it is not denied that they were attesting witnesses then the question of valid attestation does not arise or if it be considered that it arises then the maxim *omnia praesumentur rite esse acta* comes in. If however it is denied that the attestation was according to law the person relying on the deed as an attested deed must prove this like any other fact which is not admitted. Even if due attestation is not denied but evidence on the subject is given the Court cannot ignore the evidence. There can be no due attestation without execution, and if due attestation is not proved or disproved, the fact of execution is of no avail so far as the validity of the deed as a mortgage deed is concerned. *Lallishan v. Naram Sha* 13 N L R 21. By the terms of this section when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested but this does not prevent it from being used in evidence as something else or for any other purpose. Section 68 is subject to the limitation

117, that if the documents were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it, it could not be used in evidence at all. *Moti Chand v Latta Prosad*, 10 A 256=16 A L J 121=11 Ind Cas 596. The law as laid down in s 68 of the Evidence Act is imperative and does not on the face of it admit of any relaxation except in the cases provided in ss 69, 70 and 71 of the Evidence Act. *Sadhanya v Gouti Chandra Paul*, 35 C L J 473=27 C W N 131=68 Ind Cas 86. Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attestors at the time of signing the mortgage, the mortgagor must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation. *Arun Chandra v Kailas Chandra*, 36 C L J 373=27 C W N 263=70 Ind Cas 532. Where there is no proof of execution of a Will the identification of the handwriting of the attestors does not prove execution by the testator. *Khan Chand v Mt Jawandi*, A I R 1923 Lah 174. The direction in section 68 of the Evidence Act is mandatory and there is no distinction drawn by the section, between documents which are the basis of a suit and those whose production is required for a collateral purpose, so far as their admissibility is in question. *Audh Ram v Mahabub*, 79 Ind Cas 725=10 O L J 525=A I R 1921 Oudh 525. Section 68 of the Act applies both to primary and secondary evidence. *Sheik Karimullah v Gudar*, L R 5 A 686=A I R 1925 All 56. The provisions of s 68 are mandatory and it is not controlled by s 90. The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness, nor is it enough that summonses and warrants had been issued, upon the witness and the witness had failed to appear but the process of the Court such as are mentioned in Order XVI rule 10 Civil Procedure Code, have all got to be exhausted. *Gobinda Chandra Pal v Pulin Behari* 31 C W N 215=98 Ind Cas 147=A I R 1927 Cal 102. In a mortgage suit the plaintiff may to rebut the evidence of the only attesting witness who gives evidence, call the writer to prove that the document was executed by the mortgagor and attested by two attesting witnesses. It is not necessary in such a case that the writer should also be an attesting witness. *Lalshman v Krishnaji*, 105 Ind Cas 769=29 Bom L R 1425.

**Attestation, meaning of.** In this Act there is no definition of the word 'attestation'. In the Transfer of Property Act, there was also no definition of the term attestation. The definition of 'attested' has been newly added to the Transfer of Property Act by Act XXVII of 1926. That definition has been taken verbatim from section 63 of the Indian Succession Act (XXXIX of 1925). "Attested in relation to an instrument means and must be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence, and by the direction of the executant or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom signed the instrument in the presence of the executant but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary. (Section 3 of the T P Act). In *Byam v White* 14 Jur 919=2 Rob Ecc Rep 315, *Dr Lushington* observed 'Attest' means that persons shall be present and see what passes and shall when required bear witness to the facts'. So 'attest' means merely to act as a witness which might be done without subscription. *Rickets v Lopus* 4 Y & C 919, *Freshfield v Reed*, 9 M & W 401, *Burdett v Spilsbury*, 10 Cl & F 340, *Hudson v Parler*, 1 Rob 14, *Ford v Kettle* L R 9 B D 139. But upon the construction of the Act it is clear that no attestation will satisfy the requirements except through the outward mark of subscription. *Per Sir C Cresswell* in *Charlton v Hindmarsh* 28 L J P 132. 'To attest is to bear witness to a fact. Take an example, a notary public attests a protest, he bears witness not to the statements in that protest, but to the fact of the making of those statements, so I conceive the witness in a Will bears witness to all that the statute requires attesting witnesses to attest, namely,

**S. 68** that the signature was made or acknowledged in their presence" *Hudson v Parker*, 1 Rob 14 (26) In *Roberts v Phillips*, Lord Campbell Chief Justice, enunciated the same rule as regards the word "attested" that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett v Spilsbury*, 10 Cl & F 310. There the Lord Chancellor summed up the conclusion in these words: "The party who sees the Will executed is in fact a witness to it, if he subscribes as a witness; he is an attesting witness. The attestation of certain mortgages made by two witnesses required by section 59 of the Transfer of Property Act is attestation of the actual fact of the execution." *Shamji Patter v Abdul Kadir*, 16 C W N 1009 P C. The witnesses must see and be conscious of the act done and be able to prove it by their own evidence; they must be both mentally and bodily present, for if not they might be asleep or intoxicated or of unsound mind. *Per Dr Lushington* in *Hudson v Parker*, 1 Rob at p 24. In *Kathel* (1864) 3 S & J 578 Sir Gorell Barnes said: "You cannot be a witness to an act that you are unconscious of." In my view, at the end of the transaction the witness should be able to say with truth 'I know that this testator or testatrix signed this document'. A witness should be present at its execution and should testify that it has been executed by the proper person. *Freshfield v Reed*, 9 M & W 104; see also *Sharp v Buch*, 8 Q B D 111. *Ramu v Laxman Row* 33 B 41=10 Bom L R 913, *Dalchand v Latu*, 41 B 405, *Badr v Abdul*, 35 A 256. *Sashubhusan v Chandra* 33 C 681, *Harabibi v Ram Hui*, 30 C W N 361 (P C). Again in the cases of *Lord v Kettle*, 9 Q B D 139 and *Roberts v Phillips*, 4 L & B 150=24 L J Q B 171, it was held that to attest an instrument was not merely to subscribe one's name to it as having been present at its execution but included also essentially the presence in fact at its execution of some disinterested person capable of giving evidence as to what took place. These cases contemplate as a requisite of a good attestation that the document must have been executed in the presence of an attesting witness who subscribed his name to the instrument in token of this circumstance. *Sarunggan Begam v Borada Kant*, 37 C 526=11 C L J 563=14 C W N 794, see also *Ganga Parshad v Ishri Pershad*, 45 C 748=27 C L J 548. *Deonaram v Kalur*, 24 A 319 (F B). *Priantirishna v Jadunath* 2 C W N 603, *Grindia v Bejoy*, 26 C 246=3 C W N 84, *Dinomoyee v Danbehary* 7 C W N 160, *Sashubhusan v Chandra Peshkar*, 4 C L 41=33 C 861.

In *Welham v Marquis of Bath* L R 1 Fq 17 (24) it was ruled by Romilly J R that co-executants cannot be regarded as attesting witnesses because they do not sign the deed for the purpose of attesting the execution, but with the object of conveying the interest they have in the property to transfer. The same view is supported by the case of *Seal v Claridge* 7 Q B 516 where Lord Selborne held that a person who is a party to a deed cannot be regarded as an attesting witness on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, namely the prevention of fraudulent mal practice, may be completely defeated. The principle on which the rule is based was clearly set forth in the case of *Amel v Woodworth* 53 Ohio 86. "The true reason of the disqualification is that to permit a grantee to attest as a witness the execution of an instrument made to himself or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law which is to prevent the perpetration of frauds on grantors and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent bona fide transactions." This view was emphasised in the case of *Donoran v Saint Anthony Co* S N D 585 (Am) where it was observed that if the contrary view were maintained the provisions of a statute requiring the execution of a mortgage to be attested by two witnesses, might be nullified, and as illustration it was observed that "a mortgage may be given by two persons to a third the mortgagee may attest and the mortgagors one for the other then a person may give one mortgage to two persons, these two may furnish the attestation an interpretation of the statute which renders such a contingency possible is clearly inadmissible, because, there would be no guarantee of the bona fides of

the transactions" This line of reasoning appears to be based on good sense, and is consistent with the principles of justice, equity and good conscience, according to which the Indian Courts are bound to decide *Per Moolerjee J in Sarwajit Begum v Baroda Kant Miller* 11 C L J 563 (572)=37 C 326=14 C W N 974 S 68

**Presence meaning of—Signature of a Purdanashin lady—how to be attested** *Succel* in his Law Dictionary states, that when A executes a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The Standard Dictionary defines attestation to be the subscription by a person of his name to a written instrument, to signify that the same was executed in his presence. See also *Body v Halse* (1892) 1 Q B 203. Now the question is when may an instrument be deemed to have been executed in the presence of a witness. It may be generally stated as the result of the decisions, that presence involves two ideas, namely, mental cognition of the act and physical contiguity. In other words the person in whose presence the act is done must be able mentally to know what is being done and what is done in the presence of a person, must take place in physical proximity to him, though it is impossible to lay down any inflexible rule as to what degree of proximity is essential. This may be illustrated by a reference to three leading decisions on the subject which will show, to what extent judicial decisions have gone. In one of the earliest cases on the subject, *Casson v Dade*, 1 Bro C C 99, it was held that when the testatrix sat in her carriage opposite to the window of the attorney's office, in which the Will was attested, the attestation was valid because the testatrix might see the witnesses through the windows of her carriage and of the office. Again in *Newton v Clarke*, 2 Curt 320, a testator intending to execute a codicil signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil, the curtains at the foot of the bed were however drawn at the time to screen the testator from the fire place, the result was that one of the witnesses could not actually see the testator sign his name nor could the testator see that witness subscribe the codicil as attesting it. *Sir Herbert Jenner* held that the codicil was validly attested as the testator and the witness signed their names in the presence of each other. In the case of *Re Percy* 1 Rob 278, *Sir Herbert Jenner* first expressed the opinion that he would be prepared to hold, if necessary that where the testator is blind, the witnesses may be said to have attested in his presence, provided the position of the witnesses be such that the testator, if he had his eye sight, might have been able to see them sign. The principle deducible from these cases clearly supports the view that where, according to the custom of the country purdanashin ladies are unable to appear before male witnesses, a document which by independent testimony is conclusively proved to have been executed by a purdanashin lady, may reasonably be deemed to have been attested by witnesses who were present outside the purdah, and who before attestation satisfied themselves that there was no fraud and that the document had been actually executed by the lady screened off from their gaze. *Sarwajit Begum v Baroda Kant*, 37 C 526=11 C L J 563. This view has also been adopted by *Biel J* in the case of *Harmogal v Ganou Singh* 13 C W N 40 and by *Stephen and Chatterjee JJ* in *Isi Prasad v Gunga Prasad*, 11 C W N 165. A mortgage deed was taken for execution behind the purdah to a purdanashin lady. Her son came from behind the purdah and said that it had been signed by her. The witnesses thereupon affixed their signatures to the document, though none of them saw her sign it. Held that there was no valid execution of the document as it was not attested as required by section 59 of the Transfer of Property Act. *Rai Ganga Pershad v Ishri Pershad* 22 C W N 697=48 C 748=34 M L J 547 P C, see also *Hua Bibi v Ram Hari*, 5 Pat 58 (P C)=89 Ind Cas 659=A I R 1925 P C 203. A mortgage executed by a purdanashin lady was attested by her husband and another witness. The husband actually saw the signature being made and the other witness was outside the screen in the same room with the lady and he knew her voice and heard her say yes when the document was explained to her. Held that the document was duly attested in accordance with law. *Rukmini v Nilmani* 19 C W N 1309. See also *Syed Zahir v Madhusudan*, 4 Pat L W

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117=15 Ind, Cys 691 *Palanathi v Ram Naram*, 12 I A 163=19 C W N 99; P C = 17 A 471 *Rai Radha Kishore v Jagshahai* 60 Ind Cas 173. It is not necessary that the attesting witnesses should have actually seen the testator sign the document. *Kavindan v Ganga* 16 N L R 196=56 Ind Cas 217

**Requisites of valid attestation** The object of attestation is that some person should verify that the deed was signed voluntarily. The attesting witnesses must subscribe with the intention that the subscription made should be a complete attestation of the Will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P & D 269, *In bonis Sharman* 1 P & D 661, *Griffiths v Phillips*, 2 P & D 300, *In bonis Murphy*, 1 R 8 Lq 409, *Robert v Griffiths*, 1 L & B 450, *In the goods of Strealley* (1891) P 172. The witness must attest the signature, which is intended as an execution of the document. When there are several signatures that signature is to be attested by which the document is executed. *In bonis Martin* 1 Rob 712, *Fuon v Lamlin* Denne, 7 Succelland v Succelland 4 Sw & L 6, *Pliffs v Hale*, 3 P & D 166. *In bonis Dill ex*, 3 P & D 164, *Leonard v Pearson* (1902) P 243. Where a witness, put in his signature without any intention of attesting, it is not a valid attestation. *In bonis Smith*, 15 P D 2, *In bonis Murphy* 1 R 8 Lq 300, *In bonis Shanman*, 1 P & D 661. The attesting witness must know that he is putting his signature to a document. *Pearson v Pearson*, 2 P & D 451. In every case the Court must be satisfied that the names were written *animus attestandi* and for this purpose should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting. *Per Sir J Hannan in Bradloch*, (1876) 1 P D 433 431, see also *In bonis Channey* (1843) 1 Rob 757, *Roberts v Phillips*, 4 L & B 450, *Savitt v A'Court*, 19 C W N 1297=29 Ind Cys 743, *Davies* (1843) 3 Cart 748, *Strealey*, (1891) P 172, *Ellison* (1907) 2 Ir R 480, *Martin* (1849) 1 Rob 712. An attestation must follow execution. *Fernandez v Dayamanu*, 5 C 578, *Hurro v Chander*, 6 C 17=6 C L R 359. The witnesses must sign in such Hemlola Dabi, 9 C 226=

**Attestation by a scribe** A scribe may be an attesting witness if he puts his signature in such after seeing the execution of the document. *Paramasiva v Krishna* 41 M 535=43 Ind Cys 933, *Jaganathi v Dayang* 18 C 61=62 Ind Cys 97, *T R Kum v Md Hassan* 5 Bm L J 68=A. I R 1926 Rq 145, *Abunash v Ramoomal*, 19 S L P 322=A. I R 1927 Sind 118, *Abunash v Dharmadas* 26 Ind Cys 409, *Jogendra v Nidai*, 7 C W N 384, *Abunash v Kolasam* 26 Ind Cys 409, *The intention of the scribe to sign as an attesting witness must be shown or presumed*. *Badi v Abdul*, 35 A 254, *Peerapudayan Dasarath* 32 C W N 1228, *Bryan v White*, 2 Rob 101, *Malhar Harappa*, 19 Ind Cys 389=24 M L J 534, *Paramasiva v Krishna*, 10 C 115. A competent attesting witness is one who is proved to have signed the document and witnessed its execution of a document and whose name or of which he had received in acknowledgment. It is not that any per on who is present at and witnesses the execution of a document and in whatever manner is as appears at all on the deed, for whatever purpose and in whatever manner, capable of being read in writing is a good attesting witness. *Abunash Chandra v Dasarath*, 32 C W N 1223, see also *Naynarayan v Abdul*, 5 C W N 451, *Jaganathi v Dayang*, 11 M 635, *Dinamoyee v Bonbharay* 7 C W N 160, *Paramasiva v Dayang*, 18 C 61. Where the name of the scribe who wrote the document appeared under a separate heading styled as authenticating the execution. Held that the only other person who signed as a matter of construction, capable of being read as attestation. *Abunash v Dasarath* 32 C W N 1228, see also *Ram Bahadur v Ayothia* 20 C W N 699=31 Ind Cys 370, *Dalchand* A. I R 1927 Sind 403, *Anah v Samugh v Manath* 2 O W N 833=A. I R 1925 Oudh 731. A

scribe who executes the mortgage deed on behalf of the mortgagor cannot be a competent attesting witness. *Rajani v Panchananda* 23 C W N 90=48 Ind Cas 720, *Paban v Ralhal* 34 C L J 498. *Upendra v Hukam*, 46 C 522, *Srisudhar v Rashakali*, 49 C 438, but see *Prian v Jadu* 2 C W N 603. In a case, the scribe of a document which was required by law to be attested, signed his name at the end of the body of a document but above the executant's signature. Held, that such signing did not constitute the scribe an attesting witness within the meaning of this section. *Bahadur v Balchand*, 5 N L R 3=1 Ind Cas 179, but see *Ram Sahu v Gauri Shankar*, 39 Ind Cas 153. Where a person who has signed a deed as a scribe subsequently asserts that he signed as a witness the onus of proving this assertion lies very heavily on him. *Nageshwar v Barhu* 4 Pat L J 511=53 Ind Cas 79. A Court will be loath to hold that in any case a scribe wherever he wrote his name, could be considered to sign the document as an attesting witness unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe and it would seem to me that it would lead to attempts to evade the plain words of s 59 and would also lead to constant difficulties thereafter if the law was not strictly observed since parties might think that they were executing a valid mortgage if only one outside person was brought in to witness the document and evidence would have to be called to show that the scribe as a matter of fact signed as an attesting witness. Per Macleod C J in *Dak Chand v Shivram*, 14 B 405=22 Bom L R 136=55 Ind Cas 616. A scribe who executes a document for and on behalf of the executant is not a person who sees what passes or "sees it executed," when he himself does the very thing to which he subsequently signing as a witness he professes to bear witness. *Srisudhar v Ralsha* 14, 63 Ind Cas 507.

**Attestation by a Sub Registrar** The registration of his Will by a testator and his signature to a certificate of admission of execution, testified by the signature of the Sub Registrar, and of a witness is a sufficient attestation to satisfy the requirements of section 63 of the Succession Act. *Amarendu v Kashi*, 27 C 169. If a testator, on presenting his Will for registration admits his signature on the Will to be his before a Registrar and is identified before him by a witness and both the identifier and the Registrar signed their names on the Will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of s 63 of the Succession Act. *Nitya v Nagendra* 11 C 129, *Sarada v Triguna* 1 Pat 300. *Rajendra v Menola* 1 Pat L R 267, *Horosundari v Chander*, 6 C 17=6 C L R 303, *In re Roymoney* 1 C 170. *Harendra v Chandra*, 16 C 19. *Mohammad v Ali Haidar* 12 O L J 1=A I R (1925) Oudh 337. *Mu Syed v Tanyaba* 1 O L J 591=26 Ind Cas 547, *Theresa v Frances* 45 B 999=23 Bom L R 399. But a Sub Registrar before whom execution of a document was admitted cannot be taken to be a good attesting witness in the absence of proof that he affixed his seal or signature in the presence of the executant. *Abinash v Daswath*, 32 C W N 1228, but see *Radha v Nripendra*, 47 C L J 118.

**Personal acknowledgment** "What is the plain meaning" asked Dr. Lushington in *Hudson v Parler* (1844) 1 Rob 11 at p 25 "of acknowledgment, a signature in the presence of witnesses? What do the words import but this: 'Here is my name written. I acknowledge that name so written to have been written by me, bear witness? How is it possible that the witness should swear that my signature was acknowledged unless they saw it?' They might swear that the testator said he acknowledged a signature but they could not depose to the fact that there was an existing signature to be acknowledged. In a later case of *Blake v Blake*, (1882) 7 P & D 102 at p 107 *per Lord Justice Coleridge*. What is in law a sufficient acknowledgment under the Statute? What I take to be the law is correctly laid down in *Jarman on Bills* (4th Ed p 108=6th Ed p 117) in the following terms: "There is a sufficient acknowledgment unless the witnesses either saw or might have seen the signature, nor even though the testator should have expressly declared that the paper to be attested by them is his Will and I may add in my opinion it is not sufficient even if the testator were to say 'My signature is inside the paper' unless the witnesses were able

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to see the signature. But the view expressed by *Jessel M J* was not adopted in certain cases. When the attesting witnesses to a Will duly executed on the face of it did not recollect having seen the testator's signature to the Will when they subscribed their names as witnesses the Court held that it was at liberty to judge from the circumstances of the case whether it was probable that the testator's name was on the Will or not at the time of the attestation, and being of this opinion it was pronounced for the Will. *Guillom v Guillom* 1 S & T 200—29 L J P 311 (see also *Beckett v Hou* 21 L J N S 100 where *Lord Penance* said: 'The doctrine of *Guillom v Guillom* is this: that if the testator produces a paper and gives the witnesses to understand it is his Will and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the Will at the time. In *Blake v Blake* (1882) 7 P & D 110 *Jessel M J* considered the cases of *Guillom v Guillom* and *Beckett v Hou* and observed: 'I cannot find one word in the judgment of *Guillom v Guillom* to show that Sir C Cresswell was of opinion that if the witnesses were unable to see the signature the testator saying he had signed would be sufficient. I do not think that the decision bears out the interpretation put upon it by *Lord Penance* namely that there was any new doctrine laid down in that case different from the doctrine of *Hudson v Larler* supra. The existence of any such doctrine rests entirely upon the statement of *Lord Penance* in *Beckett v Hou* (supra) and as I think there was no sufficient ground for that statement I am of opinion that the case of *Beckett v Hou* is no authority. In the same case *Brett J* observed: 'It has been brought to this. Where the witnesses cannot see there cannot be an acknowledgment but that when the signature is there and they see or have opportunity of seeing it, then if the testator says this is my Will or words to that effect that is sufficient acknowledgment, although he does not say this is my signature. See also *Wright v Anderson*, (1881) 9 P D 119 at p 173. In *Dunstree v Lasalo*, (1888) 13 P D 102 at p 103 (also *I J* took a similar view. Similarly in *Hott v Genje* (1812) 3 Curt 160 at p 172. See *H J* Just and. The production of a Will by the testator it having his name upon it, and a request to witness to attest it would be a sufficient acknowledgment. In *In the Goods of Thompson*, 4 N C 613 the same learned Judge also said: 'When a paper is produced by a testator to the witnesses with his name signed thereto and they have an opportunity of seeing his name and they attest the same by subscribing the paper they being present at the same time, this is sufficient acknowledgment of his signature by the testator. See also *Bilmul und v Bhagchand*, 15 Bom L R 209—19 Ind Cas 401. *Manelhai v Hormuzi* 1 B 517. *Huroo Simlani v Chunder Kant* 6 C 17. *Nitya Gopal v Nagendra Nath*, 11 C 49, *Amarendra v Kashi Nath* 27 C 169. Attestation in the presence of a testator on acknowledgment of signature or execution is sufficient attestation. *Amer Chand v Mohanandi* 6 C L J 173. *Multonath v Jilesha* 19 C W N 1295. *Sabitri v Sati* 19 C W N 1297=29 Ind Cas 743. The definition of attested has been added by the Transfer of Property Amendment Act XXVII of 1926 since the passing of that Act attestation by a witness can be made if he receives a personal acknowledgment from the executant, of his signature. Prior to the passing of that Act the mortgagor was to put his signature in the mortgage deed before the attesting witness. A mere acknowledgment of the execution was not sufficient, *Inde Shanu Pattar v Abdul Kadir* 31 M 215 affirmed in 35 M 607 P C, *Sahedha v Rajaram* 11 A L J 767, *Ibrabibi v Ram Hari*, 5 Pat 53 (P C)=A I R 1925 P C. *Irfun Chandra v Kailash Chandra* 27 C W N 263, *Rani v Laxmanrao* 33 B 41. *Budri v Abdul* 35 A 234. *Radha v Chum* 14 A L J 361=35 Ind Cas 197. *Sam Rao v Vannajee*, 46 M 61 (81). *Parama sua v Krishna* 41 M 535. *Abdul Karim v Saliman* 27 C 190, *Girindia v Bijoy* 26 C 246. *Ahemchand v Malloo* 10 N L R 71. *Purbhudas v Sahib Khan* 18 C L R 282, *Quah Cheng v My Po*, 66 Ind Cas 589. *Godanari v Sampat* 68 Ind Cas 198, *Chulambaran v Subbaraghara* 16 Ind Cas 207. *Amrappa v Rerchanga* 44 B 231. In *re Velalapati* 8 Ind Cas 887. *Perannah v La Thau* 43 Ind Cas 916. These rulings have now been made obsolete by Act XXVII of 1926. Prior to the passing of that Act, the law was the same

as regards attestation of a deed of gift by a witness on the acknowledgment of the donor. Such attestation was held to be not valid attestation. *Ide Amarappa v. Raghava* 44 B 231, *Saheda v. Rajah Ram* 11 A L J 757=21 Ind Cas 85. *In re Telurapalattu Peda*, 9 M L T 57=8 Ind Cas 887, *Baynath v. Buaya* 2 Pat 52(61). These rulings are no longer good law.

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**Section 68 before amendment by Act XXXI of 1926** By Act XXXI of 1926 the proviso has been added to the section. Before this amendment under the provisions of this section evidence could not be admitted to prove the signature of the attesting witnesses until the absence of all the attesting witnesses had been duly accounted for. *Suamidin Singh v. Kanur Fatima* 11 Ind Cas 225. Where only one attester proved a mortgage bond attested by more than two witnesses and when its due execution was not denied, held that having regard to s. 68, the document may be taken as properly proved. *Aund Kishore v. Kance Ram* 29 C 355=6 C W N 395. Under the provisions of the old section 68 evidence could not be admitted to prove the signature of the attesting witnesses until the absence of all the attesting witnesses had been accounted for. *Suamidin v. Kanur* 11 Ind Cas 225. A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person and against each of these marks there was a statement that it was the mark of one of the executants, the name being given in each case. These statements were proved to have been written by a deceased professional bond writer who wrote the whole document in the ordinary course of his business. The two attesting witnesses also were dead and the signature of each of them was satisfactorily proved to be in his handwriting. *Held* that there was sufficient proof of the execution of the bond and that the statement in writing of the deceased bond writer was relevant under s. 32 (2) of the Evidence Act. *Haria v. Manalchand* 11 N L R 9=27 Ind Cas 866. Where the only living witness of a document was illiterate and on being examined denied its execution. *Held* that the document could be proved by other evidence. *Badr Prashad v. Gambhu*, 26 Ind Cas 500. Section 68 of the Evidence Act is imperative. So long as there is a witness alive and subject to the process of the Court no document which is required by law to be attested shall be used in evidence until one such witness has been called. The fact that, when called, he will prove hostile does not excuse the plaintiff of his duty. *Lula Singh v. Gopal Singh*, 1 Pat L J 369. Sections 68 and 69 read together were intended to lay down how a document which was required by law to be attested could be proved and the intention was, that if the provisions of the sections as to proof were complied with the document, in the absence of evidence to the contrary, must be considered proved, and that it was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the presence of at least two attesting witnesses. *Ram Devi v. Muma Jal*, 14 A L J 1041=39 A 109, see also *Shib Dajal v. Shoo Ghulam* 15 A L J 164=39 A 211=38 Ind Cas 691. Where a mortgage bond was produced regularly signed and attested and it was proved that the signatures of all the attesting witnesses who were dead were in their handwriting and that of the mortgagor was in his handwriting, *held* that there was a presumption of its due execution and it lay upon the other side to rebut it. *Uttam Singh v. Hulam Singh*, 15 A L J 167=39 A 112=38 Ind Cas 651. It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called he should at least be made to prove that another attesting witness besides himself saw the execution. *Telata v. Muthu*, 39 M L J 463=(920) M W N 512=58 Ind Cas 801. Mere proof of admission of the genuineness of the signature of the executant of a document does not dispense with the proof of its proper attestation if the document is one required by law to be attested before it can effectuate a transfer. *Varam Singh v. Deputy Commissioner*, 55 Ind Cas 701. The evidence of the attesting witness to a mortgage deed that he saw the executant sign is under section 68 of the Evidence Act, sufficient to prove the execution of the mortgage and the document can be accepted by Court as *prima facie* sufficiently proved to be



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a valid mortgage. This *prima facie* proof may be rebutted by proof on the other side that the other witness or witnesses who has or have apparently attested the document did not really see its execution. *Venkata Reddy v. Muthu Pambullu* 39 M L J 463 = (1920) M W N 512. In a suit upon a mortgage bond which was attested by four attesting witnesses, including one of the defendants who was alive at the date of the trial the plaintiff is bound to summon and examine the defendant who was the attesting witness. The fact that he was a defendant will not absolve the plaintiff from calling an attesting witness, the provision of section 68 being mandatory. *Dhwa Singh v. Mohi Lal*, 2 Pat L T 614 = 63 Ind Cas 266. In order to prove a mortgage one of the attestors if alive must be called and execution proved and it must also be proved that the execution was in the presence of two attesting witnesses and if all the attesting witnesses decide the requirements of the law would be satisfied by any evidence showing that the document was executed in the presence of two attesting witnesses. *Perumal Chettiar v. Raghava Chettiar* 14 L W 563. Where evidence of the execution of a deed is available which if tendered would satisfy the requirements of s 68 of the Evidence Act, the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant. *Raghubar v. Sanual* 8 O I J 23 = 61 Ind Cas 125. Where the only living attesting witness to a mortgage deed who had to be and was called by the mortgagee to depose to execution and attestation in a suit brought by the latter upon the mortgage was got at by the opposite side and in cross examination denied the clear evidence he gave in examination in chief about execution as well as attestation. Held that the sworn evidence given by the witness in examination in chief can be acted upon by the Court. *Thangun v. Bommaderana*, 14 L W 344 = (1911) M W N 747.

The death of attesting witnesses to a document must be proved by proper legal evidence not by hearsay. The fact that an attesting witness cannot be found must be proved to the satisfaction of the Court by evidence of a strict, diligent and honest search. A witness is subject to the process of the Court if it can be compelled to attend the Court to give his evidence. *Asoomah v. P. S. R. Chetti*, 10 Bur L T 114 = 61 Ind Cas 637.

To prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered and who was known personally to the Sub Registrar together with an entry in favour of the donee in the village records in succession to the donor, is sufficient compliance with the provisions of the law. *Pantab Bahadur v. Ramdas* 60 Ind Cas 234 = 2 U P L R 100.

Where an attester denies having witnessed the execution of a document it is open to the parties to let in other oral evidence to show that the attester did so as a matter of fact see the execution and was an attesting witness. *Sashimul h v. Mon Mohun* 67 Ind Cas 87. The production of one attesting witness satisfies the requirement of section 68 of the Evidence Act and from a mere failure to do more than is required of the mortgagee and to produce both the witnesses even if he knows where the other is it cannot be inferred that the mortgagee is intentionally keeping back the other and that there his evidence would damage the plaintiff's case. *Lakshminarayan v. Moulari Zahurul A I R* (1923) N 1, 322. Except in the case of an admission as under section 70 at least one attesting witness should be examined to prove the execution of the document. The mere fact that the document was allowed to go in at the trial without objection cannot take the place of proof of execution of the document. *Purnan Prasad v. Bijn Kuer* 5 Pat L T 7 = 101 Ind Cas 277 = A I R 1927 Pat 131. But the question of attestation being a mixed question of law and fact cannot be raised for the first time in second appeal. *Prulandi Theban v. Subramanya Iyer*, 97 Ind Cas 611 = 1926 M W N 559. Evidence of attestors to mortgage deed indispensable unless it is impossible to produce them. *Karimulla v. Gudar Koeri* A I R 1925 All 56.

Required by law to be attested. The term "required by law to be attested" means required by law of the country where the property is situate.

*Eli abeth May Toomey v Bhupendra Nath Bose*, 7 Pat 520=111 Ind Cis 57= A I R 1928 Pat 301 In that case *Dawson Miller C J* said 'It was next contended that the indenture of 20th June 1926 was not properly proved as neither of the attesting witnesses to *Mr Macrae's* signature had been called nor had the handwriting of either of such witnesses been proved as provided by s 68 and 69, of the Evidence Act. It may be stated that *Mr Macrae* executed the document in England. It was then sent to India to be executed by the other trustees. It is admitted that such a document does not require attestation in this country. All that was necessary therefore was to prove the signature of *Mr Macrae* which was done, but it was argued that his signature required registration under English law, and as *Mr Macrae* executed the document in England it was one which by law is required to be attested. Whatever conflicting views may have been expressed as to the proper law to apply to contracts in relation to law where the *lex loci contractus* and the *lex loci rei sitae* or as *Professor Dicey* calls it, *lex situs* differ it seems to be generally agreed by *Storey Dicey, Weistal* and other text writers that in so far as the formalities of alienation or conveyances are concerned the law applicable is that of the country where the land is situated, (see, *Dicey Conflict of laws* Ch 23 and Appendix Note 17) The case of *Adams v Clutterbuck* 10 Q B D 403 supports this view and no case has been drawn to our attention which conflicts with it. Similarly in *Robinson v Bland*, 2 Burr 1079 *Lord Mansfield* said. In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus as to conveyances or Wills of land, the local nature of the thing requires them to be carried into execution according to the law here." So also in *Butchurstle v Tardil*, 5 B & C 451, *Abbott C J* said "The rule as to the law of the domicile has never been extended to real property. Is there any authority that the law of England as to any lands in England, is to adopt the law of a foreign country?" The English tribunals are equally liberal in regards their respects to foreign law where the immovable property is situated in a foreign country. In *Waterhouse v Stansfield*, 10 Hare, 251, *Turner V C* said "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situate in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*."

A surety bond, so far as it creates a mere money or personal liability, does not require to be attested, and s 68 does not therefore apply. *Sanatan v Dina Nath*, 26 C 223=3 C W N 228

An unattested mortgage document cannot be proved even as containing a personal covenant to pay. Section 68 of the Evidence Act excludes it. *Madras Deposit and Benefit Co v Poonna mah Ammal* 18 M 29. It is impossible to view the question of the execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates a security. *Vinappa v Chinna Muthu*, 2 M L 1 175=17 M L J 213=30 M 251

In order to prove a sale deed, it is not necessary, under this section to examine a marginal witness, as the sale deed is not a document which is required by law to be attested. *Gopal v Bishunath*, 10 Ind Cis 64

This section only applies to cases where a document is required to be attested in the manner provided by law and it can not be admitted in evidence unless one of the attesting witnesses is examined. *Mathura Prasad v Chhedi Lal*, 13 A C J 553=29 Ind Cis 363

The provision of this section does not apply to the Will of a Mahomedan, and so an admission by the defendant, in a suit by the testator was held to be relevant in a later suit to prove the Will. *Nayban Bibi v Sayyad Para* 1 O C 408

**Waiver of objection** Where no objection was taken to the admissibility of a mortgage deed in the Court of first instance on the ground that the deed had not been proved by the examination of one attesting witness at least as provided in s 68 of the Indian Evidence Act the objection must be considered to have been waived and could not be taken in appeal. *Tonnammal v Kalithura*, 13 M L J 143

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**Effect of document not properly attested** A document which is inoperative as a mortgage by reason of its not being properly attested can not take effect as creating a charge under section 100, *Transfer of Property Act* *Debendra Chandra v Behari Lal*, 16 C W N 1075=15 Ind C 18 666, *Roxunda v Kali Nath* 33 C 985=1 C L J 219 *Samoo Patten v Abdul* 31 M 215, *Collector of M apur v Bhagwan Prosad* 35 A 161 (F B)=11 A L J 141=18 Ind Cas 311, *Anandaram v Yusuf* 31 M L J 133=36 Ind C 903, *Pinnath v Jadu*, 32 C 729, *Ramnarayan v Adhunda* 44 C 388 (P C) *Official Receiver v Irtihadas A I R* 1927 Sind 66, *Khemchand v Mallool*, 10 N L R 81, *Pribdas Sahibhan*, 93 Ind Cas 660=18 S L R 282, *Narayan v Lal Ahmad* 7 Bom L R 931

But a mortgage which is not attested or attested by only one witness is admissible as evidence of a personal covenant to pay the amount contained therein whether such a mortgage is registered or unregistered *Pulala Vietu v Thiruthi palli* 32 M 410 (I B) (*Madras Deposit and Pencil Co v Oonamalai* 18 M 29 overruled), *Sada Kanna v Padepulhi*, 30 M 284, *Ram Narayan v Adhundanath*, 44 C 388 (P C), *Sonatur v Dinonath* 26 C 222, *Dhana v Nastulla* 92 Ind C 948 *Tafaladdi v Mohan*, 26 C 78, *Dullim v Behari*, (1919) P 279 *Kom v Firm of M* 43 M L J 475 *Mathura v Chelldi* 13 A L J 553=29 Ind Cas 363, *Keri v Clara Rurton* 4 C L J 510, *Dullim v Behari* 1919 Pat 279, *Quah Chang v Mq Po* 66 Ind Cas 589

**Transfer of property Amendment Act (XXVII of 1926) whether retrospective** The Transfer of Property (Amendment) Act (XXVII of 1926) was passed in order to declare what the meaning of the word 'attested' is in the Transfer of Property Act and in no sense alters or amends the law. It is retrospective in its operation and applies to pending actions *Per Devadoss J in Balaji Singh v Challa Gangamma* 51 M L J 641=99 Ind C 113 So this Act applies to cases pending in the appellate stage at the date of its passing. *Mohammadi v Kashtupadhyaya*, 96 Ind C 775=A I R 1926 All 725 But in *Gujanandan v Hanuman Das*, 49 A 25=99 Ind C 161=24 A L J 921=A I R 1927 All (F B) a Full Bench of the Allahabad High Court, held that the Act is not retrospective in its nature and is such it does not apply to documents executed prior to its coming into force (*Walsh J C J and Mukherji J dissenting*), see also *Sheo Dutt v Ganga* 100 Ind Cas 651 Act XXVII of 1926 was amended by Act X of 1927 and in the definition of the word "attested" after the word means, the words and shall be deemed always to have meant was inserted "This amendment was necessitated by a ruling of the High Court of Judicature at Allahabad to the effect that the present definition does not apply in the case of instruments attested before the passing of Act XXVII of 1926—*Vide Statement of Objects and Reasons of Act X of 1927* The Calcutta High Court decided the case of *Radho Mohan Dutt v Arpindia Nath Nandy* 105 Ind Cas 122=31 C W N 160 (n) on the 28th June 1927 In that case *B B Ghose and Roy JJ* held, (1) that in view of the definition of the word 'attested' in the Amendment of Act XXVII of 1926 given a retrospective effect by Act X of 1927 the Sub Registrar before whom the executant admitted execution of the deed was a good attesting witness (ii) that by Act X of 1927, the definition of the word 'attested' in the Amendment Act XXVII of 1926 has been made applicable to transactions (however ancient they may be) that took place before the amendment and to which the Transfer of Property Act is applicable. But in another case of the same High Court decided on the 3rd May 1927, i.e. after the passing of Act X of 1927 *Panton and Miller JJ* held that Transfer of Property Amendment Act (XXVII of 1926) is not retrospective in its operation *Achar v Sayer*, 103 Ind Cas 662=A I R 1927 Cal 763=31 C W N 128 (n) It seems that Act X of 1927 was not brought to their lordship's notice and as such they did not consider the effect of that Act The Repealing and Amending Act (XII of 1927) was passed on the 8th September 1927 By section 2 and Schedule of that Act sections 3 and 4 and the Schedule of 'The Repealing and Amending Act 1927 (X of 1927) were repealed Now the question is what is the effect of this amendment All the three amending Acts came to the consideration of a Divisional Bench of the Madras High Court in *Palamappa Chettiar v Raja gopala Iyengar* A I R 1928 Mad 773 In that case the Court observed

If that Act had retrospective effect the attestation in the present case would be adequate but it was held by a Full Bench in the Allahabad High Court in *Girja Nandan Kaluar v Hanuman Das*, A I R 1927 All 1=49 A 25 (F B) that Act 27 of 1926 had no retrospective effect and this was followed by a Bench of the Calcutta High Court in *Nepa v Sajei Paramanul*, A I R 1927 Cal 763. The same point was considered by the Bombay High Court in *Matlal v Karanbhai*, A I R 1928 Bom 16, but was not decided on the ground that Act 10 of 1927, which had been passed before the decision in that case made the definition of "attested" retrospective. The judgment is a very brief one and there is no discussion at all of the effect of Act 10 of 1927, it being remarked that the 1926 Act was merely a case of bad drafting which has now been amended by the 1927 Act so as to run in the ordinary form. A contrary view was held by a single Judge of this Court in *Balaji Singh v Gangamma*, A I R 1927 Mad 85. However, what we have now to consider is not Act 27 of 1926, but the latest Act 12 of 1927. Under Act 10 of 1927, Act 27 of 1926 was amended as follows: "In s 2, in the definition of the word 'attested' after the word 'means' the words 'and shall be deemed always to have meant' shall be inserted. This in terms gave the definition retrospective effect, and had that amendment stood alone, there would have been no doubt whatever on the question. That amendment was, however, inserted in this Act in the middle of a large number of amendments relating to the military and air force and s 1 of that Act was enacted at the same time which prescribes as follows—

"This Act shall not affect the validity, invalidity, effect or consequence of anything already done, suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted or the proof of any past act or thing."

"This saving clause which possibly was enacted with a view to saving the amendments in the Acts relating to military and air force must also apply to the amendment of s 3, T P Act, and consequently it would appear that after making the new definition retrospective the legislature determined that that should not affect the validity, invalidity, effect or consequences of anything already done or suffered or any proceeding in respect thereof. It would therefore seem to exclude any inference with any transaction already effected or any proceeding taken in connection therewith. Consequently, the mortgage deed which was executed in 1917 if not valid at that date, would not be validated by this Amending Act. This fact seems to have been recognized by the legislature, for five months later Act 12 of 1927 was enacted which is a general Repealing Act and under which portions of over 100 Acts are repealed and amongst these are ss 3 and 4 of Act 10 of 1927. By repealing s 4 of Act 10 of 1927 that Act would have its retrospective effect restored but in Act 12 of 1927, the saving clause contained in Act 10 of 1927 is repeated almost verbatim. This saving clause, therefore enacts that the repeal of ss 3 and 4 of Act 10 of 1927, which would have made that Act retrospective, is not to have that effect for Act 12 of 1927 cannot revive or restore any right, title, etc. The effect therefore of this legislation would seem to be to provide that the new definition of 'attested' is not to have retrospective effect so as to prejudice any existing right or any act done in the past. If therefore, Lx A, the mortgage deed was not valid when executed for want of proper attestation the subsequent legislation will not make it valid. But the view expressed by their Lordships in this case is no longer good law as it was overruled by implication in a subsequent Full Bench case of *Jeerappa Chettiar v Subramanya* A I R 1929 Mad 1=55 M L J 791 (F B). In that case the question referred to the Full Bench for decision was—

"Whether Acts 27 of 1926, 10 of 1927 and 12 of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force."

Court—Trotter C J on behalf of the Full Bench answered the question as follows: "The Acts are retrospective. We should have thought that Acts

- S 69** 27 of 1926 and 10 of 1927 showed a clear intention that they were to be regarded as retrospective but the terms of Act 12 of 1927 preclude further discussion. See also *S M Fom v R M Tom*, 5 R 772=109 Ind Cas 169=A I R 1928 Rung 101, *Phayammal v Muthu Kumar Saami*, 30 L W 677=A I R 1929 Mad 841=17 M L J 588, *Darganath v Jagannath*, 27 A L J 1091=118 Ind Cas 663=A I R 1929 A 680

**Proviso** The words 'specifically denied' mean specifically denied by the party against whom it is sought to be used. So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed the failure to plead in denial must under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not in issue on the trial and as such the rule laid down in the section does not apply. In *Cool v Fransuell* 8 Taunt, 450 *Gibbs C J* said 'In cases where *'non est factum'* is not pleaded, I never yet heard it contended that it was necessary to call the subscribing witnesses.' Similarly *Lord Ellenborough C J* in *Williams v Gills*, 2 Camp 519 said "The defendant by refraining from the plea of *'non est factum'* has only admitted so much of the deed as is expanded upon the record, and if the plaintiff would avail himself of any other part of the deed he must do it by the attesting witness in the common way." See also *Gillett v Abbott* 7 A & E 783

**69** If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person

**Principle** 'It has long been unquestioned that the attestation of an attesting or subscribing witness to a document may be used when the attester is unavailable in person as evidence of the document's execution and according to the orthodox form of preferred witness rule the attestation must even be used in preference to other testimony.' *Wigmore* § 1505 The reason is that the attestation is in effect the extrajudicial statement of the attester to the fact of due execution admitted under the hearsay exception and being admissible so far as concerns the Hearsay rule it is governed, so far as concerns the rule underlying section 68, by the general principle in regard to the number of attestors required to be called. It is short if one attester suffices on the stand one attester suffices when allowed to speak extrajudicially in the attestation clause. *Wigmore* § 1306 'Proof of the signature of a deceased subscribing witness is presumptive evidence of everything appearing upon the face of the instrument relative to its execution as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. The attestation comes in by way of substitution for his oath.' *Per Nelson C J* in *Loosee v Lossee*, 2 Hill 609 The act of attesting an instrument is regarded as a written declaration of the subscribing witness to which the law, in the event of his death or absence yields a reluctant credit by way of necessary substitute for his oath. *Mr Hills' Note on the case Wigmore* § 1505 So this extrajudicial statement expressed or implied is always, when the attester is unavailable, admissible by exception to the Hearsay rule. The question there is not merely whether it is admissible but whether it is preferred to any other testimony to the maker's execution. It is assumed that the attester is personally unavailable, and that the rule of preference is therefore to that extent disposed of so that if nothing more belonged to the rule use could now be made of any competent testimony to prove the maker's execution. Is it, then, further a part of the rule of preference that, before thus going to other testimony the attester's hearsay must be used? Stated in this way, the precise and singular nature appears of the supposed requirement of proving the attester's signature. That a preference should be given to any extrajudicial statement over testimony on the stand under cross examination is an extraordinary

measure, assuming for such a statement a value not at all to be attributed ordinarily to such statements. Nevertheless, such a preference unquestionably existed as a part of orthodox common law rule in England *Wigmore* § 1320. But this section requires that the signature of the maker also as well as that of the attester must be proved. This contention means in effect that another witness to the maker's signature must be called, for (as has just been noted) the attestation is the attester's testimony to the fact of execution, i. e. the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that the testimony of the attestation taken alone, does not go far enough in its implied or expressed statement. This is indeed the ground upon which in part the above contention has been rested. It argues first, that the attestation, while asserting execution by a person of a certain name does not sufficiently identify that person with the party in the case. It argues further more, from the point of view of policy, that a person might be bribed to make a false attestation to a forged maker's signature and then to abscond, leaving it feasible to prove the document against a deceased person by establishing the attester's genuine signature *Wigmore* § 1513 *Whitelock v. Musgrove* 1 Cr. & M 520. In that case *Bayley* B said "I have always felt this difficulty that that proof alone (of the subscribing witness's handwriting) does not connect the defendant with the note. What is the effect which, with the greatest degree of latitude can be given to the attestation of the subscribing witness? It is that the facts which he has attested are true. Suppose an attestation of an instrument which describes the person executing it as A B of C in the county of York. Then the utmost effect you can give to the attestation is to consider it as establishing that A B of C in the county of York executed the instrument. But you must go a step further and show that the defendant is A B of C in the county of York, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of *Francis Musgrove*. There may be many persons of that name, and if you do not show that the defendant is the *Francis Musgrove* who executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. Why? Because it is an essential part of the issue which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument. *Wigmore* § 1513. If the document was executed outside the county, the presumption is that the subscribing witnesses are non residents and the rule does not apply [*McLinn v. O'Connor* 27 Cal. 239 (1m)] and in such cases it is sufficient to prove the handwriting of the party to the instrument. *Lurr Jones* § 529.

**Attester's Hearsay Statement—How admissible.** Upon the general principle already noted at p. 468, the attester's hearsay statement cannot be used unless the attester is unavailable for the purpose of giving testimony in person. The question is what is the circumstantial guarantee of trustworthiness (*Id.* p. 468) that the attester did not sign his name as attester to a document which he did not see executed by the purporting maker? The circumstances tending to trustworthiness seem to be four. (1) The occasion is a formal one, and the statement requires a writing, and there is commonly a radical disinclination to take part in a false transaction of such a sort. (2) The concoction of a false document will either fix an innocent party with a false obligation or will divert legitimate heirs of their rights and there is a natural repugnance to giving assistance in such a wrong. (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury is popularly supposed to be such and the attester would probably be at least an accomplice in a forgery, so that substantive sanction deterring from a crime would probably operate to prevent a false attestation. (4) The attester knows that he is liable at any time to be called upon in Court to substantiate his attestation, and not only in his falsity likely there to be exposed by the opponent's witness, but

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he will there be obliged either to commit perjury by swearing to the fact of execution or to undergo the disagreeable ordeal of recounting and confessing his falseness, — There is thus a combination of circumstances which easily accounted for the establishment of this exception to the Hearsay rule. *Higmore* § 1408

**Scope of the section** By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other writing, required by law to be attested is generally the testimony of subscribing witnesses if available or if not then proof of his handwriting, if that is feasible. Although the rule under discussion was declared by Lord Ellenborough to be a fixed, formal and universal as that can be stated in a Court of Justice (*Lee v. Haringworth* 1 Maule & S. 325) yet it has several qualifications and exceptions. The rule does not apply if the subscribing witness is dead (*Adam v. Kerr*, 1 Bos. & P. 360), or can not be found (*Halmonth v. Roberts* 9 M. & W. 167 = 11 L. J. 1 v. 140 *Parler v. Hoskins* 2 Taunt. 223 *Burt v. Walker* 1 Barn. & Ald. 697) or is without the jurisdiction of the Court (*Prince v. Bluffurn* 2 East 250 *Glubby v. Edwards* 2 Moody & R. 300 *Barnes v. Trompinsky* 7 L. R. 265). Nor does the rule apply if the attesting witness is insane (*Bennet v. Taylor*, 9 Ves. 351, *Currie v. Child* 3 Camp. 283 *Adam v. Kerr* 1 Bos. & P. 360) or incompetent (*Goss v. Tracy*, 1 P. Wms. 259) or otherwise incapable of being produced as a witness (*Clarke v. Courtney*, 5 Pet. (U.S.) 343 *Steph. Dig. I. tit. 66*). Nor does it apply if the instrument is lost and the name of the subscribing witness be unknown (*Keeling v. Ball* Peake Ad. Cas. 88, *Hewitt v. Morris*, 5 Jones & S. 18, *Burr Jones* § 528, *Taylor* § 1551). An attesting witness who is not within the jurisdiction of the Court is universally regarded as unavailable and proof of that fact lets in secondary evidence. It is equally well settled that when a document produced at a trial discloses that the execution and attestation occurred in a foreign country it is to be presumed at least in the absence of contrary evidence that the subscribing witness is then out of the jurisdiction of the country. *Boswell v. First Nat. Bank* 16 Wyo. 161 (1st), *Burr Jones* § 529. In *Clerk v. Courtney* 5 Pet. (U.S.) 319 *Storey* J. said: 'Where the subscribing witness is dead or cannot be found, or is without the jurisdiction or is otherwise incapable of being produced the next best secondary evidence is the proof of his handwriting and that when proved affords *prima facie* evidence of the execution of the instrument for it is presumed that he would not subscribe his name to a false attestation. If upon due search and enquiry no one can be found who can prove his handwriting there is no doubt that resort may then be had to the proof of the handwriting of the party who executed the instrument: indeed such a proof may always be produced as corroborative evidence of its due and valid execution though it is not except under the limitations above suggested primary evidence. In order that a case may attract the operation of this section it must be proved that no such attesting witness can be found.' In other words before a party can rely upon this section he must ask the Court to exhaust all process of the Court as by adopting the procedure laid down in Order 16 rule 10, C P C for the urest of the witness and for the attachment of his property. *Shah adi Begam v. Syed Mahomed Qasim*, 7 Pat. 312 = 110 Ind. C. 5756 = 4 I. R. 1928 Pat. 356.

A mortgage has to be proved in cases where the mortgagor does not admit execution. If no attesting witness can be found § 69 applies but if found and he denies execution section 71 comes into play. Where the fact of execution has been admitted before the Registrar the Court of fact can consider it. *Balaram v. Kamaha* 1924 Nag. 367. Sections 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, could be proved, and the intention was that if the provisions of the sections as to proof were complied with the document in the absence of evidence to the contrary, must be considered proved, and that is was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the presence of at least two attesting witnesses. *Ram Dei v. Munna Lal* 14 A. L. J. 1041 = 39 A. 109. When the Court of first instance comes to a finding as to a document having been legally proved within the

meaning of this section, it cannot be legally interfered with by the appellate Court specially when no objection was taken to the admissibility of the document at the time of the hearing. *Manch Konda v Atchi Appalaswamy*, 32 Ind Cas 760 A man who puts his mark on a mortgage deed as a witness is an attesting witness within the meaning of s 69 of the Evidence Act. *Churanyi Lal v Poona* 12 A L J 1114 The requirements of s 69, with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead, are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses are signed by the pen of the scribe. *Krishna Jua v Bishnath*, 34 A 615=10 A L J 217 All the witnesses and the executors of a mortgage deed, on which the executants had made marks only having died, evidence was given to prove the handwriting of some of the marginal witnesses and the Court was asked to presume execution as the document had been admitted by one of the executants in certain other document tendered in evidence and proved. *Held*, that the evidence adduced did not comply with the requirements of s 69 of the Evidence Act and the document could not be taken to have been proved. *Gobardhan v Hari Lal*, 11 A L J 379=19 Ind Cas 121=35 A 364 In England it is recognized that there is a distinction between proof of the handwriting of a person and presumptive and other evidence that a document had been executed. The Indian Law does not appear to allow a party to rely on pre-umptive or other evidence of execution where he is unable to comply with the provisions of s 69 of the Evidence Act. *Ibid* Under the provisions of this section evidence could not be admitted to prove the signature of attesting witnesses until the absence of all the attesting witnesses had been duly accounted for. *Suamudin v Kani* 11 Ind Cas 225 see also *Nampierumal v Inahara*, 14 L W 563 This section no doubt requires proof that the signature of the executant is in his handwriting but this fact may be proved indirectly by a contemporaneous admission of execution made by an executant or by other relevant facts, such as his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature. Such an admission recorded by the Sub Registrar in his registration endorsement can be accepted in evidence as proof of execution. *Jyuthia v Jagannath*, 20 O C 15=38 Ind Cas 605 In the expression 'it must be proved that the attestation of one attesting witness at least is in his handwriting' "handwriting" could probably be held to include in the case of marks made by his mark. *Whitley Stoles*, Vol II p 894, see also *Prian Krishna v Jadunath*, 2 C W N 603

**Diligence necessary, if witness is absent.** Although it has been held in many cases that secondary evidence is admissible where the subscribing witness is proved to reside beyond the jurisdiction of the Court yet the mere temporary absence of the witness beyond the jurisdiction of the Court (*Wills v Felt* 8 Johns (N Y) 121] or his absence in a distant part of the country are not sufficient. *McLoud v Johnson* 4 Bibb (Ky) 731 The absence of the witness is sufficiently accounted for if, after diligent enquiry he cannot be found. *Clark v Sanderson* 3 Binn, Pr (192) *Cumtiffe v Sefson* 2 Fost 182 *Crosby v Percy* 1 Launt 361 *Dulley v Summer* 5 Mass 438 *Morgan v Morgan* 9 Bing 359 *Frans v Curtis* 2 Car & P 296 *Bright v Doe*, A & L 22 *Whitelock v Musgrove*, 1 C & M 511 What is due diligence must of course depend somewhat upon the circumstances of each case. The proof should show satisfactorily that a reasonable honest and diligent inquiry has been made. After such proof is given the decision of the question depends to a considerable extent upon the sound discretion of the Court. *Jackson v Burton* 11 Johns (N Y) 61 Such an enquiry should be in due reason (*Wills v Felt* 8 Johns (N Y) 121] and in good faith at the place of residence of the witness, if known, and of the persons most likely to know of his whereabouts. *Jackson v Hallion*, 13 Wend (N Y) 178 The answers to such inquiries are treated as part of the *res or lre* and may be given in evidence. *Greenl Tr* § 574 What is sufficient proof of the search for an absent witness in order to admit secondary evidence of the signature depends somewhat upon circumstances. Where the witness has a fixed residence within the country, the rule should be more strict than where the defendant had no fixed residence, was a labouring



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man, working about from place to place, as he could obtain employment *Gallagher v London Assn Corp* 149 P 25 Parties will be required to use a less degree of effort to produce the subscribing witness if the proof shows that the witness is seeking to avoid appearing *Wardell v Fermor*, 2 Camp 282 If it is shown that there is collusion between the witness and the adverse party, or that such party has prevented the attendance of the witness, the rule will not be enforced *Wills v Trust* 8 Johns (N Y) 121, *Burr Jones* § 529, see also *Thannesa v Bomma Devara*, (1912) M W N 747 Death of attesting witness must be proved by legal evidence *Amomeah v Chetti*, 61 Ind Cas 637

**Attessor must be Competent at the time of Attestation** If the attessor was at the time not qualified as a witness his statement is not admissible The usual instance of this has been the case of a disqualification by interest *Sune v Bell*, 1 R 371 If the attessor was then qualified, but has since become dis-qualified to take the stand, his attestation is receivable because it speaks as from a time when he was qualified *Wagmore* § 1510

**70** The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested

Admission of execution by party to attested document

**Scope of the Section** Section 22 and section 65 (b) of the Evidence Act relate to admission as to the contents of a document *Whitley Stokes* Vol II p 594 The term "admission" in this section relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it *Ibdu Karim v Salman* 27 C 190 *Budha v Senan* 7 N L R 85 The expression "execution by himself" is evidently distinguished from the execution by witnesses which is known as "attestation" *Jhama v Deobu*, 2 N L R 10 (16) 'Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him though it be a document required by law to be attested Now the question that immediately arises on the application of this section is as to what is meant by execution' and as I understand the law the word "execution" there means the party by affixing his signature or mark has signified his assent to the contents of the document and if a party admits that he has done this then he admits execution I do not think that the admission of execution can be taken to mean an admission not only of the signature or mark in token of assent by him but also that all the legal formalities connected with the document have been complied with Nor do I see any reason for holding that where a party admits execution within the meaning of this section he must necessarily be taken to admit that the document has been attested as required by s 59 of the Transfer of Property Act *Per Crump J in Jagannath v Raju* 24 Bom L 1296 = 47 B 147 = 76 Ind Cas 73 So section 70 of the Evidence Act is not sufficient to dispense with the necessity of proof of attestation by two witnesses to make the mortgage bond valid under s 79 of the Transfer of Property Act the only object of s 70 being to make the admission of the executant sufficient proof of execution *Jogendra v Natar* 7 C W N 384 But in *Satschandra Mitra v Jogendra* 24 C W N 1014 = 24 C I J 175 Mr Justice Woodhouse said "That decision (*Jogendra v Natar* supra) is open to this construction that even when the executant admits execution his admission or proof of execution or signing only does not dispense with proof of attestation If this be the meaning of that judgment I am unable to agree with it I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him I say if the admission of execution is to be understood only in the sense of an admission of signing then there is no necessity of section 70 at all regard being had to the general provisions of the Evidence Act relating to admission This is also indicated by the last words of section 70 though it be a document required by law to be attested' This was approved in *Natar v Sanchandra* 22 C W N 411 = 11 Ind Cas

934, *Paban Khan v Bodal* 34 C L J 493 *Ishwafe Lal v Mussamat Nanhu*, 64 Ind Cas 11=19 A L J 855=44 A 127, *Ajrun Singh v Kalai Rath* 2 Pat 317=74 Ind Cas 150=1923 P 436, *Benoybhusan v Dhwendia Nath*, 38 C L J 114=74 Ind Cas 178, *Junj Rhu v Ma tung*, 1 Rang 557, *Nagesuar v Bichu*, 4 Pat L J 511=53 Ind Cas 79, *Priyanath v Bissessar* 1 C W N 6000 *Dhanna Lal v Shambhu* 47 Ind Cas 9, *Nagesuar v Bichu* 4 Pat L J 511 But in a recent case the Judicial Committee of the Privy Council has held that this section applies to a document duly executed *Hna Bibi v Ram Han*, 30 C W N 364 (P C)=5 P 53 P C =23 A L J 815=52 I A 362=2 O W N 641=6 P L T 71=27 Bom L R 1114=42 C L J 143=89 Ind Cas 679=19 M L J 240 (P C)=A I R 1925 P C 203 This section applies only to document which is duly attested *Mg Po Gyi v Mg Min Din* 5 Rang 561=104 Ind Cas 386=A I R 1927 Rang 293 See also *Tadia v Dua* 11 Ind Cas 585, *Naram v D C*, 55 Ind Cas 501 So admission can not make valid a document which is invalid in law *Sheikh Karhu v Md Ali* 1 C L J 577 No admission of execution is effectual under this section unless it amounts to an acknowledgment of the formal validity of the instrument *Ajrun Chandra v Kailash Chandra*, 36 C L J 373 The admission by a mortgagor of the execution of a mortgage deed before the Court, does away with the necessity of proving its execution but not with the necessity of such attestation as is required by law *Pandurang v Bilaji* 14 C P L R 42 Under this section the admission of execution of a mortgage is sufficient proof against the executant himself but there is no authority for the proposition that the document is for that reason binding upon the other defendants who were not parties *Ajrun Singh v Kali Rath*, 2 Pat 317=74 Ind Cas 150=1923 P 436 *Goddhan v Harul* 35 A 364=19 Ind Cas 121 Where a party to an attested document admits its execution a third party is not bound by it *Nagesuar v Becha Singh* 1 Pat L J 511, *Aibaran v Ram Chandra*, 22 C W N 444=44 Ind Cas 984 An admission by the representative of a party to an attested document cannot be treated as an admission of the party to an attested document of its execution by himself *Benoy Bhusan v Dhwendianath*, 74 Ind Cas 178=38 C L J 114 There was a clear admission of execution in the written statement The attesting witness called stated that the executant did not sign the deed in his presence Held that the document must be taken to have been proved *Ramlal v Must Septi* 94 Ind Cas 558=A I R 1926 Pat 295

**Admission when to be made** The term "admission" in this section relates only to the admission of a party in the course of a trial of a suit *Abdul Karim v Saliman*, 27 C 190 Such admission can be made by a party in his pleadings or in his examination *Raymangal v Mathura* 30 Ind Cas 576=38 A I=13 A L J 881 *Must Sarja v Muladhar* 13 N L R 197 *Budha v Saruan*, 7 N L R 85, *Harul v Phalur* 34 Ind Cas 281=19 O C 23 But in *Nagesuar v Bichu Singh* 4 Pat L J 511=53 Ind Cas 79, *Atkinson J* said 'I am of opinion that *Abdul Karim v Saliman* *supra* and *Raymangal v Mathura* 38 A I=13 A L J 881=30 Ind Cas 576 which decided that an admission under section 70 of the Evidence Act of 1872 to be admissible in evidence can only apply to an admission in fact made in the course of legal proceeding then pending before a Court of Justice cannot be supported on principle or authority. If authority were needed to refute such a proposition I think authority may and can be found in the decision of their Lordships of the Privy Council in *Konuar Doorganath v Ramchander Sen* 1 I A 52=2 C 241 in *Himpleton v Wallis*, 27 Ch D 251=54 L J Ch 1175 and also in *Gobindhan Das v Harul*, 19 Ind Cas 121=35 A 364=11 A L J 379 In my opinion an admission under section 70 is admissible in evidence even though it be an admission not made in the course of legal proceedings then pending before a Court of Justice, but which may be an admission made antecedent to the institution of legal proceedings. This construction of section 70 of the Evidence Act as to what constitutes an admission to be admissible in evidence is in harmony with the definition of an admission contained in sections 17 to 20 inclusive of the Evidence Act itself, and is in accordance with the general principle. But in a later Privy case it has been held that this section relates to the admission of the party in the course of the proceedings in which

**S 71** the document is produced made either in the proceedings or in the evidence *Banwar Prasad v Bighu Kuar* 8 Pat L 17=101 Ind Cas 277=A I R 1927 Pat 131, see also *Deorao v Dhandrao*, 109 Ind Cas 576=A I R 1928 Nag 244, *Hanlal v Phalun Dag* 19 O C 23=31 Ind Cas 281 An admission can be made in a written statement *Ram Lal v Septh* 91 Ind Cas 558=A I R 1926 Pat 295=1926 P H C C 117, *Iyerati v Esmail* A I R 1929 Cal 441=49 C L J 317 But an admission of execution of a document before a Sub Registrar does not amount to an admission of a valid execution which is the admission referred to in section 70 of the Evidence Act *Prabdas v Sahib Khan* 93 Ind Cas 669=18 S L R 282=A I R 1926 Sind 90, *Deorao v Dhandrao*, 109 Ind Cas 576=A I R 1928 Nag 244, *Budha v Sarwan* 7 N L R 8;

Proof when attesting witness denies the execution

**71** If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence

**Principle** The notice of the rule of Preference for the attesting witness is that of the general desirability in furtherance of truth of obtaining his knowledge on the subject. What may be the tenor of witness's testimony remains to be seen the object of the law is to obtain his knowledge, irrespective of the side in whose favour it may bear. The rule is satisfied by calling him, i.e. by making his testimony available for the trial. If his testimony fails to evidence the execution the present rule says nothing about the consequences—whatever any other rule may say. The present rule's force is absolutely spent when witness is produced for examination. So the attester's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation leave the proponent still free to prove by other testimony if he can the fact of due execution a permission demanded not only by principle but also by policy, in as much as the proponent might otherwise be defeated of his rights by a corrupt attester. *Wigmore* § 1302

**Scope of the section** The party seeking to prove an instrument may examine his witness as to the acts of execution performed the date the place the signature sealing if it is made under seal and delivery by the maker or his acknowledgment of it as the case may be the subscription by the witness or witnesses and generally the compliance with the usual and formal requisites. It may happen that the subscribing witness cannot or will not testify to the complete execution. In such case the party seeking to prove the instrument may cross-examine the subscribing witness (*Bouman v Bouman* 2 M & R 501) or corroborate or add to his testimony by other evidence (*Whitaker v Salisbury* 15, Pick Mass 534. If a party who calls a witness to prove a particular fact be disappointed in the result of the testimony it is competent for him to prove the fact by other testimony. 3 Stark L 1632. If the subscribing witness fails to establish the execution as where he does not remember the act or denies the attestation the party calling him to prove the instrument is, by a positive rule of law, not concluded by his testimony. He may establish the fact by other testimony. *Talbot v Hodson*, 71 Hunt 251. *Whitaker v Salisbury*, 15 Pick (Mass) 534. In other words, the execution of the instrument, even though it be a Will may be established by competent evidence against the positive testimony of the subscribing witnesses. *Matter of Gottrel* 95 N Y 329. The party who would establish a deed must lay his ground work by the production of the subscribing witnesses if their testimony can be obtained. If they fail to establish the execution of it the party who thus calls them, by a positive rule of the law is not to be concluded by their testimony, but will be permitted to establish the fact by other testimony. [*Whitaker v Salisbury*, 15 Pick (Mass) 534]. It would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. (1 Stark L 147). This section applies to all attesting witnesses whether the documents require attestation or not. *Loft L 251*. When in a mortgage suit it was found that one of the attestors was dead and the other either denied or did not recollect

the execution of the document, the execution of the same can be proved by other evidence *Lalshman v Gokhul*, 1 Pat 54=(1922) Pat 415. A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses *Dinabandhu v Sanatan*, 48 Ind Cas 624. "If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document, it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced *Field Ev 7th Ed 227*. It is not intended by enacting this section to depart from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution *Ayeanti v Mohammad*, 49 C L J 317=A I R 1929 Cal 44.

**If the attesting witness denies** Sometimes a witness turns round upon the party who calls him and denies his own signature. This ordinarily happens when he has been bribed by the other side. Here it would defeat justice if the party so injured were not allowed this license *Nort Ev 254*. As pointed out in *Brahmadat Tevari v Chandan Bibi* 20 C W N 192 (193)=34 Ind Cas 686, the mere fact that the attesting witnesses to a document repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant, does not invalidate the document if it can be proved by evidence of a reliable character that they have given false testimony. In discussing the evidence adduced in support of a Will which was attested by four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee and Breachcraft JJ* observed "This however, does not compel the Court to pronounce against the Will. It was ruled

in the case of *Abu Ashore Dass v Joy Doorga Dass*, 22 W R 189, that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper v Baclell* 4 Moo P C 419. The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point the Court may take into consideration the circumstances of the case and judge from them collectively, whether the requirements of the statute were complied with, in other words the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will *Young v Richards*, 2 Curt. 371, *Bungoyne v Shouler*, 1 Rob 5. So the fate of a document is not necessarily at the mercy of attesting witnesses *Maharajal v Anjumanumissa*, 48 Ind Cas 538=5 O L J 667. In *Bootle v Blunde*, 19 Ves Jr 491, 507, Lord Eldon said "If they had all denied their attestations, but it be proved by circumstances that they unjustly denied it, the Will might be proved to be a good Will by other circumstances." In *Abbot v Plumble*, 1 Doug 216 *Mansfield L C J* observed "It was formerly doubted whether if the subscribing witness denies the deed, you can call other witnesses to prove it, but no longer." "If they disavow having seen it executed, other persons who saw it executed, or can prove the party's handwriting may be called so too, even if they prove contrary to what their attestation purport, namely, that the party did not execute it. *Per Lord Kenyon, C J* in *Ley v Ballard*, 3 Esp 173 note. "The attesting witness's testimony is not indeed conclusive for the party may go on to prove him untrustworthy and may call other witnesses to prove the execution. *Per Lord Ellenborough C J* in *R v Harrington*, 4 M & S 350, see also *Hudson's case*, Skinn 79 *Dayrell v Glascock*, Skinn 413 *Austin v Hills*, Buller N P 264 *Pike v Bradbury*, Buller N P 264, *Richie Oatfield* 2 Stra 1096, *Lowce v Jolliffe*, 1 W Bl 365. In *Pile v Bradbury* Buller N P 264 "the first and second witnesses denying their hands, it was objected he should go no further, for it was argued that though,

**S 71** if you call one witness who proves against you, you may call another, yet if he prove against you too, you can go no further, but the Chief Justice admitted him to call other witnesses to prove the Will and he obtained a verdict' *Wigmore* § 1302 If the witnesses deny execution either through collusion or absence of recollection it is open to the plaintiff to prove execution by other evidence *Sheik Karimullah v Gudar*, L R 5 A 686=A I R 1915 All 56, *Baliyam v Kamaha*, A I R 1924 Nag 367, *Aylati v Mohammad* 49 C L J 347=A I R 1929 Cal 441 Where the attester denies attestation and the other attestors are dead, what is required under s 71 is only proof of execution not execution in the presence of attesting witnesses *Lalla v Dashan*, 74 Ind Cas 839, *Paleshuari v Santar Dayal*, 74 Ind Cas 969 Where the only living attesting witness of a document was illiterate and on being examined denied execution *Held*, that the document could be proved by other evidence *Badri Prashad v Gambhir*, 26 Ind Cas 500 A scribe who has signed the document but who was not present at the time of its execution could not be an attesting witness *Ram Sahu v Gouri Shankar*, 39 Ind Cas 153 The mere fact that the only surviving attesting witness is considered hostile by the party taking his stand on the document, does not relieve him from the duty of examining him as a witness *Gobinda v Pulin* 31 C W N 215 *Tula Singh v Gopal Singh*, 1 P L J 369 If he denies the execution, other oral evidence is admissible to prove execution *Basdeo v Rashbehari*, 104 Ind Cas 344, *Lakshman v Gokul* 1 Pat 154 *Sashi Mukhi v Monmohini*, 67 Ind Cas 87 *Lakshman v Krishna Ji*, 29 Bom L R 1425=105 Ind Cas 769, *Coles v Coles* L R 1 P 70, *Pillington v Gray*, (1899) A C 401, *Dayman v Dayman*, 71 L T 699

**Does not recollect** If the witness's testimony on the stand wholly fails through lack of recollection, may not his signature and attestation, on being proved by himself or some one else suffice as an implied testimony to the facts of due execution? To use the attestation in this way is to use a hearsay (i.e. extra judicial) statement, but for this case a well recognized exception to the Hearsay rule exists (*vide notes under section 69*) A failure of memory, so far as it involves a general mental disability, organic in its nature, and analogous to insanity, should excuse entirely from production of the person and of his deposition But a mere casual failure of memory as to the facts of execution obviously cannot excuse, for it cannot be ascertained except after production to testify—When it appears after such production, other principles come into play (a) the witness may adopt his attesting signature as record of past recollection and upon the faith of it verify the facts of execution as thus known to him to have occurred (b) if he fails to do this his signature may be otherwise proved, and his attestation taken as sufficient evidence of the facts of execution, (c) in any case upon his failure to recollect the fact of execution may be proved by other qualified persons *Wigmore* § 1315 The first question is, may not the attester, though not actually recollecting the circumstances adopt his signature as a record of past recollection and base his testimony on the faith of his signature which he would not have put there had he not witnessed the execution? That he may is clear by the principle of Recollection *vide* s 119 *infra* *Wigmore* § 1309, *Per Bailey J in Vaughan v Hubbard*, 8 B & C 16 But where the attesting witness becomes incapable to recall to his memory the circumstances of the execution of the document the proponent may, if he can, prove the facts of execution by other witnesses Because it could never have been the design of the Statute to vacate a Will which was duly executed, whenever the witnesses to it have forgotten any material circumstances attending the attestation They are indeed always called upon to prove the Will not because the statute requires that they shall prove a compliance with all the requisites of the law, but because they would most likely prove or disprove them and because upon principles of common law the attesting witness to every instrument must be produced if living and within the power of the Court *Per Thelker J in Clarke v Dumarant*, 10 Leigh 13, 3. The Court will not allow the defective memory of the illiterate witnesses to overturn the Will *Smith v Smith*, (1866) 1 P & D 113 In *Thompson v Hill* (1852) 2 Rob 126 at p 132 *Dr Lushington said* "The character of the witnesses—the length of time which has elapsed

since the transactions took place the nature of the facts deposed to,—whether they are likely or not to have made an impression on the minds of the witnesses, are circumstances to be taken into account, to which is to be added this consideration also, whether the case admits of the principle—the presumption—*omnia rite esse acta*’ “The maxim *omnia præsuntuntur rite esse acta*,” says *Lindley L J* in *Harris v Knight*, (1890) 15 P & D 170 at p 179 ‘is an expression, in a short form of a reasonable probability, and of propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.” See also *Cooper v Beckett*, 3 Curt 648=4 Moo P C 419, *Wright v Sanderson*, (1834) 9 P & D 149 *Lloyd v Roberts* (1858) 12 Moo P C 158. The presumption applies with more or less force according to the circumstances of each case. *Vennombe v Butler*, (1864) 3 S & T 580, *Harris v Knight* (1890) 15 P & D 170 (184). To prove the due execution of a Will for the purpose of getting probate of it, strict affirmative proof of due attestation is not absolutely necessary and if from circumstances the Court can reasonably come to the conclusion that the Will has been duly executed, probate may be given. *Sibo Sundari v Hemangini*, 4 C W N 204, *Anna Cholam v Ramaswamy* 30 M L J 55 (P C)=20 C W N 673 (675). In *Blake v Blake*, (1882) 7 P & D 102 *Holker L J* said “If the witnesses so come forward to prove the Will has been in doubt, or could not remember whether they did or did not see the testator sign, the fact that everything appears to have been rightly done would entitle the Court to come to the conclusion that they did in fact see her sign. For the application of the doctrine see *Blake v Knight* 3 Curt 547, *In re Moore*, (1901) P 41 *Wordhouse v Balfour*, (1887) 13 P & D 2, where the recollection of the witness was blank as regards circumstances of the execution. *Woolmer v Daly* 2 Lah 773. The same rule is applicable in the case of other documents required by law to be attested. One of the attesting witnesses A to a mortgage bond deposed that he was present, saw the execution and became an attesting witness, the other witness B stated that at the request of the mortgagor, he became an attesting witness but had no recollection of any other circumstances in connection with the execution of the document. On the same day, when the document was later on presented for registration B identified, the executant who, in his presence admitted execution before the registering officer. Held that the inference might legitimately be drawn that the requirements of the law as laid down in section 59 of the T P Act were fulfilled. *Benoybhusan v Dharendra* 38 C L J 114. In delivering the Judgment *Mr Justice Mookerjee* said “The principle applicable to cases of this character was considered by this Court in *Jogendra Nath v Nitar Charan*, 7 C W N 384 by the Allahabad High Court in *Ram Der v Munnatal*, 39 A 109, *Uttam Singh v Hukam Singh*, 39 A 162 *Shub Dayal v Sheo Ghulam*, 39 A 241, and by the Madras High Court in *Venkata v Mulhu*, 39 M L J 463. It was ruled by this Court that it might fairly be presumed that both signed as attesting witnesses after execution of the document by the mortgagor and that such presumption might be made on the principle enunciated in section 114 of the Indian Evidence Act. In that case upon the face of the Will, without a memorandum of attestation, there was a signature of the testator at the foot, as also the subscription of two witnesses. It was ruled by *Dr Lushington* that in the absence or death of witnesses *prima facie* the presumption is that the testator signed in the joint presence of the two persons and they subscribed in his presence. This principle was applied by the Allahabad High Court in the three cases mentioned where reference was made to *Wright v Sanderson*, 9 P D 149. These decisions were

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followed, as based on sound principle by the Madras High Court in the case mentioned before. Reference may in this connection be made to the decisions in *Blake v Blake* 7 P D 102, *Harris v Knight*, 15 P D 170 and *In re Francis v Percott* (1902) P 205. No doubt as pointed out in *Strong v Hardel*, (1915) 1 P 211, the question is one of inference from the surrounding circumstances, and cases are conceivable where the Court may decline to draw the inference by reason of proof of facts which show the requirements of the law were not in contemplation of the parties.

Proof of document  
not required by law  
to be attested

72 An attested document not required  
by law to be attested may be proved as if it  
was unattested

**Principle and Scope** This section embodies section 37, Act II of 1855. For a long time it was held that when a document was attested, one at least of the attesting witnesses must be produced. *Doe v Duffard* 2 M & S 62. In *Hardel v Fermour* 2 Camp 282, 284, Lord Ellenborough said that it did not depend on the nature of the deed to be proved it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give. See also *Higgs v Dixon* 2 Stark 180. *Streeter v Bulett* 5 C B 562. But as this worked great hardships to suitors, the Common Law Procedure Act, 1854 (17 & 18 Vict C 125, s 26) and the Indian Evidence Act of 1855 introduced the present reasonable practice. *Aort Et* 255. Those Acts restricted the rule to documents required by law to be attested. *Re Roche* L R 32 Ch D 35. This provision is applicable, only if all the parties are before the Court, and in *ex parte* proceedings the attesters should yet be called. *Worthington v Moore* 61 L T 338, *Re Reay* 3 W R 312 (Eng), *Taylor Et* § 1839 42, *Phyp Et* 4th Ed p 484. So documents which do not fall under s 568 may be proved by other evidence. *Vide Dattani v Juggabundlu*, 23 W R 293.

73 In order to ascertain whether a signature, writing or  
seal is that of the person by whom it pur-  
ports to have been written or made, any  
signature, writing or seal admitted or proved  
to the satisfaction of the Court to have been  
written or made by that person, may be compared with the one  
which is to be proved, although that signature, writing or seal has  
not been produced or proved for any other purpose.

The Court may direct any person present in Court to write  
any words or figures for the purpose of enabling the Court to  
compare the words or figures so written with any words or figures  
alleged to have been written by such person.

\*[This section applies also, with any necessary modifications,  
to finger impression.]

**Principle** In proving a document or a signature two distinct kinds of evidence offer themselves first testimony by a person, who saw the act of writing or some circumstance leading up or pointing back to that act secondly, evidence of the kind of handwriting. The difference is that in any and all ways of the second mode there is involved the establishment of a personal type or character of writing and an estimate based on comparison, that the disputed writing belongs to the type. By this mode there is always an inference from the type to the genuineness of the disputed instance. The evidential fact, the type of handwriting, involves an inference from a kind of habit or skill of handwriting to an

\* This paragraph was added to s 73 by the Indian Evidence Act 1899 (5 of 1899)

act done, the specific handwritings) *Wigmore* §§ 1991, 383, 99 We resort to testimonial evidence when we ask a witness, who possesses a knowledge of a certain type of handwriting, to say whether the disputed document is in that type of handwriting We resort to circumstantial evidence when we furnish the tribunal directly with a knowledge of the type, so that it may apply it for itself *Wigmore* § 1996 Here first of all questions of relevancy arises The specimens, to afford a fairly trustworthy inference, must of course be genuine, and they must also be numerous and representative enough to serve as an adequate basis for inference to the general style *Ibid*

**Scope of the Section** By section 45, handwriting and signature of a person can be proved by an expert Section 47 admits the opinion of any person, acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed, by that person In addition to the modes of proving handwriting which have already been noted under ss 45 and 47 there remains direct comparison of the disputed document with an undisputed one If the signature etc., of the document, with which that in dispute is to be compared, is admitted by the party to be genuine the comparison is the more satisfactory If it be proved genuine to the satisfaction of the Judge with whom the decision of this collateral issue rests (*Birch v Ridgway*, 1 F & F 270) the comparison can be instituted (*Egan v Cowan*, 3 Law Times 223) A party may under clause, (2) be made to write for the express purpose of comparison (*Doe v Wilson*, 10 Mood 530) Here the comparison will be less satisfactory, as a person may feign or alter the ordinary character of his writing with the very view of defeating a comparison *Cobell v Kilmister* 4 F & F 490 Formerly, comparison could only be made between the disputed document and one in evidence for the purpose of the cause But the present latitude seems a wise extension, as there is still sufficient guarantee of the genuineness of the document with which the disputed document is to be compared *Nort Es* 255-256 The competency of this kind of evidence has been seriously doubted in the Courts of England, and until overruled by legislature the Courts have declared such evidence inadmissible The first objection made to the admission of this kind of evidence is that writings offered for the purpose of comparison with the document in question might be spurious, and therefore the standard must be proved to be genuine, and collateral issue is at once entered "The difference between letters which have been received in correspondence and papers put in a witness's hand," it was argued in *Mudd v Suckermore*, 2 P & D 18 "is two fold First, when a correspondence has taken place with a witness before any controversy commenced no suspicion of fraud can attach, and the knowledge of the handwriting acquired thereby is the strongest evidence short of ocular proof second such a correspondence may be shown to be acted upon But in the other case, there is nothing but the oath of the witness in the cause to be depended upon, so that on fifty documents put into a witness's hand for the purpose of comparing with the writing in question fifty distinct issues would arise as to their genuineness In the second place it is said that specimens might not be fairly selected "If such evidence was admissible, it was argued by counsel in *Mudd v Suckermore supra* 'how easy it would be, out of hundreds of specimens of a man's writing collected at different periods of his life to produce ten or twelve in Court that would correspond sufficiently with a forged signature to deceive the most experienced witness' The third objection is that jurors might not be able to read, and therefore it would be impossible to call on them to make the comparison In answer to these arguments *Mr Best* says "There certainly was great weight in the first objection particularly when taken in connection with the general rules of common law practice So long as parties to a suit were allowed to mask their evidence till the very moment of trial, so long would it have been highly dangerous to permit either of those to adduce *ad libitum*, for the purpose of comparison, a number of supposed specimens of handwriting which the opposite party, having had no previous notice of the intention to adduce, would not be in a condition either to answer or contradict specimens which might not be fairly selected or even be the handwriting of the party to whom they are attributed *Best Es* § 239 But as has been pointed out by *Sergeant Storr* while arguing in *Mudd v Suckermore*, (1836) 2 P D O 20 the inconvenience of collateral issues



**S 73.** already exists where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received. The correctness of this knowledge depends on the genuineness of that letter, and even where he says he saw the party write, his knowledge depends on the issue whether or not he did see the party write. As to the second objection Mr Best says "It is not always easy to obtain unfair specimens, and, should such be produced, it would be competent to the opposite party to encounter them with true one" *Best on Ev* § 238. Concerning the third objection, Mr Best says "It does not seem satisfactory logic to protect a jury which can read from availing themselves of that means for the investigation of truth because other juries might, from want of education, be disqualified from so doing, if some men are blind that is no reason why all others should have their eyes put out" *Best on Ev* § 238. This last argument against jurors loses all its force in India in as much as no civil cases are tried here by jurors and a very few important criminal cases are tried with the help of jurors. Moreover the jurors are always selected from persons who are literate. Finally it may be argued with great force that proof of handwriting by comparison is really the best evidence on the subject. As to comparison by juxtaposition on the one hand, and where the standard exists only in the mind of the witness on the other it has been pointed out in the latter case the characteristics of the standard are indistinct shadowy and uncertain while in the former they appear in all the distinctness of visible characters. In one case you compare existing tangible realities, in the other a visible reality with an invisible, intangible impression in the mind. *Woodman v Dane* 52 Me 9. "It is more satisfactory" said *Duncan J* in *Farmer's Banl v Whitehall* 10 Serg & R 110 (Am) "to submit a genuine paper as a standard and let the jury compare that with the paper in question and judge of its similitude, than the evidence continually received, of allowing a witness who has seen the party write once to compare the disputed paper with feeble impression and transient view the writing may have made in his memory." "Another singular opinion" said *Woodward J* in *Hyde v Woolfoll*, 1 Iowa 159 (Am) (referring to the English cases in which it was held that impression is allowable only with writings properly in evidence in the cause) "has been that the standard writing must be one used in and connected with the case. But how can this be held necessary when we look at the object of the standard. It is of no consequence what the writing you compare is, all you want is a genuine handwriting, and it is as respects the nature of the evidence not material what instrument it is nor whether the paper be blank in all except the signature nor whether the writing be connected with the case or not."

In England the controversy was set at rest by enactment of Stat 17 & 18 Vict C 125 as well as 28 & 29 Vict C 18 which allow comparison of hands with a proved handwriting. Under the statutory laws as well as under this section as well as ss 45 and 47 it seems clear, first, that any writings the genuineness of which is proved to the satisfaction not of the jury, but of the Judge (*Egan v Cowan* 30 L T 223) may be used for the purpose of comparison although they may not be admissible in evidence for any other purpose in the cause (*Birch v Ridgway* 1 F & F 270, *Cresswell v Jackson*, 2 F & T 24) and next, that comparison may be made either by witnesses acquainted with the handwriting or by witnesses skilled in deciphering handwriting, or without the intervention of any witnesses at all by the jury themselves (*Cobbet v Administrator*, 4 F & T 190) or in the event of there being no jury by the Court. *Asport v Hul*, 4 C & P 267. The comparison may be instituted "by Mr Norton 'by any one the Judge, the jury an ordinary witness, or an expert' *Arbon v Russell* 3 F & F 152' *Nort T* 236. So far as the comparison by an ordinary lay witness is concerned, if the learned writer's meaning is, that he can compare by putting the document in juxtaposition it is clearly erroneous. Such comparison by witness is absolutely barred by the opinion rule because "where it is merely opinion on similitude of the writing collected from barely comparing them the jury may compare them as well as any body else and any two people may think differently." *Per Yates J* in *Brookbowl v Woodley*, Peake N P 21. Note similarly in *Doe v Suckermore* 5 A & F 719 *Denman L C J* said "If the proved document and the controverted are both in Court, and the

witnesses speak to their resemblance or difference from immediate observation, they seem to perform a task for the jury which every one of them, even though illiterate, might well perform for himself.' So it is clear that on principle, comparison by a lay witness should not be allowed, even in the presence of the tribunal. But this rule does not apply in the case of an expert witness, because 'he does what possibly the jury may be incompetent to do.' *Ibid*, Wigmore § 1997. The question of comparison of signature is distinct from question of admissibility. *Akhyruddin v Emperor*, 53 C 372=92 Ind Cas 412=27 Cr L J 266=A I R 1926 Cal 139. The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for purposes of proof be compared with other writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person. *Veera Raghava v Soura Ayyangar*, 35 M L J 608=48 Ind Cas 68=24 M L F 477. In delivering the judgment in the case the Court observed: "This case turns solely on the meaning to be given to the word 'purports' in section 73 of the Evidence Act. Different views have been taken by *Jenkins C J* in *Barindia Kumar v Emperor*, 37 C 467=14 C W N 1114 and by *Chandrasekharai and Batchelor JJ* in *Emperor v Ganpat*, 15 Ind Cas 649=14 Bom L R 310. We are inclined to agree with the latter. We do not discover any object in limiting the scope of the section to documents which are signed or contain some intrinsic statement of the identity of the writer, and apparently in English law all that is necessary to render proof by comparison admissible is a dispute as to the writing." In the second portion of the section under construction the word used is "alleged," as from the context it is clear that no contradiction between the two words could have been intended, the impression left on the mind is that the two must have been used to express the same idea. So under this section, it is not necessary that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom the writing is attributed. The word "purports" in this section means "alleged." When an anonymous writing is produced and ascribed by the prosecution to a particular person, then the case for the prosecution must be taken to be that, having regard to the admitted document, and the comparison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused. *Emperor v Ganpat Ballirishna*, 14 Bom L R 310=15 Ind Cas 649=13 Cr L J 505. But in *Barindia Kumar v Emperor*, 37 C 467=14 C W N 1114 at p 1138 *Jenkins C J* said: "In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard writing must purport to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that person. The section does not specifically state by whom the comparison may be made though the second paragraph of the section dealing with related subjects expressly provides by way of contrast that in that particular connection the Court may make the comparison. In this case we are told that a comparison was made by the learned Sessions Judge out of Court after the conclusion of the arguments, but whether with the assistance of the Assessors or not does not appear. If there was no submission of this question to the Assessors it may be a question how far this was not an irregularity. The result has been that on a comparison so conducted the learned Sessions Judge, without in all cases observing the precise terms of the section, has held certain writings to be those of one or other of the accused without having invited or heard arguments from their counsel on this point. I cannot think this was a proper course to pursue, a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts."

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In *Sreemutty Phoodce Bibee v Gobind Chunder Roy*, 22 W R 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution'. In this case no expert has been called to assist the Court, and not because no expert was available, there is, it is well known a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to him. It is true that the opinions of experts on handwriting meet with their full share of disparagement at times but at any rate there is this use in their employment that the appearances on which they rely are disclosed and can thus be supported or criticized whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Mr Justice Blackburn who in *R v Harvey*, 11 Cox C C 546 refused to allow a comparison to be made without the help of experts "see also *Swojini v Hari Das*, 26 C W N 119. But comparison of signature is one of the modes of proving handwriting. Although where there is no other evidence, such proof would be regarded hazardous and inclusive it cannot be regarded as an error in law to base the conclusion on such proof alone. *Pasupuleti Venkammie*, 11 M L T 424=14 Ind Cas 711.

But before a Judge allows documents to go to the jury for the purpose of comparison of handwriting under this section it is his duty under section 298 of the Criminal Procedure Code to find whether these documents are admitted or proved. The record of the case should contain a note of such finding. *Queen Empress v Lalsing Rat Un Cr C 491* *Queen Empress v Lalsing Rat Un Cr C 452*. But in a trial by jury where the Judge allowed certain documents to go upon the record which were not proved under the requirements of s 73 of the Evidence Act, for the purpose of comparison with the disputed handwriting, held that there was no such irregularity of procedure as to warrant an interference in revision. Whether the documents were proved or not it was for the jury to decide. *Queen Empress v Lalsing Rat Un Cr C 452*.

**English law and origin of the rule.** Although all proof of hand writing except when the witness wrote the document himself, or saw it written is in its nature comparison,—it being the belief which a witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge (*Doe v Sulermore* 5 A & E 731 per Patteson J) the law until the year 1854 did not allow the witness or even the jury, except under certain special circumstances actually to compare two writings with each other, in order to ascertain whether both were written by the same person. *Payton* § 1869. But to the common law rule excluding proof of the hand writing by comparison there were two exceptions. The first was the case of a document already in evidence. It was competent for the Court and jury to compare the hand writings which were in evidence in the cause for other purposes, and which were admitted or proved to be in the hand writing of the supposed writer. *Best* Et § 239, *Griffith v Williams* 1 C & J 47. *Doe d Perry v Newton* 5 A & E 514. The case of *Perry v Newton* supra decided by the Court of King's Bench in 1836 is always cited as the leading case to support this exception, although the exception did not arise in the case at all. On the trial of an action of ejectment the defendants produced the alleged Will of one B on which they rested their title. The genuineness of B's signature was disputed. The counsel for the plaintiff in cross-examining one of the defendants witnesses put into his hands some letters which the witness said he believed to be in B's hand writing. It was afterwards proposed to submit these letters to the jury, that they might compare them with the signature in the Will. The letters were not in evidence for any other purpose. The Judge refused to allow them to be put in and on appeal the full Court sustained the ruling. *Lord Denman* C J said 'This is a point on which we ought not to raise any doubt. The comparison is unavoidable. There being two documents in the cause one of which is known to be in the hand writing of a party, the other alleged, but denied to be so no human power can prevent the jury from comparing them with a view to the question of genuineness, and therefore it is best for the

Court to enter with the jury into that inquiry, and to do the best it can under circumstances which can not be helped. The best rule is that comparison of writings by the jury shall not be allowed in any case where it can be avoided." Another exception to the rule was the case of ancient documents. "When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the hand writing of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the *maxim lex non cogit impossibilia* allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one." *Best on Ev* § 240, *Roe v Raulings* 7 East 282 (n) *Doe v Pater*, R & M 141, *Doe v Davies* 10 Q. B. 311, *Moorewood v Wood*, 14 East 327, *Barr v Harpur*, 1 Holt 420, *Brune v Raulins* 7 East 282, *Crauford and Lindesay Peetages*, 2 H. L. C. 557, *Solita v Yarron* M. & R. 133, *Bromage v Hume* 7 C. & P. 548. With these exceptions comparison was not allowed in England *Macferson v Thoytes*, Peake N. P. 29, *Brookford v Woodby* 9 Peak. N. P. 30, *Garrels v Alexander*, 4 Esp. 37. In *Eagleton v Kingston* 8 Ves. 473 (1803) Lord Eldon said "I very lately I never heard of evidence in Westminster Hall of comparison of hand writing by those who had never seen the party write, though such evidence had been frequently received in the Ecclesiastical Courts." See also *Hade v Brougham*, 3 Ves. & Ber. 172, *Regina v Morgan* 1 M. & R. 131, *Clement v Trilledge* 4 Car. & P. 1, *Allport v Neek* 4 Car. & P. 267, *Waddington v Cousins* 7 Car. & P. 595, *contra Per Lord Kenyon in Allebrool v Roock* 1 Esp. 351 in which case he said "Some Judges have doubts for the policy of that rule of evidence respecting the allowing of the jury to prove comparison of hands, because often at a distance from the metropolis the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part I have always been inclined to admit it and shall do so in this case." See also *Riett v Braham*, 4 Term R. 497, *King v Cator* 1 Esp. 117.

The subject at last came before the Court of King's Bench in the well known case of *Mudd v Suclermore* 5 Ad. & E. 703. In that case the Court being evenly divided in opinion the judgment went against the admissibility of the evidence, and the rule for new trial was discharged. A few years after the decision the English Parliament in 1854 adopted the views of the dissenting Judges in *Mudd v Suclermore*, by enacting a statute in these terms "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise of the writing in dispute." Stat. 17 & 18 Vict. ch. 125, sec. 27. Next year in India Act II of 1855 was passed, section 48 of which ran as follows "On an inquiry whether a signature writing or seal is genuine, any undisputed signature, writing or seal of the party whose signature writing or seal is under dispute may be compared with the disputed one, though such signature writing or seal be on an instrument which is not evidence in the cause." Although the English Act was confined to civil suits, the Indian Act applied both to civil and criminal cases. *Goode v Er* p. 201, *Queen v Amanulla* 6 W. R. Cr. 5, *Queen v Bakhore Choubey* 5 W. R. 93 Cr. Under either Act the comparison may be made, not merely by witnesses acquainted with the hand writing but by experts skilled in deciphering, and in all cases the general resemblance may be traced, not only by conformity of composition, whether of language or of words, but by minute details of correspondence or difference, such, for instance as the shape of particular letters or the orthography of the words. Science too is allowed to bring its material aid of which the resort to magnifying glasses which frequently occurs on trials, may be taken as example. Where the party whose hand writing is in dispute is in Court the obvious test might be applied of calling on himself to write. His presence however would not exclude the reception of evidence by comparison. Before the passing of the Act II of 1855 such comparisons were not allowed in India. *Annagurubala v Krishnaswami*, 1 M. H. C. R. 457.

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In 1865, Stat 28 & 29 Vict C 18, was passed, section 8 of which runs as follows "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of genuineness, or otherwise, of the writing in dispute." Section 1 of the same Act provides, that the above enactment, in common with certain other clauses relating to evidence—shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland. *Taylor* § 1869. The Indian Evidence Act found place on the Statute Book in 1872.

**Comparison of writing etc, meaning of** All evidence of handwriting, except where the witness actually saw the document written, is in its nature, comparison of handwriting for it is nothing less than the belief which the witness entertains upon comparing the writings before him with the exemplar in his mind, derived from some previous knowledge of the hand. *Woodward J in Frazer v Brown* 43 Pa St 12 (Am). But this is not what is properly known as comparison of handwriting. "By comparison is meant," says *Starkie* "a comparison by the juxtaposition of two writings, in order by such comparison, to ascertain whether both were written by the same person." *Starkie* *Ev Part IV* p 654. "Comparison of handwriting is where other witnesses prove a paper to be the handwriting of a party, and the witness is desired to take the two papers in his hand compare them, and say whether they are or are not, the same hand writing. There the witness collects all his knowledge from comparison only, he knows nothing of himself he has not seen the party write nor held any correspondence with him." *Per Duncan J in Cone v Smith* 6 Serg & R 568, *Budiet v Hunt*, 43 Ind 387, *Lawson Expert & Op Ev* 383. This as has been remarked, is a distinct and separate a thing from the comparison which a witness called to testify to handwriting, makes between the exemplar in his mind, as an external, visible and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective. *Woodward J in Frazer v Brown*, 43 Pa St 12.

**The genuineness of the standard** Wherever proof of handwriting by comparison is permitted it will be found that care is taken that the standard of comparison shall be genuine. The reason of the rule is obvious. Under the English Statute as well as under this section comparison of a disputed writing is allowed only with a writing proved to the satisfaction of the Court to be genuine. For it is plain that if there be any controversy as to the genuineness of the specimens with which the comparison is to be made, all the evils pointed out by the opponents of this species of proof become apparent, and a number of collateral issues are in each case at once raised. Therefore the handwriting used as a standard must be established by clear and undoubted evidence. Strict proof of its genuineness is required in order that no reasonable doubt shall remain. Nothing sort of the evidence of the person who saw the person write the paper [*Richardson v Newcombe*, 21 Pick 317. *Mugge v Adams* 13 S W R 330 (Tex)] or his admission of its genuineness or evidence of equal certainty, should be sufficient for that purpose. Unless this is adhered to the law is open to a multitude of collateral questions. *Baker v Haines* 6 Whit 291 (Am). In a New Hampshire case decided in 1852, it was said "If there is any controversy as to the genuineness of the specimens they are excluded and for the obvious reason that collateral issues would at once be raised upon them should a different course be taken." *Bowman v Sinton* 55 N H 90 (Am). The signature of a party to an appeal or appearance bond, which when filed, becomes a Court record, is presumed to be genuine, and may be used as a standard without further proof. *Saure v Dawson*, 2 Mart 202 (Am). "When the identity of anything is fully and certainly established you may compare other things with it which are doubtful, to a certain whether they belong to the same class or not, but when both are doubtful and uncertain comparison is not only useless as to any return result but clearly dangerous and more likely to bewilder than to instruct the jury." *Per Coulter J in Deque v Hare* 7 Pa. St 125 (Am). A document

to be admissible against an accused person should be proved to be a document in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witnesses *Pulinbehari v King Emperor*, 16 C W N 1105=16 Ind Cis 257, *Queen Empress v Tulsaye*, Rat Un Cr C 491

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**Photographic copies of document** Ordinarily photographic copies of admitted documents are not allowed to serve as specimens of admitted signature or disputed signature *Vide Mc Cullough v Munn*, 2 I R 194 C A Such copies are secondary evidence *Ibid* But it is held in *Massachusetts* that magnified photographic copies of the signature in dispute and of admitted genuine signatures of the same person are admissible in evidence when accompanied by competent preliminary proof that the copies are accurate in all respects except as to size and colouring 'They were capable' said *Merriell J*, 'of affording some aid in comparing and examining the different specimens of handwriting which were exhibited on trial It is not dissimilar to the examination with a magnifying glass Proportions are so enlarged thereby to the vision that faint lines and marks, as well as the genuine characteristics of handwriting which perhaps could not otherwise be clearly discerned and appreciated, are thus disclosed to observation and afford additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer we are unable to perceive any valid objection to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury' *Marcy v Barney*, 16 Gray 160 Letter press copies might under some circumstances be useful as well as the originals, or in default of them *Wigmore* § 2019

**Court may direct person to write** Any person whose handwriting is in dispute, and who is present in Court, may be required by the Judge to write in his presence and that such writing may be compared with the document in question *Doe d Devine v Wilson* 10 Moo P C 502 503 *Cobbett v Kilmister* 4 F & F 490, *Taylor* § 1871 To prove the handwriting of a person in a particular document a party may ask the Court to have the handwriting of that person to be taken in Court for the purpose of comparison The result of the comparison is the determination of an issue arising in the case and is quite distinct from the determination of the question of admissibility or otherwise of evidence and consequently is within the province of the jury and not of the Judge *Khyr ruddin v Emperor* 42 C L J 504

**Finger impression** In *Bavan Hazam v Emperor*, 68 Ind Cas 958=1 P 242, *Sir John Bucknill J* of the Patna High Court strongly deprecated the practice of taking the finger impression of an accused person in a Court of Law, see also *Jassuram v Emperor*, 77 Ind Cis 423 (P) But in a later case of the same High Court it is held that under this section the Court has power to take the finger impression of an accused person *Zahur v Emperor*, 6 Pat 623=106 Ind Cas 212=8 Pat L T 847=A I R 1928 Pat 103 see also *Emperor v Nga Tun*, 2 Bur L J 270=1 Rang 759 (F B)=83 Ind Cis 668=A I R 1924 Rang 115 (F B) *Public Prosecutor v Kandasami* 50 M 462=A I R 1927 Mad 696 Section 5 of Act 33 of 1920 authorised the Magistrate to direct the thumb impression to be taken *Superintendent v Hiranbala* 30 C W N 373=43 C L J 79, *Basgut v Emperor*, 6 P 301=104 Ind Cis 626

**Comparison of handwriting—Value of** A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts *Sarajini v Hari Das* 26 C W N 75 *Balakram v Md Said* 77 Ind C 872 In *Phoode Bibee v Gobind Chunder Roy*, 22 W R 272, it was said by the Court that a comparison of signature is a mode of ascertaining the truth which ought to be used with very great caution *Gupta v Emperor*, 76 Ind Cis 425 *Barindra v Emperor*, 14 C W N 114=37 C 467 A comparison of writings has consequently been deemed a mode of ascertaining truth which ought to be

**S 73** used with very great caution (*Nabin Krishna v Rasul Lal*, 10 C 1047 (1051), and *Kurali Prasad v Anantaram*, 8 B L R 490 (502)=16 W R P C 16), specially if no skilled witness has been called to make the comparison *R v Siliclorf* (1894) 2 Q B 766 *R v Harey* 11 Cox C C 546, *Doe v Suclermore* 5 A & E 703 (734), *Rajendra Nath v Jogendra Nath* 14 M I A 67=7 B L R 216=15 W R 41, *Ramesh Chandra v Rajani* 21 C 1=20 I A 93, *Ambika Charan v Naresuan*, 29 C W N 75=85 Ind Cis 552, *Galstaun v Sonatun*, 78 Ind Cis 668 *Abdul Ali v Abdoor Rahman* 21 W R 429, *Abdulla v Gann*, 11 B 690, *Babu v Parmesuar* 64 Ind Cas 234, *Puan v Girish* 9 W R 450. We must bear in mind that although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two afford no safe foundation that one of them is genuine *Sarojini v Hari Das*, 26 C W N 113=34 C L J 373, *Butahu v Parmesuar*, 64 Ind Cas 234. If two signatures are exactly identical, there is room for suspicion that the one in question may be a copy or careful imitation of the genuine signature. It is a fact well known and may be readily verified that no two signatures, actually written in the ordinary course of writing them are precisely similar. The character of a person's signature is generally of uniform appearance and the resemblance between the one and another signature of the same person is thus apparent but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a facsimile that one is a perfect match to the other in every respect. There is generally diversity in the marks of the pen, the size of the letter the level of the signature and space it occupies that stands as a guard over the genuine signature and characterises it as a true signature *Sarojini v Hari Das*, *supra*, see also *Lallah Jha v Bibi*, 21 W R 436. But as was observed by *Coleridge J* in *Doe v Suclermore* 5 A & E 703 (705) 'the test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause and is therefore itself permanent. Again as *Sir John Nicoll* said in *Robson v Roche* 2 Ad 53 p 79. But such evidence is peculiarly fallacious where the dissimilarity relied upon is not that of a general character but merely of particular letters for the slightest peculiarities of circumstance or position, as for instance the writer sitting up or reclining or the paper being placed upon a harder or softer substance or on a plane more or less inclined—nay, the material as pen ink etc. being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently however, of anything of this sort few individuals write so uniformly that dissimilar formations of particular letters are grounds for excluding them not to have been made by the same person *Galstaun v Sonatun* 78 Ind Cis 663=A I R 1925 Cal 485.

## PUBLIC DOCUMENTS

### 74 The following documents are public

Public documents

documents —

(1) documents forming the acts or records of the acts—

- (i) of the sovereign authority,
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country,

(2) public records kept in British India of private documents

**Scope of the section** This section is merely an interpretation clause and is important because certain modes of proof are prescribed in regard to public documents as distinguished from private documents. *Cum Fy 11th Ed p 166* It is not always easy to determine whether a particular writing is a public or private document. In *Sturla v Ives* 5 App Cas 623, the question arose as regards the meaning of the word "public documents." In delivering the judgment Lord Blackburn said "It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within the sense is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr Baron Parke said in delivering the opinion of the Judges in the case of *The Irish Society v The Bishop of Derry* 12 Cl & F 611. Now my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry a public document and made by a public officer. I do not think public there is to be taken in the sense of meaning of the whole world. I think an entry in books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporate book concerning a corporate matter or something in which all the corporation is concerned, would be public' within that sense. But it must be a public document and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire as might be said to be the case with the bishop acting under the writs issued by the crown. That may be said to be quasi-judicial. He is acting for the public when that is made, but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards [*Liams v Urban District* (1899) 1 Ch 241].

The term is generally understood to include all such documents as Acts of Parliament and Parliamentary papers, bye-laws, all records whether judicial or non-judicial the process of any Court of law probates of Wills and letters of administration papers belonging to or issued by the departments of State, Royal Commissions, Municipal Corporations and trading companies, entries in all public registers, Royal proclamations and all other acts of State. *Pouell v 248* In this connection it should be borne in mind that the term "public" as applied to documents is used in English law in two distinct senses. It may mean that the statements contained in the document to which it is applied are admissible as a form of testimony, either against all the world or against some class of persons, of the facts stated therein (*Ibid* ss 35 37 and ss 40 43) or it may mean that the document is one of those originals of which are kept in some special custody for the benefit of the public or of some particular class of persons, and are therefore not ordinarily produced in Court, like a private document, but proved by means of some kind of copy. When we speak of a public document in the first sense we are regarding it as a medium of proof when in the second, as a document for which on public grounds a special mode of abduction is provided. There are many documents which are public in both senses, there are many others which are only public in the latter sense. A Will for instance is a public document for the purpose of abduction, the proper mode of proving it in Court being the production of the probate merely, but it is not a public document in the other sense, and any recitals of fact contained in the Will which forms part of it are no more admissible to prove those facts against strangers than are the recitals contained in any deed of assignment which must be proved by the direct oral evidence of witnesses. On the other hand a register of births which is equally a public document for the purpose of abduction (the entries in it being provable by certified copies) is also a public document in the other sense, being admissible as a medium of proof against all persons of the births recorded in it. *Wills Act 2nd Ed 233* In the Indian Evidence Act, to avoid confusion, the term "Public documents" have been used only in the second sense. All descriptions of public documents have this characteristic that they are kept in some special custody and provable by means of a copy without production of the original. *Wills Act 2nd Ed 407* A public



**S 74** document is one prepared by a public servant in the discharge of his public official duty. The mere fact that it is kept in an office does not lead to the inference that it is a public document. *Mahtab Din v Karar Singh*, 107 Ind Cas 618 = A I R 1928 Lah 640. Where a letter received from the Comptroller of the Military Accounts in reply to the warrant of attachment acknowledging the same was relied on to prove knowledge of the judgment debtor as regards the existence of the decree held, that the letter was a public document under s 74 of the Evidence Act and that the same, did not require proof. *Sheikh Edu v Ilva Lal*, A I R 1928 Oudh 488.

**Acts or Records of the Acts** In *Queen Empress v Arumugam*, 20 M 189 (F B) the question was whether reports made by a Police Officer in compliance with sections 157 and 168 of the Criminal Procedure Code are public documents within the meaning of this section. In answering the question in the negative *Shephard J* said "Section 74 of the Evidence Act defines public documents, and if any of these reports is a public document, it must be because it forms the act or the record of the act of a public officer. It is necessary to examine the language of the 74th section more closely in considering the report which the subordinate police officer is under section 168 of the Code directed to send to the station house officer. It is a report of the result of the investigation held under the provisions of the chapter XIV of the Code. No doubt there may in this instance, be said to be a record of acts done by a public officer. Nevertheless, I do not think the report is a public document within the meaning of section 74. In construing that section, I think it may fairly be supposed that the word 'acts' in the phrase documents forming the acts or record of the acts' is used in one and the same sense. The act, of which the record made is a public document, must be similar in kind to the act which takes shape and form in a public document. The kind of acts which section 74 has in view is indicated by section 78 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The enquiries which a public officer may make whether under the Criminal Procedure Code or otherwise may or may not result in action. There may be no publicity about them. There is substantial distinction between such measures and the specific act in which they may result. It is to the latter only in my opinion, that section 74 was intended to refer. Unless this line of distinction is drawn I do not see where the right of discovery is to stop. If the report which a subordinate police officer sends to his station house officer may be inspected before the trial what is there to prevent inspection of the report which any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts. When a Civil Surgeon reports to a Magistrate as to the age of a person he is merely giving his expert opinion and is not making a record of his act in official capacity for the use of the public within the meaning of s 74 and consequently such a document is not admissible without proof. *Abdul Halim v Saadat Ali* 1 Luck 733 = 108 Ind Cas 817 = A I R 1928 Oudh 155. The acts mentioned in this section are all final completed acts as distinguished from acts of a preparatory or tentative character. The section does not make a distinction between statutory duties and other official acts. *Pahaya v Government* 7 Mys L J 189. A circular by which the Director General of Posts and Telegraphs notified that stamps of a certain kind would soon be issued to Post Offices for sale to the public was not an 'act or record of act of a public officer within the meaning of this section. *Velayudam v Emperor*, 1929 M W N 193 = 115 Ind Cas 509 = 30 Cr L J 183.

**Plaints and written statements decree, etc** In *Shahada Mahamed v Danie Wedgebarry* 10 B L R App 31, certified copies of plaint and written statement in a former suit were tendered in evidence. But the certified copy of the plaint was admitted on the ground that it was a public document whereas the certified copy of the written statement was not admitted. Now the question is whether the decision of *Pontifex J* in that case is correct. *Mr Field* says "It is clear that in this case the written statement was rightly rejected but the plaint

was improperly admitted. Both were private documents, and neither should have been admitted' *Tield* 7th L. p. 236. Mr. Woodhouse adds "The correctness however of this decision so far as it held the plaint to be admissible has been for a long time doubted and has not been followed on the original side of the Calcutta High Court. The decision it is submitted is erroneous, there being no principle upon which the case of a plaint can be distinguished from that of a written statement. Both are acts or records of acts of private parties and not of a public tribunal or its officers." The general statement of law as made by *Tield* and *Woodhouse JJ.* is correct but in this connection it should also be borne in mind that it was at one time the practice in Bengal for the *Lower Courts* to set out the substance of the pleadings in their judgments and this practice was removed by circulars issued by *Sudhar Dutt* *Bhaya v. Pande*, 3 C. L. J. 221. *Parbatty Dey v. Purna Chandra* 9 C. 586. The English law is stated by *Taylor*. The next class of public documents to be mentioned are the records of Courts of justice, and other judicial writings. As records of the Supreme Courts, and of the old Superior Court, and the 'quasi' records will embrace depositions, (*Hughes v. The M. 109*) affidavits, bills and answers (*Ewer v. Ambrose* 1 B. & C. 211) decrees filed in the old Court of Chancery, rules of Court, and judgments, which, although not strictly records, partake in such a manner that they can be proved by copies to the same extent as records. Generally to the same rule of evidence. Indeed for the sake of convenience, the general term 'records' will alone be used. The documents just mentioned *Taylor* § 1534. The reason why the documents of another Court may be proved without production is thus given by *Gilbert* "Records, being the precedents of the decisions of Courts, to which every man has a common right to have recourse for the purpose of ascertaining the law is plainly agreeable to all manner of reason and justice. Every man might demand a record to serve his own occasion but the Court might demand it, but both could not possess it at the same time, and therefore it must be kept in one certain place." Besides, these records by being daily removed from the Court, would be liable to loss.

S 74 use of affidavit to direct it to be taken off the file for the purpose" But Prof Wigmore says 'this would hardly be the ruling at the present day. Wigmore § 1215. A deed offered in the other Court for purposes of proof was regarded as a part of the record, temporarily at least. *Buller* N P 253, *Wigmore's Case*, 5 Co Rep 75, the question depends largely on the nature of other proceedings and of the document. *Handley v Fulghugh* 21 A K Marsh 24. Writs of execution and warrants of commitment until they are returned must be proved by actual production, though after their return, they become matters of record, and are consequently provable by copies. R N P 231. With respect to writs of summons under the Rules of the Supreme Court, they may be proved by the production either of the originals, or of the copies by the officer of the Court under Ord V rr 12 & 13 or if the original be lost, by copies authenticated by the Court or a Judge, and any one of these documents will furnish proper evidence of the institution of the action, to which they relate. *R v Scott*, L R 2 Q B 415=45 L J M C 259. The pleadings in an action may be proved either by producing the originals or by means of the copies filed with the officer of the Court under Ord X L I r 1. *R v Scott*, L R 2 Q B D 415, *Taylor* § 1586. In later cases it has been held that a plaint is not a public document and must be proved in the ordinary way. *Manbodhi v Hirasai* 93 Ind Crs 650=A I R 1926 Nag 339, *Parkeshwar Prosad v Debendra Prosad*, 92 Ind Crs 184=7 Pat L T 267=A I R 1926 Pat 180. But in this connection the following observation of *Ellenborough C J* in *Ramsbottom v Buelhurst*, 2 M & S 567, 567 should be borne in mind. 'The judgment roll imports incontrovertible verity as to all proceedings which it sets forth, and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. Every part of the record, as long as it remains on the files of the Court, must be taken to speak absolute verity. All papers filed in a suit, in which a compromise is confirmed by a decision, form part of the record. Such record is public document. *Bhagani v Gooroo* 25 W R 68, see also *Lalita v Surnomoyee* 3 C W N 353, *Mongal Sen v Hira Singh* 1 A L J 369. The deposition of a witness is part of the record of the acts of an official tribunal within the meaning of this section and is such a public document. *Salhina v Laddan Salheba* 2 C L J 218. *Chandeswar v Bishekar*, 101 Ind Crs 289=5 P 777, *Harmand v Ramgopal* 27 C 639=4 C W N 429. But a certified copy of the deposition of a witness would not come by itself in any case it would be necessary to adduce evidence proving the identity of the person who gave the deposition. *Brayaballav v Akhoy* 30 C W N 251=93 Ind Crs 15. Proceedings of a Court of Justice may be proved by a Court official deposing to what took place in his presence and also to an uncertified record thereof. Such proof is secondary evidence, under s 65 66 of the certified record,—the record being a public document under s 74. *Harmand v Ramgopal* 4 C W N 429=27 C 630 P C A. *Robolani v Ramgopal Nath v Fingerprint*, 22 C W N 742=46 Ind Crs 183=81 Ind Crs 25 Cr L J 917, see also *Ambar* 3 M 670=13 A L J 935, 52, but *Ambar*, 69 Ind Crs

being

at the instance of the collector in his capacity as a holder of a trust estate is a private document, and its accuracy has to be established *Preonath v Durga*, 11 C L J 578=16 C W N 578

**Other Public Documents** Letters between district authorities are public documents as they form records of the acts of public authorities. Hence they are admissible in evidence under s 74 *Prithee Singh v Court of Wards*, 23 W R 272. Registers giving details of the government revenue chargeable thereon at the time of settlement, produced from the collectorate are public documents *Lalmohan v Nandalal*, 15 C L J 191. Every entry in the register of inventions and every document entered and recorded in that register is a public document. Certified copies of these are admissible in evidence *Sannath v Butler*, 4 A L J 11=A W N 1907, 23. The Loan Register of the Public Debt office in the Bank of Bengal is a public document *Chandi Charan v Bostab*, 31 C 281=8 C W N 125. An examined copy of a quinquennial register is evidence without the production of the original *Oody Monee v Bisho Nath*, 7 W R 14, see also *Ramnandan v Jyogobund*, 75 Ind Cas 955=2 P 839. A collector's register kept under Bengal Act VII of 1876 is also a public document *Soshi Bhuvan v Gurnish Chunder* 20 C 940 see also *Pertapodai v Hui Das*, 22 C 112. *Collector v Sherif Indad W R* (1864) 358. Records of the proceedings of a Municipal Board are public documents and the officer who is authorised to deliver copies of public documents in the course of his official duties is for such purposes a public officer. *Reference under s 46 of Act I of 1879*, 19 A 293 (I B)=A W N 1897 61. Municipal registers of deaths and births are public documents *Anis ul-Rehman v Beni Ram*, 59 P R 1901. Probate of a Will is never proved by the production of the original Will. A copy of the Probate granted in Australia is admissible in evidence in India. Such a copy is the copy of the Will and of the endorsement made thereon by the Registrar of probate showing that the Will has been filed and proved in Court granting the probate. The Will when so recorded and endorsed is a public document under section 74 (iii) of the Evidence Act which may be proved by secondary evidence under section 65(e). *In the matter of the application of Adya* 11 Ind Cas 261. A *thasra* prepared by the patwari of a village is a public document *Dajit v Pariah* 3 O C 205. *Ayalul* accounts prepared from time to time by village officers for administrative purposes, are to some extent public documents *Siva Subramanya v Secretary of State*, 9 M 285.

Records of confession made by magistrate, are probably admissible under s 74 of the Evidence Act *Queen Empress v Sundar Singh* 12 A 595=A W N 1890 199, *Gobunda v Emperor*, 69 Ind Cas 257=23 Cr L J 673. When oral information is given to a police officer in charge of a station as to the commission of a cognizable offence, and it is reduced to writing by him under s 151 Cr P Code, such writing is a public document under s 74 *Abdul Rahman v Queen Empress* U B R (1893 1896), Vol I 21. A notice under s 107 Criminal Procedure Code is a public document. *Anjad v Lal Shmi*, 23 Ind Cas 529=18 C W N 644. A report of a *Kotwal* in connection with the appointment of a *mohant*, is a public record *Baldeo v Gobind* 36 A 161=23 Ind Cas 18=12 A L J 179. A *dal halnama* is a public document *Mahammad v Ram* 25 Ind Cas 529, *Sitaram v Emperor* 7 L R 173 Cr. The certified copy of an order of the Probate Court to the effect that letters of administration be granted to the person named with a copy of the Will annexed of the deceased testator is admissible, the latter being a public document within the meaning of this section *Habiram v Hem Nath* 19 C W N 1068. Registers proposed and kept under Land Registration Act are public documents *Rama nandan v Jaygobind* 2 Pat 839. The history of a district attached to a settlement record being compiled under the direction of a Settlement Officer is a public document and is provable by the production of a certified copy *Muhammad v Sultan Singh* A I R 1924 Lah 639=75 Ind Cas 1010. A report in the B form under s 173, Criminal Procedure Code is a public document within the meaning of this section *Channemore v Government* 7 Mys L J 231. The crop cutting report of the Deputy Collector made under s 40 Bengal Finance Act, should be considered a public document and is evidence of the amount of crops produced by the land *Hargobind Singh v Kishen* 7 Pat L T 671=

**S 76** Ind Crs 966=A I R 1926 P 436, *Kishun Deyal v Ishuarnath* 8 P L T 74=A I R 1927 Pat 167 A school master is an 'executive officer' of Government within the meaning of s 74 clause (1) (iii) of the Indian Evidence Act *Bhanudas v Krishnabai*, 28 Bom L R 1225=50 B 716=A I R 1927 Bom 11

**Registers which are not public documents** Census registers are not public documents within the meaning of this section *Emperor v Bhazanrao* 6 Bom L R 535 A certificate granted by the Board of trade is not a public document under s 74 of the Evidence Act *In the matter of the collision of Ara*, 5 C 368=5 C L R 331 An *anumati patta* is not a public document *Krishna Kishore v Kishori Lal* 14 C 496=14 I A 71 P C It is doubtful whether *jummabandi* is a public document *Alhya Kumar v Shama Charan*, 16 C 586 *Ramchunder v Bunsheedhar*, 9 C 741, but see *Tara v Abinash* 4 C 79 *Fulhan v Register* prepared by a *patwari* is not a public document *Bai Nath v Sulhu* 18 C 534 Where a copy of a Will certified by the Registrar General of Ceylon to be a true copy made from the record filed in his office was sought to be put in evidence the Will not being a public document within the meaning of s 74 of the Evidence Act, in the absence of evidence that the copy in question was compared with the original, it was held inadmissible as secondary evidence of the contents of the document *Ponnammal v Sundaram* 23 M 499=10 M L J 310 A document purported to be a report by a village *nika* *thuan* to the *moharn* in charge of the central office (in which entries in the village registers are copied into another register), informing him that on the day after the entry of the marriage of B and A, F (former husband of B) had come to the writer and stated that he had not divorced B The writer accordingly desired the *moharn* not to take action of this report of the marriage of B and A Held that such a document is not a public document within s 74 of the Act *Fau Ahmad v Crown*, 1 P R 1914 Cr =139 P L R 1914=23 Ind Cas 696

**Public records kept in British India of private records** A mortgage deed registered according to law is under clause (2) a public document *Bani Prosad v Sobai Lal*, 7 O C 327 The returns in the custody of the Registrar of Joint Stock Companies constitute public record of private documents within the meaning of section 74, sub section 2 and secondary evidence thereof is admissible *In the matter of Ananta Bazar Patila*, 21 C W N 1161 (F B)=26 C L J 459

**Public documents—value of** Under s 74 of the Evidence Act, documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer *Kupa v Bhawan Prosad*, 105 Ind Cas 353

Private documents

## 75 All other documents are private

**Notes** All documents which are not public documents are private documents Private documents include documents such as contract memorandum letter etc If it becomes necessary to prove the contents of the private document it must be produced or its absence accounted for *Burr Jones* § 201

**76** Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificates shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies

*Explanation*—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section S 76

**Scope of the Section** A person's right to get a copy of a public document depends upon his right to inspect it. The question whether a person has a right to inspect any particular document is rather difficult to solve. There is no general provision on the subject to be found in any enactment in force in British India, although there are some special provisions applicable to particular cases. *Field Lr 7th Ed 232*. In England, the right to inspect public documents varies with respect to their nature. There is a common law right to inspect many As to others it rests upon particular Acts. *Nort Lr 258*. But this section saves and excludes all such documents as the Government has a right to refuse to show on the ground of state policy, privileged communication etc. *Nort 257, Taylor Lr § 1483*. As regards special enactments which give right to inspect and take copies, vide the Civil Procedure Code (Act V of 1909), the Criminal Procedure Code, (Act V of 1898) the Indian Registration Act (XVI of 1908), the Administrator General's Act (III of 1913), the Indian Companies Act (VII of 1913), the Oudh Land Revenue Act (XVII of 1867), etc.

It might have been supposed that for the lawful custodian of documents in official custody, an authority could be implied from the very nature of his office, to furnish copies that should be receivable in evidence. The certifier must be the lawful custodian of the particular document. The authority must of course exist at the time of certifying, a certificate for example from one whose office had expired would have no standing. The deputy officer may properly certify for the chief officer nominally having custody. The officer's authority rests on his custody of the original, this custody, however enables him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, to the use of a register as evidence of a record of private deed, was the registrar's inability to speak to the genuineness of the deed, and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record for it is originally prepared and thereafter preserved in the office, and although it may not have been prepared by the chief officer or custodian himself still his knowledge of the affairs of the office is transacted by his subordinates is sufficiently direct to suffice a personal knowledge. The result is clear enough for documents actually having their inception within the office, such as a book of account, a Court roll or an ordinary official register. But many kinds of documents preserved in official custody, are prepared within the premises of the office by private persons and are then filed or deposited in the office under a requirement of law—such as bonds or affidavits of various sorts. In some of these instances, no doubt the document is customarily acknowledged before the officer or other wise verified by him before filing, in others—affidavits, for example—there has been already a due verification certified by some other officer. *Wigmore § 1677*.

The loan register of the public debt office in the Bank of Bengal is a public document, within the meaning of s 74 of the Indian Evidence Act. Any person is entitled to inspect the same and to obtain certified copies thereof under this section who can show a *prima facie* case that he has an interest for the protection of which liberty to inspect must be given. *Chandi v Bostab 8 C W N 125=31 C 284 Muller v The Eastern and Midland Railway L R 38 Ch D 92, Rer v Justice of Staffordshire, 6 A & E 84*. This section allows certified copies to a person who has a right to inspect the document. *Anuar v Faral 84 Ind Cas 487, see also Bank of Bombay v Suleman 32 B 466*. Neither in the Cr Pro Code nor in the Evidence Act is there any provision dealing or limiting the right of private persons interested in criminal proceedings to inspect public document in the hands of third parties. A right to inspect public documents is, however assumed in s 76 of the Evidence Act. It may be inferred that the Legislature intended to recognize the right generally for all persons, who can show that they have an interest for the protection of which it is

**S 77.** necessary that liberty to inspect such documents should be given *Queen v Ammugon*, 20 M 189=7 M L J 167 see also, *Subramania v Govt of Mysore*, 7 Mys L J 195 6 Mys L J 513 Whether any person has a right to inspect a particular public document is a question not dealt with by the Evidence Act and altogether outside its scope *Emperor v Muthia*, 30 M 466 Sections 76 and 77, refer to public documents, and are not applicable to *Iobalas Hurcehur v Churn*, 22 W R 355

**77** Such certified copies may be produced in proof of the contents of the public documents or parts by production of of the public documents of which they purport to be copies

**Principle** The record of a Court should not be taken away from its place of custody into another Court. The principle of this irremovability has been judicially sanctioned on grounds of policy. The removal into another Court as evidence would make it impossible for the time being for others to use the records there would be a serious risk of loss, and there would be a constant additional wear and tear upon the document *Wigmore* § 1215. The usual mode of proving the record of another Court is by production of a certified copy. But the copy is not produced in such cases because it is better evidence than the original, it is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place *Bullow v Thomas* 19 Gratt, 14, 18. For reasons similar to those applicable to judicial records documents belonging to any public office need not be proved, but may be otherwise proved. Their removal for production in evidence would delay and hinder the official use of the files would make it impossible for other persons to consult the absent documents would subject them to risk of loss and would injure them by constant wear and tear *Wigmore* § 1218. *Per Lord Mansfield in Jones v Randall* Cowp 17, *Per Lord Ellenborough in Hennel v Lyon* 1 B & Ald 182 184. *Per Lord Abinger in Mortimer v Mallan* 6 M & W 58 69. *Per Pollock C B in Doe v Roberts*, 13 M & W 523, 530. Now a paper offered as a copy but not supported by any person's testimony in Court is a hearsay—i.e., extrajudicial—statement, obnoxious to the Hearsay rule. Hence some person must be called to the stand to verify the paper as the copy that it purports to be. A paper offered anonymously as a copy, or offered without calling some witness to verify it, is inadmissible. But there are exceptions to the Hearsay rule under which copies made by specific classes of persons may be admitted. Under the exception for official statements copies made by officers lawfully authorized to give copies—i.e., exemplified certified attested or office copies are receivable *Wigmore* § 1281. The reason for the exception is thus stated by *Buller J*: 'Here a difference is to be taken between a copy authenticated by a person trusted for that purpose for there that copy is evidence without proof, and a copy given out by an officer of the Court who is not trusted for that purpose, which is not evidence without proving it actually examined. The reason of the difference is that where the law has appointed any person for any purpose the law must trust him so far as he acts under its authority' *Trial at Nisi Prius* by *Buller J* p 229, *Wigmore* § 1677. *Blair v Braybrook* 6 Stark 8. *Appleton v Braybrook*, 6 M & S 37. The officer's authority rests on his custody of the original his custody however, enables him to speak not merely to the correctness of the copy but also to the existence and genuineness of the original *Wigmore* § 1677. So in order to allow this exception to the Hearsay rule the principle of trustworthiness of the statement is satisfied. The Necessity principle is satisfied by the fact that the certifier cannot be called to testify to the genuineness of the copy without great inconvenience and loss to public departments.

**Scope of the section** "In this section the term used is 'may' This then is one and usually the most convenient mode of proof of public documents. The act is not compulsory. It does not exclude any other mode of proof. If then a certified copy—a term sufficiently explained in the preceding section—

should from want of some formality fail as a certified copy, it may still be used in evidence as an examined or sworn copy, if it has been examined with the original by any one who can swear to the comparison with the original and to the accuracy of the copy. *Rid v. Margeson* 1 Comp 169. *Not* F. 258. But this opinion of Mr Norton contravenes the clear provision of section 65 according to which, in cases of public documents only certified copy of the same are admissible as secondary evidence. In such a case no other secondary evidence is admissible. In *Krishna Kishore v. Kishorilal*, 11 C 487=111 A 71. *Sir B. Parnell* said: "If then the *anumati patra* was a public document within the meaning of s 71 of the Act which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy." The party who wishes to give evidence of the contents of any public document must take care to obtain the proper kind of copy which is made admissible by the particular statute. Such copy in fact is raised to the rank of primary evidence. *Powell* F. 240. Where a document is a public document it can be proved by producing certified copy of the same. *Dalvi v. Pratap* 3 O C 205. This section does make copies admissible which have been unlawfully issued. *Anwar v. Faiz*, 54 Ind C. 487=2 R 391. A document in order to become a public document must be shown to have been prepared by a public servant in the discharge of his duties. *Mahabadi v. Karar*, 107 Ind Cas 618. A certified copy of the order of a Court passed upon a compromise should be received in evidence if offered in proof of compromise under this section as it is a copy of a document forming the record of an act of a public judicial officer. *Mangal Singh v. Hira Singh* 1 A L J 369. Where oral information is given to a police officer in charge of a station as to the commission of a cognizable offence and it is reduced to writing by him under s 154 Cr Pro Code such writing is a public document under s 71 of the Evidence Act, and its contents may be proved by a certified copy under s 77. *Rahman v. Queen Empress*, U B R (1893 1896) Vol I 21. The *crinal jamabandi* is a statement of the amount due under s 45 of Act VIII of 1873 from every occupier of land assessed to water rate. It contains particulars of the area and of the land in respect of which the rate is due. It is a public document within s 74 of the Evidence Act. The *porchas* distributed to the cultivators are also public documents. If produced in original the *jamabandis* do not require to be further proved. The contents of the *jamabandi* could also be proved by the production of certified copies furnished as provided by ss 76 and 77 of the Evidence Act. *Umrao Singh v. Ram Singh*, L R 3 A 536 (Rev)=1 U P L R (B, R) 26, see also *Ramlal v. Ghasiram*, 71 Ind Cas 825.

Proof of other official documents

78 The following public documents may be proved as follows —

- (1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government

- (2) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government



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- (3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government —  
by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer
- (4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—  
by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor General of India in Council
- (5) The proceedings of a municipal body in British India,—  
by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body
- (6) Public documents of any other class in a foreign country,—  
by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country

**Official Printed copies** There is no reason why an officer may not be authorized to give printed copies as well as written copies, nor has there been any doubt that such authorized copies were admissible. Yet it can not be said that such an authority has ever been implied from the nature of an office. An official printer's copies have been usually regarded as admissible, but the official printer's authority though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of those principles, as in the difficulty of presuming the authenticity of a printed copy purporting to be an official one. In general, where an official printer is appointed his printed copies of official documents are admissible. *Hignore* § 1684. The reason for their correctness is thus stated by *Tilghman C J* in *Budhis v James* 6 Binn 326 "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing." The most frequent application of the principle however is to the evidencing of the statute law domestic and foreign. Upon the theory of Judicial Notice no evidence of domestic law need be offered.

**Documents required to be certified** Copies of documents required by section 78 or 86 of the Evidence Act to be certified are not admissible in evidence

when they are not certified *Ram Pershad v Rattan Chand* 4 Ind Cas 329 = 87 P L R 1909 S 78

Clause (1) Under this clause printed proclamation of peace is admitted because 'such things as these in print as are of a public nature, as a public act of Parliament may be given in evidence without comparing it with the record' *Dupays v Shepherd* 12 Mod 216 Under section 196, Cr Pr Code, the sanction of the Local Government is made essential and his sanction must be conveyed in an order signed by the Chief Secretary to the Government An order signed by Deputy Secretary on behalf of the Chief Secretary is not legal *Abd O'nullah v Beni Madhab* 36 C L J 180=26 C W N 878 Notification published in the Fort St George Gazette fixing the date of municipal election is proof of the order of the Government fixing the election *Commissioner of Madras v Ekambara* 53 M L J 603=A I R 1927 Mad 980 This clause does not prove the authority of the promulgation of a notification by the Governor with his minister when the notification does not purport to say so *Naucler v Corporation of Madras*, 99 Ind Cas 18

Clause (2) Entries in the legislative journals, are admissible to prove the proceedings of the legislature, because the entrant is an officer charged with the duty of making such a record The general principle is undisputed, So far, then, as the proceedings of the Legislature are relevant to be proved the journal is admissible If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the statements in the report or petition may be inadmissible but the fact of its receipt or the mode of its treatment may be relevant, and therefore may be evidenced by the journal *Wignore* § 1662 Under this clause, the text of an Act is published in the Gazette must be taken to be the authorized text of the Act *Brindaban v Mahabir* 97 Ind Cas 316 *Subramana v Shanmugam*, A I R 1926 Mad 65=46 M L J 363 *Bhagat v Rupishore*, 7 Ind Cas 409 As regards the value of Hansard report, *vide The Englishman v Lajpat Rai*, 37 C 760=14 C W N 713

Clause (3) This clause corresponds to the English Documentary Evidence Act, 1868 (31 & 32 Vict Cap 37) as amended by Stat 45 & 46 Vict C 9, which is in force in British India and other colonial possessions To prove the treaty of alliance of 1703 between Portugal and England, London Gazettes of May 24 and July 14 1703 were received *Captain Quelch's Trial* 14 How St Tr 1084 In *R v Holt*, 6 T R 436 *Asherst J* said 'The gazette is an authoritative means of proving all acts relating to the King and the State' In the same case *Buller J* added 'The gazette, which is published by royal authority is admissible to prove any thing done by his Majesty in his character of King or which has passed through his Majesty's hands' In the same case also *Lord Kenyon L C J* observed "That the gazette is evidence of many acts of State is not doubted These documents are addresses of different bodies of subjects received by the King in his public capacity They then become acts of state, and of such acts, announced to the public in the gazette it is admitted that the Gazette is evidence *Wignore* § 1684 see also *Kurran v Corbourn* 5 Esp 231 *Vanoneson v Doruel* 2 Camp 44 *R v Gardner* 2 Camp 513, *Att Gen v Fleakstone* 8 Price 92, *Bradley v Athu*, 4 B & C 301

Clause (4) Depositions in a foreign Court are public documents *Haramund v Ramgopal* 4 C W N 429=27 C 639 P C see also *In re Rudolph Stalman* 15 C W N 1073

Clause (5) This clause brings the records of proceedings of a Municipal body in British India within clause (2) of sub section (1) of section 74 as the records of the acts of an official body *Reference under section 46 of Act I of 1879* 19 A 293 (F B) A certified copy of such a record is admissible under this section *Alshoy v Commissioners of Bogra Municipality* 37 C L J 589 A legitimate way of proving the proceedings of a Municipal body in British India is by a copy of such proceedings certified by the legal keeper thereof or by a printed book purporting to be published by the authority of such body as laid down by this clause *Syed Motram v Cuttack Municipality*, 17 C W N 511=14 Cr L J 91=18 Ind Cas 631 *Corporation of Calcutta v Promotha Nath Mallick*, 16 Cr L J 679=30 Ind Cas 643

## THE INDIAN EVIDENCE ACT

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Clause (6) The mere presence on a document of the impression of a seal such as was in the use by the *Mulldan*, or High Court of the Burmese Government, is no sufficient proof of the correctness of the document as a copy of the existence of an original or of the genuineness of the transaction to which it purports to testify. Such evidence can be manufactured without any great difficulty and the Courts must be on their guard against its acceptance unless under proper tests and safe guards. *Ma Me Zet v Maung Saing*, U B R (1897—1901) Vol II 404. Copies of attendance and leave registers, kept in the Native State of Hyderabad are not admissible in evidence under this clause. *Shamsker v Mohammad*, 90 Ind Cas 329. The words "diplomatic agent" in this clause are very wide and *prima facie* cover the Resident of Hyderabad who is the Political Agent of the Government of India. *Maharaj Bhandas v Krishnabai*, 28 Bom L R 1225 = 50 B 716 = A I R 1927 Bom 11. Copies of attendance and leave register kept in Native States are not admissible. *Shamsker v Mahomed*, A I R 1926 Oudh 29.

## PRESUMPTIONS AS TO DOCUMENTS

79 The Court shall presume every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact and which purports to be duly executed in British India, or by any officer in alliance with her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine.

Presumption as to genuineness of certified copies

certified by any officer in alliance with her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumptions as to documents. Sections 79 to 90 deal with certain presumptions as to documents. All these presumptions are based on the ancient and well known maxim *omnia praesumuntur rite esse acta* (All acts are presumed to have been done rightly and regularly). *Co Litt* 6b 332. The rule is applicable to public and official acts as well as to ancient deeds and private acts. Where the acts are of an official nature, or require the concurrence of official persons a presumption arises in favour of their execution. In these cases the ordinary rule is *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* (*Co Litt* 232, *Fau Omeron v Douel* 2 Cump 41, *Doe v Evans* 1 Cr & M 46)—every thing is presumed to be rightly and duly performed until the contrary is shown. *Per Stony J in Baul of United States v Davidridge*, 12 Wheaton (U S) R 69, 70, *Davies v Pratt* 17 C B 183. Upon the same principle proceeds the rule that deeds, wills and other attested documents which are more than thirty years old and are produced from the proper custody, prove themselves and the testimony of the subscribing witnesses may be dispensed with although of course it is competent to the opposite party to call him to disprove the regularity of the execution. *Best on Presumptions* p 81, *Re Airey* (1897) Ch 169. *Broom's Legal Maxims* 722. These presumptions however are not conclusive. But in certain cases the Court may presume certain things (*Vide* ss 79-81, 89). In the former case the Court is empowered to throw the burden of proof on whichever

party it pleases, to presume a fact or to call for proof of it, as it thinks best. *Cum*, Fr 87, *Safiquunnisa v Shabhan Ali*, 26 A 581 (586)=31 I A 21=7 O C 290=6 Bom L R 750, *Raghunath v Holi Lal*, 1 A L J 121 (123). The presumption in this clause is not a hard and fast presumption incapable of rebuttal, a *presumptio iuris et de jure*. *Imperator v Srinivas*, 7 Bom L R 969 (974)=3 Cr L J 32. The word 'may presume' in s 90, ought generally to be construed in more rigorous of the senses allowed by section 1. *Meher v Niu Muhammad* 110 P L R 1902 *Safiquunnisa v Shabhan Ali*, 7 O C 290, *Ramien v Verappa* 11 M L 1 69. In cases in which the Court "shall presume" a fact a presumption is not conclusive, but rebuttable. Of course there is no option left to the Court, but it is bound to take a fact as proved until evidence is given to disprove it, and the party interested in disproving it must produce such evidence if he can. Sections 79 to 90 contain the principal presumption as regards documents. Of course certain presumptions as regards documents may also be raised under section 114 (*Rule s 114 (d)*).

**Principle** There is a well known maxim of English law, *omnia presumuntur rite esse acta*—this is an inference of reasonable probability arising out of the experience of mankind. The law assumes that any act done in public or any formal act privately performed will be done in due form by the person authorized to do it. *Harris v Knight* 15 P D 170, *Pouell Fr* 391. Thus there is a presumption that a public officer acting in execution of a public trust will do his duty. *Per Lord Ellenborough* in *R v Verelst*, 3 Camp at p 433, *per Coleridge J* in *R v Whitson*, 1 A & L at p 611, *per Blackburn J* in *Waddington v Roberts*, L R 3 Q B 379. But care must be observed that confusion does not arise between the two presumptions—that of the regularity of the official acts and that of the authority from acting in an official capacity. The latter deals with the question of what original authority is to be presumed—the former, taking the authority for granted assumes the regularity and order of the acts until the contrary appears. It has long been held that one's appointment to office may be presumed, until the contrary appears from the fact that one has acted in an official capacity. *Berryman v Wise* 4 T R 366, *R v Gordon* 1 Lech 515 *R v Verelst* 3 Camp 132, *Marshall v Lamb* 5 Q B 115, *Plumer v Brisco*, 11 Q B 46.

**Scope of the section** The authority to certify a copy implies that the terms set forth by the officer as representing the original in his custody must be a literal copy, not merely the substance or the effect, of the original's terms. *Higmore* § 1678. A certified copy of an original in a public office proves *prima facie* the original to have been of file in the public office when it was made and for this plain reason, the officer's certificate recorded to it the sanctity of a deposition, he certifies 'that the preceding copy is faithfully drawn from the original, which exists in the office under my charge'. *U S v Higgins*, 14 Pet 334 346. So certified copies of depositions are admitted without any further evidence. *Duncan v Scott*, 1 Camp 100 102. The reason for admission of such certified copies is thus given by *Lord Ellenborough* in the above case. "If it is suspected that some one personated G, and that his signature is forged, I will send to chambers for the original examination, otherwise the copy so attested and delivered, must be received and relied on." The same rule is applicable to certificates and other documents as well. Certificates and other documents made by persons entrusted with authority for the purpose are evidence of the facts which they are required to certify to to the extent of their authority. *Per Sparkey C J* in *Neuman v Doe*, 4 How Miss 555 *Higmore* § 1670. This section is applicable to certificates, certified copies or other documents which purports to be certified by any officer in British India or by duly authorized officers in any Native State in alliance with His Majesty. The presumption that the document itself is genuine, of course includes the presumption that the signature and the seal (where a seal is used, see section 76, ante) are genuine. *Field v Th Ed* 241. So if a duly certified copy, made evidence by statute of a lease in official custody, had been offered, it may be that no proof would have been necessary of the signatures or handwriting of those commissioners who had executed the original lease or of the town officers signing it, such a

**S 80.** duly authenticated copy of a public document showing an official act done by commissioners in discharge of a lawful duty and produced from proper custody having been made competent evidence, proof of handwriting or signatures is necessarily dispensed with, such proof would indeed be impossible in relation to a copy. *Com v Richardson*, 112 Mass 71, 73. The only requirement for raising this presumption is that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The registering officer's certificate is not necessary to prove the certificate of registration the genuineness of which is to be presumed under this section. *Muhammad v Sohara*, 71 Ind C 19 805. But this presumption does not arise where sanction under s 196 Cr Pro Code is signed by the Deputy Secretary instead of by the Chief Secretary as required by that section. *Al Ozuallah v Ben*, 36 C L J 180-26 C W N 878-50 C 135. It is doubtful whether this section is applicable to copies given before the passing of the Indian Evidence Act. *Jukir Ali v Raychunder*, 10 C L R 469 (476).

**Presumption of proper official character.** The presumption is that one who is to have acted in an official capacity possessed the necessary and proper capacity and authority. *Lauson Pie Et Rule* 13. In *Re Murphey* 8 C & P 310 *Coleridge J* said "with regard to the last objection these trustees are public officers. They all acted as such before signing of this rate, and I cannot say that there is no evidence that they are trustees. If the proof of their once acting is not enough would proof of ten times be so? Where is the line to be drawn? I think it is evidence to go to the jury that they were trustees." In *Berryman v Wise* 4 Term Rep 366 *Buller J* said "In the case of all peace officers, justices of the peace, constables etc it was sufficient to show that they acted in these characters without producing their appointments." Similarly in *McGohey v Alston* 2 M & W 206, *Baron Parke* said "The rule is that all public officers, who are proved to have acted as such, are presumed to have been duly appointed to office until the contrary is proved." In *Bank of the United States v Dandridge*, 12 Wheat 64 *Mr Justice Story* has given an exhaustive view of the principle underlying this section. "By the general rule of evidence," said he "presumptions are continually made in cases of private persons of acts even of most solemn nature, when those acts are the natural results or necessary accompaniments of other circumstances. In aid of this salutary principle the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with public peace and the security of private property indulges its own presumptions. It presumes that every man in his private and official character does his duty until the contrary is proved, it will presume that all things are rightly done unless the circumstances of the case overturn this presumption according to the maxim, *omnia præsumentur rite et solemniter esse acta donec probetur in contrarium*. Thus, it will presume, that a man acting in a public office has been rightly appointed, that entries found in public books have been made by the proper officer."

**80** Whenever any document is produced before any Court, Purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken

**Principle** This section merely gives sanction to the maxim *omnia praesumuntur rite esse acta* with regard to documents taken in the course of judicial proceedings *R v Viran*, 9 M 224 (227) The maxim *omnia praesumuntur rite esse acta* finds, perhaps, its best application in sustaining the validity of judicial proceedings They are presumed to be regular *Lauson Pre Ev* Rule 10 When a deposition is taken in open Court, or by a Magistrate, there is a degree of publicity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly, and honestly done *Nort Ev* 261

**Scope of the section** The statement as to which this section says that certain presumptions shall be drawn, are statements or confessions taken in accordance with the law This section does not render admissible any particular kind of evidence but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law This section does not operate to render it admissible *Queen Empress v Viran*, 9 M 224-2 Weir 125 Under this section of the Act, the Court presumes certain facts concerning a document purporting to be a record of the evidence But it must purport to be signed by a Judge or Magistrate, and where the person taking the deposition omits to claim the position of a Judge or Magistrate, the presumption that he is so does not arise The defect may be supplied by oral evidence The certified copy should also show on the face of it that it is a copy of a part of the record in a specified proceeding *Crown v Ali Shue*, 1 L B R 268 This section does not deal with the admissibility of documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done: (1) that the document purporting to be recorded evidence or statements or confessions are genuine (2) that the statements as to the circumstances under which they were taken made by the officer who affixed his signature are true, and (3) that the evidence etc., was duly taken *Podam Prasad v Emperor*, 50 C L J 106-33 C W N 1121-119 Ind Cas 193=A I R 1929 Cal 617 (F B) Under this section a presumption has to be made as to the genuineness of the statement recorded No presumption can be made however, regarding the identity of the deponent Where the document containing the deposition is a very old document one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deposition *Bhagat Prasad v Sher Khan*, 94 Ind Cas 985=A I R 1926 Oudh 489 see also *Queen Nuseenuddin* 21 W R Cr 5, *Queen v Durqa*, 11 C 550 Though there is no oral evidence to identify the deponent of a deposition made more than 60 years ago it does not render the provisions of s 80 of the Evidence Act inapplicable thereto, nor would the absence of the signature of the presiding Judge to a copy of such deposition preclude the presumption that the copy is a true copy *Sorabji v Mata Din* 7 O L J 512=60 Ind Cas 437

**Record or memorandum of evidence** The mode of recording depositions in civil cases are to be found in Order 18 rr 5 6 C P Code and in criminal cases in ss 356 359 360 361 Cr Pro Code Rule 5 of Order 18, runs as follows "In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge not ordinarily in the form of question and answer but in that of a narrative and, when, completed shall be read over in the presence of the Judge to the witness and the Judge shall, if necessary correct the same, and shall sign it" Rule 6 runs as follows "Where the evidence is taken down in a language different from that in which it is given and the witness does not understand the language in which it is taken down, the evidence so taken down in writing shall be interpreted to him in the language in which it is given" As regards the effect of non-compliance of the formalities laid down in these two sections *Richardson J in Elahi Baksha v Emperor*, 22 C W N 616=45 C 825=27 C L J 377=45 Ind Cas 285, said, "The contention relating to the deposition of the appellant in the presence of Mohan and"

S 80

taken is that the formalities required by rr 5 and 6 of O 18, C C P were not observed. It is not disputed that the evidence was not given on oath. But it is said that after the deposition had been written down by the Munsif it was not read to the witness in the presence of the Judge. Upon that it is argued that the deposition is not legally a deposition at all and the Judge was wrong in allowing it to go to the jury. In support of the contention reference is made to the cases of *Empress v Mayadeb Gossami*, 6 C 762 and *Kamatrupattan Chetty v Emperor*, 28 M 308. If as a matter of fact, the appellant's deposition was not interpreted and read over to him in the prescribed manner, the cases cited support the contention advanced unless the rule laid down is to be confined so it seems to have been in the past, to prosecution for perjury. Our attention however, has also been drawn to the case of *Bogra v Emperor* 34 M 141 where a different note, and as it seems to me the true note, is struck. The cases of *Empress v Mayadeb* 6 C 762 and *Kamatrupattan v Emperor* 28 M 308, have been followed in other cases for instance *Empress v Jogendra Nath* 42 C 240=18 C W N 1242. Speaking for myself however, with great respect I am not sure that I clearly understand the principle of those decisions. Under section 80 of the Indian Evidence Act the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required in the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory and that if it were not complied with in a particular case, the deposition, while it might perhaps lose the benefit of section 80 of the Evidence Act, might still be proved in some other way. As at present advised I can see no reason why even in a prosecution for perjury failure to comply with the provisions of rr 5 and 6 of Order XVIII should render a deposition entirely inadmissible in evidence and why if section 80 cannot be relied in and the deposition should not be proved for instance by the Judge who took it down, or by the admission of the deponent. But in later Calcutta cases it has been held that the provisions of these two rules are not directory but mandatory. So the omission to observe the formalities of these two rules renders the deposition inadmissible in evidence against the deponent on his subsequent trial for perjury. Section 91 of the Evidence Act excludes the oral evidence of its contents. *Emperor v Nauab Ali*, 51 C 235=35 Cr L J 1027=81 Ind Cas 803=A I R 1924 Cal 705. See also *Jyotish Chandra v Emperor* 36 C 955=14 C W N 82, *Mohendra v Emperor* 12 C W N 845=9 Cr I J 116 *In re Nallari* 42 M 461=50 Ind Cas 561, *Inam Din v Aiamatulla*, 58 Ind Cas 830=1 Lah 361 *Kamatrupattan v Emperor* 28 M 308. The practice is common when a witness understands English to hand his deposition to him to read over. The practice is a sufficient compliance therewith for all purposes and a deposition so read over by the witness proves itself under this section. *Ramesh v King Emperor* 23 C W N 361=29 C L J 513=50 Ind Cas 660. Clause (I) of section 360 of the Criminal Procedure Code lays down that "as the evidence of each witness taken under sections 356 and 357 is completed, it shall be read over to him in the presence of the accused if in attendance, or of his pleader if he appears by pleader and shall if necessary be corrected. The object of this section is to give the witness an opportunity of correcting his statement. *Ramdhani v Emperor* 4 P L W 11=19 Cr L J 169 *In re Olhoy* 7 C L R 393. The provisions of this section are obligatory and not merely mandatory. *Amrita v Emperor* 12 C 957 *Jyotish v Emperor*, 36 C 955, *Haronath v Sana Ma*, 25 C W N 119=38 C L J 281, *Huralal v Emperor*, 28 C W N 968=52 C 159, *contra Mohiuddin v Emperor* 4 Pat 488=26 Cr I J 811, *Abdul v Emperor*, 26 Cr L J 669 *Muthu v Emperor* 3 Rang 612=27 Cr L J 87 *Jaque v King Emperor*, 5 Pat 63=27 Cr L J 184, *Abdul Rahman v Emperor* 5 Rang 53=31 C W N 271. Section 80 of the Evidence Act contemplates that the deposition which it is proposed to use as evidence should have all the guarantees of authenticity which the law prescribes, one of them being that the Magistrate shall sign it only after it has been read over to the witness in the presence of the accused or his pleader, in order that the witness and the accused may have an opportunity of pointing out mistakes. *Tunya v*

*Emperor*, 12 Bar L T 167=10 L B R 16=51 Ind Cts 666=20 Cr L J 506 see also *Ngai Sam v K E U B R* 1912, 1st Qr 123 Section 509 of the Criminal Pro Code does not enact that a deposition of a medical witness shall be taken and attested by the Magistrate in the presence of the accused. What it provides is that the deposition, if so taken and attested, may be put in evidence in the Sessions trial. Therefore, that the deposition was taken and attested by the Magistrate in the presence of the accused cannot be presumed under s 80 of the Evidence Act. *Queen Empress v Popp Singh* 10 A 174=1 W N 1888 11, but see *Kachali v Q E* 18 C 129. This section is applicable to the depositions made before the Commissioner- *Ultamchand v Empress*, P L J 1900 63 Cr. Previous disposition, fulfilling all the formalities is admissible in a subsequent case. *Queen Empress v Samappa*, 15 M 63=2 W L R 79 Cr.

**Confession of accused taken in accordance with law** A confession by an accused recorded by a Magistrate is admissible under this section, even though the Magistrate who recorded it ultimately came to the conclusion that he had no jurisdiction to try the case. *Emperor v Banlo Behary* 10 C P L R Cr 16. If when a document is tendered in evidence at a trial purporting to be a confession of the accused it is found to contain the memorandum required by s 161(3) a presumption arises under this section that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof. If, however the memorandum does not appear or is defective the document is inadmissible unless, the defects can be cured by the examination of the Magistrate who recorded it under s 33. The provisions of s 164(3) render it incumbent on a Magistrate who is called on to record a confession to explain to the person who is to make it that he is not bound to make a confession at all and that if he does so it may be used as evidence against him. Further the Magistrate should only record the confession if upon examination of the person making it, he has reason to believe that it will be made voluntarily. Where the memorandum at the foot of a confession does not conform with the form as laid down the defect is curable if it is of form and not of substance. If as a matter of fact the statement was duly recorded that is to say after the required explanation had been given but the Magistrate has failed to embody that fact in the certificate such a defect would be curable. If the explanation had not in fact been made the statement could not be held to have been duly made and s 533 cannot be appealed to. *Protap v Emperor*, 6 Lah 415=7 Lah L J 482=A I R 1925 Lah 605=93 Ind Cts 978=27 Cr L J 514 see also *Queen v Shwya*, 1 B 219 (222) *Ahenam v Emperor* 6 Lah 58, *Queen v Piram*, 9 M 224. The word Magistrate in s 26 includes Magistrates in native states and a confession made before such a Magistrate is admissible in evidence certainly under s 74 as against the persons by whom they were made. *Gorinda v Emperor* 69 Ind Cts 257=23 Cr L J 673, *Queen Empress v Sundar Singh* 12 A 595 but see *Emperor v Dhanka* 24 Ind Cts 169=16 Bom L R 261. Confessional statements though retracted are admissible in evidence. Section 80 of the Evidence Act makes it clear that it is not necessary that the recorder of the confession should always be examined. *Guyah Maylu v Emperor*, 2 Pat L J 80. So far as s 80 of the Evidence Act is concerned the Court is bound to make the presumptions specified in that section in respect of the document purporting to be a confession of the accused. *San Bau v Crown* 1 L B R 340 (F B). But a confession recorded by a Magistrate during the course of a police investigation without a certificate as required by s 164 cannot be admitted under s 80 without proof of its having been made. *Emperor v Radhe*, 7 C W N 220, *Reg v Shwya*, 1 B 219. No presumption can be made under the section where the confession is recorded in English and not in the language in which it was made. *Baua v King Emperor* 10 O C 112=6 Cr L J 94. A Magistrate may make what the police may not a record of any statement whether a confession or not made to him before judicial proceedings commence. Section 80 of the Evidence Act expressly provides for proof of the document distinguishing it from a record of evidence, as well as s 533 Criminal Procedure Code. *Lalu v Empress*, 2 P R 1893 Cr.



**S 81.** Dying declarations A dying declaration is not admissible in evidence without proof that the deceased actually made the declaration. Even if it bears a Magistrate's attestation it is not admissible under s 80 where the Magistrate was not the committing Magistrate. The person who took the statement should be subject to cross examination as to the dying man's state of mind when he made it and as to other circumstances. *Reg v Pata Adu*, 11 B H C 247, see also *Hasim v Empress*, 9 P R 1900 Cr = P L R 1900 p 49. When a dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct, and this is signed by the Magistrate who recorded the statement, s 80 of the evidence Act creates a presumption that the circumstances under which it is stated to have been taken are true the investigation by the Magistrate being a judicial proceeding. *In re Karrupan Samban* 16 Cr L J 759 = 31 Ind Cas 359.

**81** The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody

**Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents**

**Principle** The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession by judicial decision or by statute that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to are to be assumed genuine. Two principles however are in fact usually involved, first the admissibility of a copy proved to be printed by official authority as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated either in decisions or in statute. A sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also. *Wigmore* § 2150. In general then, where an official printer is appointed his printed copies of official documents are admissible. It is not necessary that the printer should be an officer in the strict sense, nor that he should be exclusively concerned with official work. It is enough that he is appointed by the Executive to print official documents. As for authentication of his copies, it is enough that the copy offered purports to be printed by the authority of the government. Its genuineness is assumed without further evidence. *Wigmore* § 1684. In *Biddes v James* 6 Binn 326 *Tilghman C J* said 'Confidential persons have been selected to compare the copies with the original rolls and superintend the printing. The object of this provision was to furnish the people with authentic copies and from their nature printed copies of this kind either of public or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record. I am for admitting the printed copies authorized by the Legislature either of this or any other state whether the law be public or private. But the question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to proof of documents but to the admissibility of the secondary evidence. *Jeremiah v Vas*, 36 M 457 = 12 Ind Cas 961.

**Gazette** In *R v Holt*, 6 T R 436, *Ashhurst J* said "The gazette is an authoritative means of proving all acts relating to the king and the state" In the same case *Bullen J* said "The Gazette, which is published by royal authority is admissible to prove anything done by His Majesty in his character of king or which has passed through his Majesty's hands" See also *Captain Quelch's Trial*, 14 How St Tr 1084, *Kirwann v Cockburn*, 5 Esp 234, *Van Omeron v Dowick*, 2 Camp 44, Stat 31 & 32 Vict C 37, ss 2, 5 But the entire gazette must be produced *Rex v Loue*, 15 Cox 286 Under the provisions of this section the genuineness of the gazette must be presumed, though it is not formally tendered at the trial *Bawa Sarup v Emperor*, 7 Lah L J 264=88 Ind Cas 22=26 P L R 566=26 Cr L J 1078=A I R 1925 Lah 299 In *R v Forsyth Russ & R* 274 the reporters say "The Judges seem to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer or where it came from"

**Newspaper** Printed matter in general bears upon itself no marks of authorship other than contents But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter under the substantive law, usually arises from the act of causing publication, not merely of writing and hence there is usually available as much evidence of the act of printing or of handing to a printer as there would be of any other act, such as chopping a tree or building a fence There is therefore no judicial sanction for considering the contents alone as sufficient evidence For the newspaper and the like, special question arises Suppose, for example, that the publication of a libel is to be proved, and that the libel is alleged to have been communicated to J S It is simple enough to prove that J S read a copy of the paper containing the libel, but how shall the defendant's publication of that copy be proved? Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's or by some statutory method), then the identity between the copy and the one read by J S will suffice as evidence that the two issued from the same press, & the defendant's *Wigmore* § 2150 In *Gathercole v Miall* 15 M & W 319, 336, *Alderson B* thus laid down the rule "The question is whether there is reasonable evidence that this is a copy of the individual paper which has been produced and which has been shown to have been published by the defendant We must use our own common sense, and remember that, with respect to newspapers, not one but a great variety of copies, are published for general circulation among the public at large If you compare an instrument in one or two parts and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials and from the same type So I say here with respect to a newspaper If you find it in general corresponds it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced, and if so, it is printed by the defendant" *Wigmore* § 2150 In England St 38 Geo III C 78, re enacted in G & 7 William IV C 76 requires a daily deposit of a newspaper at the stamp office See also *R v O'Connell*, 5 State Tr N S 1, 538 Such provision is made in India by the Press and Registration of Books Act (XXV of 1867), s 11A of which enacts "The printer of every newspaper in British India shall deliver at such place and to such officer as the Local Government may by notification in the local official Gazette direct and free of expense to the Government, two copies of each issue of such newspaper as soon as it is published" In *G G Jeremiah v F S Vas* 2 M W N 576=10 M L T 506=12 Ind Cas 961, it has been held that the presumption of genuineness of the newspaper, under s 81 of the Indian Evidence Act, does not also raise a presumption that it was printed and published by the person by whom it purports to be In delivering the judgment in that case *Sundara Aiyar J* said

It is contended that under section 81 of the Evidence Act, the Court is bound to presume the genuineness of every document purporting to be a newspaper or a journal and that inasmuch as Exhibit A, in the case bears the name of the accused as the printer and publisher the presumption of its genuineness would include a presumption that the accused is the printer and publisher of Exhibit A, and that, therefore, it was unnecessary for the complainant to let in any evidence

**S 82** of the publication of Exhibit A by the accused Mr Osborne for the appellant contends that the section applies only to public documents, and that in any event, it provides only that the Court should presume that a document purporting to be a newspaper or journal is that it is the particular newspaper or journal, and not that it was printed or published by a particular person. His first contention appears to be supported by a note of Messrs Amcer Ali and Woodroffe in their commentaries on the Evidence Act, 11th Ed p 125 that the section refers to public documents, but it is very doubtful whether the language of the section supports it. If the punctuation may be taken to throw any light on the question, the existence of a comma, after the word 'journal' is against the appellant's contention. Even otherwise, the natural import of the words of the section does not appear to favour the view that the phrase 'printed by the Queen's Printer' not only qualifies the expression 'private Act of Parliament', but also 'newspaper or journal'. It is however unnecessary in this case to discuss the question further, as I am of opinion that the presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be. Such apparently, is not the English Law. According to that law, the proper way to prove the publication of a libel where evidence is not given that a particular paper complained of was published by the accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question. In *Gathercole v Mall*, 15 M & W 319 *Parle B* was of opinion that as the defendant had been proved by the regular statutory evidence to be the printer and publisher of the paper the witness's evidence that the copy he saw was similar to the one produced in Court was sufficient to show that it was published by the defendant. According to section 7 of Act XXV of 1867, the production of an authenticated copy of a declaration made under that Act is admissible to prove that the person mentioned in the declaration is the publisher of the journal to which the declaration relates. Section 81 would apparently authorise and require the Court to presume that any document purporting to be a copy of the journal in question is in fact such and this would prove that the declarant under Act XXV of 1867 is the publisher of the paper produced in Court. Section 7 of Act XXV of 1867 expressly provides the mode of proving that a particular person is the printer and publisher of a newspaper. *Jeremiah v Pas*, *supra*. Even if news papers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement. *Beua Sarup v Emperor* 88 Ind Cis 22=7 Lah L J 264=26 P L R 566=26 Cr L J 1078

**82** When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature, is genuine and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland

**Origin of this section** This section consolidates ss 9, 10 11 of Stat 14 15 Vict C 99 known as *Lord Brougham's Act*. Section 9 of that Statute runs as follows. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence in any particular in any Court of

Justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in Ireland, or before any person having in Ireland by law and consent of parties authority to hear, receive and examine evidence without proof of the seal or stamp or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same. Section 10 runs as follows: "Every document which by any law in force or hereafter to be in force is or shall be admissible in evidence in any particular in any Court of Justice in Ireland, without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in England or Wales or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same." Section 11 runs as follows: "Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the *British Colonies* or before any person having in any such colonies, by law or by consent of parties authority to hear, receive and examine evidence without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed." The words 'British Colony' as used in this Act shall apply to the Islands of Guernsey, Jersey, Alderney, Sark and Man, and to all other possessions of the British Crown, wheresoever and whatsoever (*vide s 19 Ibid*) So British Colony included British India. But section 11 of Lord Brougham's Act was repealed in India by the Indian Evidence Act section 2 and schedule and from the Statute Book by Statute Law Revision Act of 1875. The Indian Evidence Act has repealed section 11 above but has given effect to the object of that section by enacting this section.

**Scope of the English law** There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the Court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are, however, deemed to have sufficient guarantee of reliability to render them admissible if offered in evidence. The fact that they are kept for reference by a person having no interest to falsify them, and that, if untrue, they would be readily discovered and corrected, makes them worthy of evidence. The element of duty also enters into the case. Usually the person keeping the record is under some obligation official or otherwise to keep them and this brings them close to those entries in account books which are admitted because made in the regular course of business pursuant to duty. The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgments of deeds made before a Court of record, enrollments of deed, fines and recoveries, and many records of similar nature. *Smart v Williams* 1 Salk 280 *Lynch v Clarke*, 3 Salk 151. It is necessary conditions to the admissibility of a public record or document that it shall have been intended to be open to public inspection. The mere fact that the record is made by a public officer, even though he be acting pursuant to duty, does not make it one intended to be public. A confidential report will therefore be excluded. *Sturte v Freeman*, 43 Law T N S 209 *Lord Blackburn* in that case discussed very fully the elements which are necessary to make a document public within the meaning of this exception. He says at page 214 "What a public document is within that rule is of course, the great point which we have now to consider. I do not think that 'public' is to be taken there as meaning the

**S 82.** whole world. I think an entry in the books of a manor is public, in the sense that it concerns all the people interested in the manor, and an entry in a corporation book concerning a corporation matter or something in which all the corporation is concerned would be public within that sense. But it must be a public document and it must be made by a public officer. But I think that the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards. The proper mode of proving such a document even by the Common Law of England was by means of examined copy, that is, a copy taken on behalf of the party generally by some clerk or other private person who produces it in the witness box and proves that he has copied it accurately from or examined it with the original and that it is correct. *Lynch v. Clarke* 3 Salk 151. *Reed v. Lamb* 29 L. J. 152, *Mortimer v. McCallan*, 6 M. & W. 511, *Will I. 2nd Ed* pp 107, 108. The cases do not throw much light on the question what evidence if any it is necessary in such a case to give of the original, but it seems that whereas judicial notice would be taken of the existence, authenticity and custody of those of wide public importance established within the jurisdiction of the Court, such as the journals of the Houses of Parliament or the books of the Bank of England and especially of such as are recorded and kept in the pursuance of statutory provisions of which the Court will take judicial notice, such as land tax assessments, some evidence would be necessary on these points with regard to documents of less notoriety, such as the rolls of a manor Court. In case of the latter descriptions the witness who proved the examined copy or some other person should ordinarily give some evidence to verify the original document. In order to put the admissibility of copies of public documents on a clearer and more settled footing Lord Brougham's Act, (Stat 14 & 15 Vict. c 99) by section 14, enacted that—

‘Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice or before any person now or hereafter having by law or by consent of parties authority to hear receive and examine evidence provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and, which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words.’

The section does not define what is intended by the words “of such a public nature as to be admissible in evidence on its mere production from the proper custody.” It has been held that the parish registers of baptisms, marriages and burials which have been kept in pursuance of canon and statute law answer his description (*Re Hall's Estate* (1852) 22 L. J. Ch 177, *Re Porter's Trusts* (1856) 25 L. J. Ch 688) but it seems doubtful whether it could be held to comprise the rolls of manor courts or the books of old corporations or any others which ordinarily require some verification as aforesaid. *Will's Evidence 2nd Ed* 408, 409. So this Statute does not deal with documents which are provable by means of copies under any other statutes. Before this General Act several statutes had enacted provisions with regard to the proof of particular public documents by means of certified and other copies but in consequence of the omission of any provisions dispensing with the proof of the genuineness of such copies the beneficial effect of the enactments was much diminished. In order to remove the inconvenience the Statute 8 & 9 Vict. c 113 by section 1, enacted that—

‘Whenever by any Act now in force or hereafter to be in force any certificate, official or public document or proceeding of any corporation or joint stock or other company or any certified copy of any document bye-law entry in any register or other book or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice, or before any legal tribunal

or either house of Parliament or any committee of either house, or in any judicial proceeding the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.' The general result of these two Statutes seems to be this that, save where some statutory provision requires some other and special mode of proof, the proof of an examined copy or the mere production in Court of a copy purporting to be certified by a person purporting to have the due custody of the original will be sufficient *prima facie* proof of public document, except in cases where verification of the original was necessary by the common law before an examined copy could be given in evidence. *Wills 2nd Ed* pp 409 410. Where the copy is signed and certified as the section 14 *supra* provides, it is admissible on its mere production in Court. *R v Weaver*, L R 2 C C 85. The register of parliamentary voters of a borough and the poll books were provable under that section by copies. *Keed v Lamb*, 6 H & N 75. The bye laws of a railway company duly made and allowed under Stat 8 & 9 Vict 20, ss 103 111, may be proved by a certified copy under the hand of the secretary of the company in whose custody they are. *Motteram v E Counties*, 7 C B N S 53=29 L J M C 57. As to proof of bye laws of a municipal corporation under Stat 45 & 46 Vict C 50, s 24, *vide Robinson v Gregory*, (1905) 1 K B 534. For a complete list of Statutes which contain provision making certified copies evidence, *vide Roscoe's Digest of the Law of Evidence*, Eighteenth Ed Vol I pp 98 100. For an exhaustive list of documents which are provable in England by means of certified copies under particular Acts of Parliament *vide* §§ 1602 1609 of *Taylor on the Law of Evidence*, *Wills on Evidence 2nd Ed Appendix A* pp 422 460.

**Scope of the section.** The object of this section is to give currency in the Courts of India to the presumptions which, with regard to certain classes of documents, are recognised in the English Courts. Such documents are declared by this section to be admissible in India as they would be in England, and it is no more necessary in Indian Court, than it would be in an English Court to prove the seal or signature or to prove that the person signing held the office which he claims. *Cun Et* 11th Ed 175. The chief magistrate of the city of Glasgow being a person lawfully authorized to administer oaths a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the city of Glasgow and by a Notarial certificate is sufficient proof of the execution. *In the goods of Henderson*, 22 C 491. Both the declarations purport to have been made under section 16 of the Statutory Declarations Act, 1855 (5 & 6 Will IV C 62), see also *In the goods of John Eliot Woodroffe's Ev* 8th Ed 567, *In the goods of William Abbot* *ibid*, *In the goods of Henderson*, *ibid*. *In the goods of Henry Pacler* *ibid*, *In the goods of H W Agor*, *ibid*, *In the goods of William Cornell* *ibid*. *In the goods of Henry Francis* *ibid*, *In the goods of Anna Hande* *ibid*. On an application for letters of administration to the estate of a deceased who was domiciled in Scotland and to whose estate one P had been appointed executor *dative qua* Father the application being made by one K under a power of Attorney granted by P, such power not having been executed and authenticated in the manner provided by s 85 of the Evidence Act. Held that the application must be refused. *In the goods of A J Primrose* 16 C 776. In delivering the judgment *Norris J* said 'Section 85 of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any Court, or Judge Magistrate, British Consul or Vice consul, or Representative of Her Majesty or of the Government of India was so executed and authenticated. This power of attorney is not executed before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney

**S. 83** must be executed before or be authenticated by one of those persons. Therefore, I am reluctantly obliged to refuse this application." It is submitted that *Norris J* did not consider whether this section is applicable. Section 81 of the Evidence Act is an enabling section, its object being to add facilities to prove powers of attorneys and not to exclude any other mode of proof than that allowed by that section. *Hoodroffe I*, 5th Ed 567. In a similar case in the Madras High Court *Mr Justice Shepherd* said "A question has been raised as to the proof of the execution of the power of attorney under which the petitioner in this matter seeks to act. The power of attorney does not purport to have been executed in the presence of a notary public or any other of the persons designated in section 85 of the Evidence Act, but with regard to the execution by each of three executors, one of the attesting witnesses has made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness is the proper signature of the person bearing that name. To each of the declarations is appended a certificate signed and sealed by the notary public. In similar circumstances it has been held in Calcutta that, in as much as the execution is not proved in the manner indicated in section 85 of the Evidence Act the application for letters of administration ought to be refused (*In the goods of A J Primrose* 16 C 776). In arriving at this decision, *Mr Justice Norris* seems to have assumed that the provisions contained in section 85 is of an exhausted character and no other mode of proving the execution of a power of attorney is admissible. That assumption however is in my opinion not warranted by the language of the section, nor can it have been intended to exclude other legal modes of proving the fact in question viz the execution of the power of attorney. I can not see why the fact should not be proved by an affidavit made before a person competent to administer an oath. The Evidence Act is expressly declared not to apply to affidavits. Seeing that the declarations are made in the form prescribed by the statute of 1835 and before officials competent to administer an oath I am of opinion that they ought to be received as evidence of the facts therein stated. I am told that it has been the practice here, as apparently it was in Calcutta to receive such declarations and I cannot say that the practice is erroneous." But certificates issued by the Manchester Chamber of Commerce that there was a natural strike of coal miners and consequent stoppage, congestion and disorganisation are not admissible as they are neither public records under s 35 nor are documents of the nature mentioned in s 82. *Girdhardas v Kerauala* 28 Bom L R 232=93 Ind Cas 622=A I R 1926 Bom 253. A Register of Births and Deaths kept under Madras Act III of 1899 is a public document and a certified copy of an entry in it is admissible under this section and section 35(5). *Krishna Chariar v Krishna Chariar*, 38 M 166=(1913) M W N 355=13 M L T 385=24 M L J 517=19 Ind Cas 452.

**83** The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

**Principle** The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested. *Phipson*, 313. The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries: it is therefore a natural implication that he has the duty and the authority to make a written return of his doings. *Wigmore* § 1665. So these maps are admissible in evidence as an exception to the Hearsay rule (*Id* 436). The presumption is that public officers do as the law and their duty require them. *Lauson Pre Et* 67. "It is a recognized principle that a person

acting in the capacity of a public officer is *prima facie* taken to be so. The fact does not of itself prove any title, but only that the person fills the office." *Per Patteson J in Bowley v Barnes*, 8 Q B 1037. The well known maxim of *omnia presumuntur rite esse acta* S. 83

**Scope of the section.** This section is applicable only to maps and plans purporting to be prepared by the Government. *Vadakkuvayyadath v Nilambar*, 9 M L J 415. This section does not deal with the question of the admissibility of a private map. If such a question arises in a litigation, the answer must depend upon the relevancy of the map in relation to the question in controversy. *Shib Charan v Nil Kantha Mahato* 16 Ind Cas 747=17 C L J 612. In the absence of evidence to the contrary, settlement records and maps may be properly judicially received in evidence as correct when made. *Marung Ya Gyua v Ma Ngwe* 2 L B R 56. A map prepared by an officer of Government in the course of proceedings for the settlement of land forming the silted bed of a certain river is not one admissible in evidence under ss 36 and 83 but it is a map, whose accuracy must be proved by the party producing it, before it can be admitted in evidence. *Kanto Prashad v Jagat Chandra* 23 C 335. In a boundary dispute, a survey map, if not conclusive evidence is valuable evidence which should be considered. *Gudadhar Banerjee v Tara Chand* 15 W R 3, *Ranee v Gireedhar* 20 W R 243. A map prepared by an officer of Government, while in charge of a *khass mahal* the possession by the Government being only that of a private proprietor, does not come under this section so as to raise a presumption of the accuracy. *Jummajoy v Duarkanath* 5 C 287=4 C L R 571. *Ram v Bansidhar*, 9 C 741. Where it was established that an Amin, making a *thal bust* map at a revenue survey had no authority to determine what lands were *debutter* but only to lay down and to map boundaries held that this map could not be treated as raising a presumption of correctness within this section, on the question as to the amount of *debutter* land in one of the villages mapped. Where statements as to what lands were *debutter* appeared on the face of the map to have been made as pointed out by agent on behalf of the proprietor of the mouzah and the principal tenants, in the presence of the agent of the holders of the estates in the neighbouring mouzahs, held that this section has not the effect of making those statements evidence. *Jarad Kumari v Laloo Moni* 18 C 221=17 I A 145 P C. Accuracy of Amin's map means accuracy of drawings and measurement. It has no reference to correctness of boundaries, etc., in relation to rights of parties. *Omrita v Kulec* 25 W R 179. A map prepared by private arrangement by a Deputy Collector for the settlement of the silted bed of a river does not fall within the purview of this section. *Rahimuddin v Bhabangana Debiya*, 19 Ind Cas 572. But where maps and plans and statements were made by *patuaris* who were government servants by the authority of Government for a public and not a private purpose such maps must be presumed to be accurate under this section. *Rahimatullah v Secretary of State* 113 P L R 1913=112 P W R 1913=63 P R 1913=18 Ind Cas 799. No presumption of accuracy can be made with regard to maps not falling within this section. *Madhabai v Gaganendra*, 9 C W N 111. Under this section a *thalbust* map must be presumed to be correct. *Niamutoolah v Ilmimut* 22 W R 519 see also *Photal v Ranee* 19 W R 361 P C. The fact of a later Government survey map having been prepared does not affect the presumption of accuracy under this Act of an earlier superseded map. *Joggesur Singh v Byemut Nath* 5 C 822=6 C L R 519. A copy of a map prepared by an Amin employed by Government, was tendered in evidence for the plaintiff in a suit for possession. It was admitted by the Subordinate Judge at the trial but was ultimately rejected by him as the copy was not proved. An interlocutory order was made by the High Court giving the plaintiff liberty to prove the map on the hearing of the appeal and directing the original to be called for from the Collector's office. This procedure was affirmed by their Lordships of the Privy Council. *Dinamani v Brojomohini* 29 C 197 (199)=29 I A 21 P C. But a map prepared for the purpose of a suit is not admissible under this section in the absence of proof of its accuracy. *Mahesari Hiratal* 1 N L R 121.

The question whether a map is a public document within s 74 Evidence Act, is *prima facie* a question of fact, and the mere circumstances that the map



- S 84.** in question was treated as public document in some other litigation, to which the plaintiff was not a party does not bind the plaintiff. A map prepared at the instance of the Collector in this capacity as the holder of a trust estate, is a private document and its accuracy has to be established. This section has no application to such a map. *Pronath v Durga Tarini* 11 C L J 578=10 Ind Cas 376=16 C W N 317. Where the plaintiff's estate formed portion of a *parganah* in which the Government and other landlords were interested and the Government prepared a *chitta* of the whole property and set down against each plot to which of those various estates it belonged. Held that although the *chitta* does not come under this section and cannot be regarded as a public document, yet it may be used in evidence under s 13 of the Act. *Narendra Krshore v Ka v Lalul* 2 Ind Cas 513. A map prepared in 1572 under the direction of the Government acting not in its sovereign capacity, but as the land lord of certain holding is admissible in evidence if not under this section under section 13 of the Act. *Upendra v Chairman of the Calcutta Corporation*, 16 C W N 116.

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are conclusive, and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. *Jagadindra Nath v Secretary of State* 30 C 291=7 C W N 193=5 Bom L R 1 see also *Sateowari v Secretary of State*, 22 C 252, *Maug Thun v Maran*, 41 Ind Cas 247, *Shyama Sundari v Jogobundhu*, 16 C 186, *Sarat Sundari v Secretary of State* 11 C 781. *Devan Ram v Collector of Shahabad* 14 B L R 221 note. *Ram Jeuan v Collector of Shahabad* 19 W R 127. *Abdul Hamid v Kharachandra* 7 C W N 842 (81). *Chittas* made by Government for its own private use in connection with resumption proceedings are nothing more than documents prepared for the information of the Collector and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. They are admissible neither under the section nor under s 13 when it is not known whether they were acted on for the purpose of resumption proceeding or if in fact reliance was placed upon them by Government for the purpose of resumption proceedings. *Upendra Nath v Radha Gobinda*, 98 Ind Cas 85=A I R 1927 Cal 189. Where entries are made in the *thalust* without enquiry and where they were immediately contradicted no reliance can be placed on it. *Jogadindia v Hemanta Kumari*, 15 C W N 887 P C=14 C L J 319. Renell's map was made 22 years or so before the decennial settlement on which the permanent settlement proceeded. If it be referred to as evidence, there is a presumption of its accuracy under this section in respect of such matters as to which it is admissible in evidence. *Secretary of State for India v Ananda Mohan*, 34 C L J 205, see also *Naresh Nayani v Secretary of State*, 71 Ind Cas 1048=32 M L T 162=50 C 446=45 M L J 444=28 C W N 453 P C. *Huridas Acharjya v Secretary of State* 43 Ind Cas 361=26 C L J 590=22 M L T 133=20 Bom L R 49 (P C). *Secretary of State v Kaliha*, 15 C L J 281.

**84** The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

Presumption as to collections of laws and reports of decisions

and of every book purporting to contain reports of decisions of the Comts of such country

Principle Vide section 38

Scope of the section The words "any country" are wide enough to include India Great Britain and other foreign countries and as such the Indian Act, British Statutes as well as foreign law can be proved by the authorised

edition of the Statute of that country. This section deals with statute law as well as judge-made law. When the Indian Evidence Act was enacted in 1872 there was no provision in any other Statute which enabled the Court to ascertain the case law from the authorised Report. The authorised as well as unauthorised reports were in existence at that time and it seems by this section those unauthorised reports were presumed to be genuine. So according to this section as well as section 38 reports of cases recognised by the Courts of a country will be evidence and be relevant and receivable. *Nori Li* 202, see also notes under section 38.

## 85 The Court shall presume that every document purporting to be a power of attorney, and

Presumption as to powers-of attorney to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated

**Principle** The genuineness of certain purporting official seal impressions need not be evidenced otherwise than by the production for inspection of the document bearing them. What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with no further evidence? When a document bearing a purporting official seal—a notary's certificate to a power of attorney, for example—is offered in Court, the acceptance of it for the offered purpose involves the assumption of four things namely (1) that there is an official of that name, (2) that this is genuinely his seal's impression (3) that this seal impression was affixed by him and further more (4) that it is allowable to receive this hearsay official statement as testimony to the fact stated by him. The first three of these elements go to the matter of the genuineness of the document that is to say, the document purports to be that of J S, a notary, asserting a certain fact, and the net result of the first three elements is that we accept as a fact that J S a notary, did make this written assertion. If there were a signature only, with no seal, and the document was similarly accepted, the second and third elements would merge (i.e. the purporting J S's signature is accepted as written by him) it is only in the case of a seal that they are distinct (for it might be his seal's impression and yet another person might have affixed it). Thus it is that the second and third elements are always judicially united, i.e. any presumption of genuineness, whenever made covers both elements. Hence, in effect the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated (1) that there is an official of that name (2) (3) that this document was genuinely executed by him. Now the remaining element (4) that this hearsay statement of his is admissible is obviously concerned with the Hearsay rule.

Of these, the elements (2) and (3) are obviously pure questions of authentication, i.e. the acceptance of the document signifies that we have some how assumed that this document was genuinely executed by one J S. What is the true nature of the process? Is it the process of Judicial Notice? It is sometimes dealt within the terms. But this seems clearly unsound. In the first place the principle of judicial notice i.e. of assuming the truth of an allegation without any evidence (*vide s 56*) rests on the conceded notoriety of the fact alleged as being too well known to need evidence, obviously this can never be the case with the specific act of executing a particular document. In the next place the doctrine of judicial notice applies as soon as the general allegation is made without any evidence whatsoever in its support it would follow that as soon as the party alleged by counsel that J S had executed an alleged document the Court must notice that as a fact and no production of a purporting seal or signature would be necessary but this is obviously not the practice. Further more it is conceivable that a Court might judicially know what the design of a certain public seal was but this would not of itself enable the Judge to declare that the specific impression offered in Court was genuine or forged. It would

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seem, then, that what is actually done is not done by virtue of any doctrine of judicial notice. It is, on the contrary, a simple instance of declaring that sufficient evidence of genuineness exists, on the general principle of Authentication. The fact constituting this sufficient evidence is the existence upon the document of an impression or writing purporting to be the official seal or signature, and this may well serve as sufficient evidence because the forgery of the seal or signature would be a crime and detection would be fairly easy and certain. On the other hand the element (1) noted above namely, that I S who has thus genuinely executed this document is the official that he purports to be, is a real result of the principle of Judicial Notice. This element is wholly separable from that of the authenticity of the paper. *Higmore* § 2161

**Scope of the section** The Court takes judicial notice of the seals and signature of the persons mentioned in this section [vide section 57, cls (6) and (7)] This section authorises a Court to presume the genuineness of the execution and authentication of a power of attorney when such execution was done before and authentication was done by any of the officials mentioned in this section. The section is an extension of the provisions contained in the Registration Act with reference to powers of attorney executed for the purpose of procuring the registration of conveyance or other such instruments. *Chun Li Hih Fil* 178 Where a power of attorney was neither executed before nor authenticated by any persons mentioned in this section, letters of administration to the estate of a deceased person by virtue of that power of attorney cannot be granted. *In the goods of A J Primrose* 16 C 776 (779). But so far as presumption of due execution and authentication of a power of attorney is concerned, this section is not exhaustive. *In re Sladen*, 21 M 492 *contra*, *In the goods of A J Primrose*, 16 C 776. When a document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public is produced before the Court an affidavit of identification as to the person purporting to make the power of attorney being the person named therein is unnecessary. *In the goods of Mylne* 9 C W N 936=33 C 625. A registered power of attorney is admissible in evidence to prove the agency under this section and unless its genuineness is suspected in which case proof of its execution can be called for the agent should be allowed to appear and act within the meaning of Order III, rule 2 of the C P Code. *Habib un nissa v Mushwaff* 18 O C 372=33 Ind Cas 661. *In the goods of Mylne supra*. A power of attorney executed in England before a Justice of the Peace and authenticated by his signature alone without his official seal was accepted. *In the goods of Bridson* Nov 19th 1889, per Wilson J cited in *Woodhoffs Ev* 8th Ed 573.

**Power of attorney** No definition of the term "power of attorney" is given in the Act. According to section 2 (21) of the *Indian Stamp Act* "power of attorney" includes any instrument (not chargeable with a fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it. So a power or letter of attorney is a writing authorising another person who in such case is called the attorney of the party, appointing him to do any lawful act in the stead of another as to receive debts or dividends sue a third person transfer stock or give possession upon a deed of feoffment. It is either general or special, i.e., general in respect of the conduct of all affairs of a person, as where he leaves the country special in respect of any one or more named matters, as to receive money. This instrument gives the attorney authority to act in his name exactly as the party giving it would himself do until revocation. *Bail of Bengal v Ramanatham*, 43 C 527, *Venkataramana v Narasimha* 39 M 141=24 M L J 180=1913 M W N 73=18 Ind Cas 137. *Pernanand v Sat Prasad* 33 A 487=19 Ind Cas 617 (F B), *Reference under the Stamp Act* s 46 15 M 386, *Raghu v Ramchunder* 10 W R 39=11 B L R 55 (F B). *Joqi v Mohammad*, 80 Ind Cas 467, *Bryant v Banque-du Peuple*, A C (1893) 170. A power of attorney which was executed in England without a stamp but a stamp was fixed in British India is a valid instrument. *In the goods of the Adam* 23 C 187. Where the endorsement on the deed as registered stated that the person who presented the document for registration had a

special power of attorney authorising him to do so it must be presumed that the power of attorney was a proper power under s 33 of the Registration Act Section 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by s 35, he registers the document on being satisfied as to the various particulars mentioned, so that when the question of execution is raised the presumption from registration of *omnia presumuntur rite et solemniter acta* applies, and further all defects in his procedure are expressly cured by section 87 of the Act *Seth Kanhai Lal v The National Bank of India*, 28 C W N 689=40 C L J 1 P C, *Baynath v Jamal*, 28 C W N 1029, *Chhotey v Collector*, 44 A 514=L R 491 A 375=27 C W N 437 P C, *Kristonath v Brown* 14 C 176 *Jambu v Muhamad*, 42 I A 22=37 A 49=19 C W N 282 As regards deposit of original instruments creating powers of attorney *Vide* section 4 of the Powers of Attorney's Act (VII of 1882) Powers of attorney should be strictly construed *Krishna v Tribhuban* 114 Ind Cis 305=A I R 1929 Oudh 12, *Bani of Bengal v Ramanathan*, 43 C 527=43 I A 48

**Notary Public** In the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all Courts, and their proper official acts under the law merchant are *prima facie* sufficiently authenticated by their seals *Hutcheson v Mannington* 6 Ves Jr 823 *Brooke v Brooke* 17 Ch D 833 *Coole v Wilby*, 25 Ch D 769 The omission of a notary to affix his seal of office to his certificate of his acts, at common law, did not affect the validity of the certificate made by the officer At common law, notaries were authorized to provide themselves with seals and authenticate their official acts with them, and when so authenticated their certificates of such acts were received in evidence by the Courts of all civilized countries without further proof and were *prima facie* evidence that the recitals contained therein were true but if not authenticated, proof had to be made of the notary's official character before it could be received in evidence *Burr Jones Es* § 110 (1) A power of attorney executed in British Honduras before a Notary Public was held to be provable in Court of equity by the production of the Notary's certificate under his hand and seal *Armstrong v Stockhams* 24 L J Ch 176, *Haywood v Stephens*, 36 L J Ch 136, *Taylor Es* § 1566 So also an affidavit sworn before a Notary public is also receivable *Haggit v Ineff*, 24 L J Ch 120 under s 133 of the Negotiable Instruments Act (XXVI of 1881) the Governor General in Council is authorized to appoint notaries public within any local area and by s 139 of the same Act power is given to the same authority to make rules for notaries public

**86** The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India \* [in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records

† [An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent

\* These words in s 86 were substituted for the words resident in by the Indian Evidence Act (1872) Amendment Act 1891 (3 of 1891), s 8

† This paragraph was added to s 86 by s 4 of the Indian Evidence Act 1899 (5 of 1899) in substitution for the paragraph added by s 8 of the Indian Evidence Act (1872) Amendment Act 1891 (3 of 1891)

**S 86** therefor, as defined in section 3, clause (40), of the General Clauses Act, 1897,\* shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place

**Principle** The theory of judicial records is that the judgment roll, as finally made up embodies in itself alone the entirety of the controversy as adjudicated and thus supersedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings. *Wigmore* § 2450 The doctrine about producing the original of a document, or accounting for its absence, permits copies to be used when the original is not obtainable, the application of this to the production of the original judicial records of domestic tribunals is well established *Ibid* The usual modes of authenticating foreign judicial records are, either by an exemplification of a copy under the Great Seal of a State in as much as Courts recognize, without other proof than inspection, the seals of state of other nations which have been recognized by their own sovereign (*Greenleaf Ev* 479) They may be authenticated by a copy proved to be a true copy by a witness who has compared it with the original or by the certificate of an officer properly authorized by law to give a copy, which certificate must itself also be duly authenticated *Buttrick v Allen* 8 Mass 273, *Picard v Bailey*, 6 Foster 152, *Church v Hubbard* 2 Cranch 228, *Greenleaf Ev* § 514 The law on the subject is thus stated by *Marshall C J* in *Church v Hubbard* 2 Cr 186 236 'The sanction of an oath is required for their establishment unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual The consul has not sworn he has only certified that they are truly copied from the originals To give to this certificate the force of testimony it will be necessary to show that this is one of the Consular functions to which to use its own language, the laws of this country attach full faith and credit So this section authorises the representatives of his Majesty or the Government of India in or for such country to give such certificate So if the copy is merely certified by an officer of the Court without other proof it is inadmissible *Appleton v Lord Braybrooke* 2 Stark 6 M & S 31 *Thompson v Stewart* 3 Conn 171

**Scope of the section** This section does not exclude other proof *Vallabdas v Irawankar* 30 Bom L R 1519=113 Ind Cris 313=A I R 1929 Bom 21 So a document purporting to be a certified copy of a deposition in a suit in a Court in Cutch is admissible in evidence where the certificate is to the document being a true copy was given by a higher officer than the trial Judge *Ibid* If the copy is certified under the hand of the Judge of the Court his handwriting may also be proved *Henry v Aiden* 3 East 221 *Buchanan v Raeler*, 1 Campb 63 If the Court has a seal, it ought to be affixed to the copy and proved, even though it be worn so smooth as to make no distinct impression *Cavan v Start*, 1 Stark 525, *Indt v Atkins*, 3 Campb 215 n And if it is clearly proved that the Court has no seal it must be shown to possess no other requisites to entitle it to credit *Blair v Lord Braybrooke* 2 Stark 7 *Parlard v Hill*, 7 Cowen 131 If the copy is merely certified by an officer of the Court, without other proof, it is inadmissible *Appleton v Lord Braybrooke*, 2 Stark 7 'So this section says that if a copy of a foreign judicial record purports to be certified in a given way the Court may presume it to be genuine and accurate It does not exclude other proof The assertion of *Bala Bulsh* that *Ram Bux* sued *Chann* and that she gave evidence before *Moonshee Mah* in his presence is primary evidence of those matters His proof of the *salhur* records is secondary evidence and by ss 65 and 66 of the Evidence Act, secondary evidence may be given of public documents which they are under section 71 without notice to the adverse party when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here *Per Lord*

*Hobhouse in Hararnund Roy v Ramgopal*, 1 C W N 129=27 C 639=2 Bom L R 562, see also *Moumohun v Grish*, 8 Mad Jur 14 But the provisions of this section is mandatory *Murl Das v Achut Das*, 92 Ind Cas 138=A I R 1924 Lah 493=5 Lah 105 So copies of documents required by section 78 or 86 of the Evidence Act to be certified, are not admissible in evidence when they are not duly certified *Ram Pershad v Rattan Chand*, 87 P L R 1909=4 Ind Cas 929 The certificate required by law under this section cannot be dispensed with merely because it can be obtained at any time The mere fact that copies of depositions of a Court of a native State were forwarded by the Resident in due course does not make them admissible without his certificate *Murl Das v Achut Das*, *supra* So also where the records of a German Court were not authenticated in accordance with the Indian Evidence Act but in the manner prescribed by the English Extradition Act which is applicable in this country the records were admissible under it *In the matter of Rudolph Stalman*, 15 C W N 1053=14 C L J 375=12 Cr L J 305 This section contains an instance of documents to which s 65 cl (f) seems to refer *Hurish v Prosonno* 22 W R 303

Section 11 of the Civil Procedure runs as follows "The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record but such presumption may be displaced by proving want of jurisdiction" The presumption is a rebuttable presumption *Hadjee Kaseem v Hadjee Isup* 6 C W N 829=29 C 509, *Molony v Gibbons*, L R 32 Ch D 131 *Udhe v Puan* 41 P L R 1910, *Ramanathan v Lakshmanan*, 24 M L T 241, *Sita Devi v Gopal Saran*, 9 Pat L T 397=111 Ind Cas 762=A I R 1928 Pat 375, *Ishri Prasad v Sri Ram* 25 A L J 887=105 Ind Cas 186=A I R 1927 All 510

In para 1 for the words "resident in" the words "in or for" have been inserted by the Indian Evidence Act (1872) Amendment Act 1891 This amendment was necessary for the decision in *Ganee Mahomed v Tarine Charn*, 14 C 546 In that case it was doubted whether the notification in the Calcutta Gazette of the 8th April 1879 by the then Deputy Commissioner of Cooch Behar regarding the mode of certifying copies of judicial records as correct copies after the Governor General in Council had under s 434 of the Civil Procedure Code notified that decrees of Cooch Behar Courts might be executed as if they were decrees of British Indian Courts was a compliance with the provisions of s 86 of the Evidence Act, when there was a representative of the Government of India resident in Cooch Behar The notification referred to above is of no use when there is no representative of the Government of India in Cooch Behar so that certified copies of judicial records of Cooch Behar cannot then be received in evidence in British Indian Courts under s 86 of the Evidence Act

**87** The Court may presume that any book to which it may refer for information on matters of

Presumption as to  
books maps and  
charts

public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published

**Scope of the section** In proving matters of public or general interest the declarations will not be confined to those which are merely oral Thus in England ancient maps showing public roads and the boundaries between counties towns parishes and manors are admissible when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased *Hammond v Bradstreet* 10 Ex 390, *Pipe v Fulcher* 28 L J Q B 12, *Reg v Mutton*, 1 C & K 58 But this section authorises a Court to

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presume, that a book on matters of public or general interest and any published map or chart was written or published by the person and at the time and place by whom or at which it purports to have been written or published. A Court is justified in referring to books published before the suit in which the name of the institution and its history are described both being matters relevant to the suit. *Augustine v. Mody* (1891) 11 M 211 see also *Morin v. Shukh Mahomed* 28 C L J 106 18 Ind Cas 541 where it has been held that reference may legitimately be made to the work of Mr Crooks on Castes and Tribes on the North-western Provinces and Oudh as an authoritative custom prevalent among the Frakhi sect of Mahomedans.

**88** The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to telegraphic messages

**Scope of the section** This section allows the Courts to treat telegraph messages received as if they were the originals sent with the exception that a presumption is not to be made as to the persons by whom they were delivered for transmission and unless the non production of the originals is accounted for, secondary evidence of their contents is inadmissible. *Shunaram v. Fnamu*, U B R (1897 1901) Vol II 384 Before the section can be utilized, there must be legal proof that the message had been forwarded from the telegraph office to the person to whom such message purports to have been addressed. In the absence of such evidence the telegram cannot be held to have been proved. *Thadur Singh v. Emperor* 1 Ind Cas 210 The Court is forbidden by the express provisions of this section to make any presumption as to the person by whom the telegram was sent. *Paradarajulu v. Emperor*, 12 M 855=51 Ind Cas 343 But in a Bombay case it has been held that this section merely embodies the fact that a telegraph office makes no enquiries and is in no way responsible for the identity of a sender of message much less for the truth of the contents. It is not open to the prosecution on the single evidence of the telegram to ask the Court to presume that it was sent by a supposed sender. But there is nothing in the section to prevent the telegram once admitted from being considered along with the rest of the evidence. *Emperor v. Abdul Gani* 49 B 873=27 Bom L R 1373=91 Ind Cas 690=A I R 1926 Bom 71

**89** The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution etc of documents not produced

**Principle** A circumstance sometimes treated as an extrajudicial admission though in theory distinct in nature is the opponent's destruction or suppression of the instrument in question. *Wigmore* § 2132 Preliminary to proof of contents (of a lost document), and involving proof of execution stands proof of the pre existence in the state of a valid instrument. This is a rudimental principle which is not contested. Now there is no specific proof of execution and what was there also? (The other party to the alleged agreement had burnt the paper.) Every thing is to be presumed *in odium spoliatoris* and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established it would have sufficed for the admission of subsequent evidence of its contents. It seems clear on principle that, 1

there be no subscribing witness the act of destruction is itself the best evidence of which such a case is susceptible, because it has put it out of the party's power to submit the paper to witnesses of handwriting, and the act of a spoiler is in its nature equivalent to a confession. But, before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what is surmised to have been. There are few men who have not papers which it would be not only innocent but prudent to destroy. If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity sufficient to dispense with the ordinary proof of execution and let in the contents of the paper (as proved by another witness). (But the witness to destruction appended not to have read the paper destroyed and thus to be unable to identify it). I would seem, therefore, that the plaintiff, in making out a circumstance to stand for proof of execution ought to have shown a competent degree of knowledge (of identity) in the witness drawn from the declarations of him who destroyed the paper or some other source equally satisfactory if such there were. Had that been done it would have produced a presumption of identity and consequent execution. *Higmore* § 2132. So this section proceeds on the maxim *omnia præsumentur contra spoliatorum* (Every presumption is made against a wrong doer.)

**Scope of the section.** There is a presumption also in favour of innocence whence it might be assumed that everything had been done which the law required. Execution attestation and a proper stamp, therefore will be presumed if the party who has possession of the instrument refuses or neglects to produce it on notice. *Hart v Hart* 1 Harc. Crisp v Anderson 1 Stark 35. *Vort* Et 265. If a man by his own tortuous act, withhold evidence by which the nature of his case would be manifested every presumption to his disadvantage will be adopted. 1 Smith L. C. 10th Ed 353. 1 Vern 19. According to the same principle if a man withhold an agreement under which he is chargeable after a notice to produce, it is presumed as against him to have been properly stamped until the contrary appears. *Crish v Anderson* 1 Stark N P C 35. *Marine Investment Co v Harbide*, L R 5 H L 624. This section is restricted to cases, where a notice is delivered to the adverse party. It does not extend to cases where a summons to produce is delivered to a stranger to the suit. *Wal* L. p 68. See also *Umud Ra a v Sayyad* *Ibid*, 38 A 494=21 C W N 265. So where any document is not produced after due notice to produce, and after being called for it is presumed to have been duly stamped (*Cloismadence v Carrel* 18 C B 44) unless it be shown to have remained unstamped for some time after its execution. *Marine Investment Company v Harbide* L R 5 E & I App 624. *Steph Dig* Et Art 86. *Whitley Stokes* Vol II p 900. The Act contains no rule as to when alterations and interlineation shall be presumed to have been made (a) in the case of a will (b), in the case of other document. In case (a) they are presumed to have been made after the execution of the will. *Simmons v Rudall* 1 Sim N S 136. In case (b) they are presumed to have been so made that the making would not be an offence. *Gordon's Case* Deu S1 & P 592 per *Jervis C J*. *Stokes Anglo Indian Code* Vol II p 900. Where the attesting witnesses of a mortgage deed where it was proved that the mortgagor had executed the deed and that it had been returned to him at the time of the sale of the mortgaged property to the mortgagee and where the mortgagor failed to produce the deed before the Court though called upon to do so. Held that the execution of the mortgage deed was in view of s 89 of the Evidence Act satisfactorily established irrespective of the provision of s 68. *Jang Bahadur v Chanbray Singh*, 41 Ind Cas 171.

## 90 Where any document, purporting or proved to be thirty years old, is produced from any

Presumption as to document-thirty years old

custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such

presume that the signature and every other part of such



**S 90.** document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested

*Explanation* - Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable

This explanation applies also to section 91

#### Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper

(b) A produces deeds relating to landed property of which he is the mortgagor. The mortgagor is in possession. The custody is proper

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper

*Principle* The reason for this specific and simple rule are two fold. First after a long lapse of time, ordinary testimonial evidence from those who saw the documents execution is practically unavailable and a necessity always exists for resorting to circumstantial evidence. Secondly the circumstance of age—or long existence—of the document together with its place of custody, its unobtrusive appearance, and perhaps other circumstance suffice in combination as evidence to be submitted to the jury. *Wigmore* § 2137. In *Roe v Raulings* 7 East 291 Lord Ellenborough said 'Ancient deeds proved to have been found amongst deeds and evidences of law may be given in evidence although the execution of them can not be proved and the reason given is that it is hard to prove ancient things and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use and are free from suspicion of dishonesty' *Wigmore* § 2137. *Wynne v Lyrchull* 4 B & Ad 376, *Indicus v Motley*, 32 L J C P 128, 131

*Scope of the section* The general rule is this, that an ancient document proves itself (*Doe v Burdett* 1835, 4 A & E 1 19), or in other words it is presumed that it was written, signed sealed, delivered attested and stamped as the case may be by persons, in the mode, and at the time and place, that it purports to have been, provided always that it is produced from proper custody, and that the appearance of it when inspected is not inconsistent with its authenticity. *Wadh v Winchester* 3 Bing N C 183, 200. But in as much as the proof of a document always involves the identification of the parties to it, the rule must be understood subject to this that if an ancient document does not itself state or otherwise identify the names or characters of the parties to it, some sort of evidence will be necessary before it will be admissible. *Wills* 2d Ed 384. The rule is applicable not only to documents in general (*R v Farringdon*, 2 F R 166 *Chelsea Water Works v Couper*, 1 Lsp 275 *Marsh v Collnett*, 2 Lsp 66) but also to Wills (*McKenzie v Fraser*, 9 Ves Jr 5 *Ranchiff v Pelupis*, 6 Dow 149, *Doe v Passingham* 2 C & P 440, *Doe v Deakin* 3 C & P 402 *Doe v Burdett* 1 A & E 1 19). 'The principle is that the witnesses may be presumed to have died' *Doe v Hooley*, 8 B & C 22 24. The attesting witnesses need not be called even if in fact he is living. *Doe v Burdett*, 1 A & E 1 19. While it may be objected that documents of this class may be fabricated and that they are not corroborated or authenticated as any part of the res

*gestae*, yet it may be answered that the fabrication or forgery of documents purporting to be ancient is not likely to escape exposure, when subjected to the tests of public trials and is not to be presumed *Burr Jones* § 308. The inherent difficulty of furnishing strict proof of the execution of ancient documents is another consideration which has influenced the Courts to relax the general rule and to admit under proper restrictions, ancient documents purporting to constitute part of a transfer of title or act of ownership *Bristow v Cormican*, 3 App Cas 653. "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge and resort must necessarily be had to written evidence." *Malcomson v O Dea*, 10 H L Cas 593. The conditions to which such a document is subject in order to authorize its introduction are (1) it must have been in existence for the period of thirty years, (2) it must have come from the proper custody—i.e. from some place where it would be natural to find a genuine document such as the one in question, (3) the document must in appearance be free from suspicion i.e. "on inspection, it must exhibit an honest face." *Burr Jones* § 308. This rule is of general application (*Wynne v Tyndall*) and the cases illustrate it in connection with many different kinds of documents, including settlements (*Doe v Samples* 8 A & E 151), Wills (*Doe v Wooley*, 5 B & C 22), bonds (*Johnson v Couper*, 1 Esp 275) memorials (*Riggs Miller v Wheatley*, 28 L R 144), leases (*Plaxton v Dare* 10 B & C 17) agreements (*Vytton v Thornbury* 29 L J M C 109) cases stated for council's opinion (*Meath v Winchester*, 3 Bing N C 183), steward's books containing entries of the receipt of rents (*Wynne v Tyndall* 1 B & A 376) and letters (*Doe v Baynon* 12 A & E 431), Wills *Et. 2nd Ed* p 385. The presumption of genuineness of a document 30 years old can only dispense with the necessity of its proof but the question of sufficiency of evidence is not affected thereby. *Baldeo Misu v Bharos Kunbi*, 95 Ind Cas 261=A. I R 1926 All 537. With regard to the proof of ancient documents the proper rule is that if they are more than thirty years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicions of dishonesty. *Vithal Mahadev v Dandialal* 6 B H C A C 90 see also *Deputy Commissioner v Mahesh Balsh* 6 O C 102. This presumption is not allowed to prevail where it is inconsistent with the title which such documents profess to create. *Lutefomussa v Goor Sarun* 18 W R 485. The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon, or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and presumed for use and are free from suspicion of dishonesty. *Hari Dhangou v Buru Dasee* 5 B H A C 135. In order to establish the authenticity of an ancient document it is not necessary to show that it was recompanied by possession. *Bhusheshwar Bhattacharyy v George Henry Lamb*, 21 W R 22. Under this section the map may show the time of its preparation. *Presnath v Durga Parani*, 14 C L J 578=10 Ind Cas 76=16 C W N 317. Although a presumption under s 90 of the Evidence Act may be made with respect to a pedigree filed at the time of the Regular Settlement of the Province and found on the Settlement file, on the ground that it was more than 30 years old and that it was produced from proper custody yet before such pedigree can be admitted in evidence, it must be shown that it is admissible under cl 5 or, cl 6 of s 32 of the Evidence Act. *Mithuna Porshri v Bhulan Singh*, 14 Ind Cas 339.

In practice a Court does not generally decide whether it will make the presumption or not under this section, until all the evidence in the case is before it. *Ibrahim v Rim Aaram* 10 A L J 87. Where the document is more than thirty years old and is produced from proper custody the Court may under this section presume its genuineness and more particularly that of the signature appearing on it. *Bhupati Singh v Khetal Singh* 21 Ind Cas 271. *Nur Mahamed v Allah Nawal* 5 P W R 1915=, P I R 1915=27 Ind Cas 562. *Gulab v Mahamad* 35 Ind Cas 593. *Darwaza Walla* 19 Ind Cas 419. The Will in dispute having been duly registered and the document being over

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thirty years old, it must under this section be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will. *Babu Badri Prasad v Anupurna Kuer* 6 O L J 311=52 Ind Cas 837

A Will of 1873 which was registered, was acknowledged before the Registrar. The original Will was not produced in Court. An old man who gave his evidence, swore that he was the person who identified the testator before the Registrar. He also swore that he was present at the execution of the Will though his name did not appear as a formal attesting witness in the document. All the attesting witnesses are dead. Held that presumption as to duly attesting the Will arose under s 90 of the Evidence Act. *Khageswar Singh v Someswar Bhattacharyya*, 33 C L J 382=63 Ind Cas 518

From *Kabaja* receipts, the Court is entitled to presume that the person named therein as purchaser has obtained possession through the Court. When that document was over 40 years old, although it is possible that physical possession of the land may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given. *Pandurang v Sasappa* A I R 1923 Bom 364. Assuming that a document which is produced apparently from proper custody, was executed, still if there are circumstances which show that it was not acted upon as one would have expected a document of that nature to be acted upon, the presumption as to the title created by such document falls down. *Mahadeo v Inghatra* 1925 Bom 293. In the case of a document more than 30 years old executed by an illiterate person but registered therein, from these two circumstances a presumption of its being genuine. *Blum Sanjar v Mani Ram* 9 O & A L R 893. A deed more than 30 years old and executed before the Transfer of Property Act, even if not signed by the executant but only by some scribe at his instance will be presumed to be genuine. *Ganga Singh v Suraybah* A I R 1924 All 832. If one is dealing with a document some thirty years old the main fact that the proof of consideration is not at all satisfactory is by itself a slender ground for holding that the document known to have come into existence was entirely unreal. *Sailaya Nath v Kaya Heshcheenc* 51 C 135=39 C L J 380=81 Ind Cas 493. Where a Will was more than thirty years old and all the attesting witness except one were dead and the surviving attesting witness spoke against the due attestation of the Will. Held, in the circumstances of the case that presumption as to its genuineness and proper attestation might be drawn under s 90. *Shyam Sunder v Jagannath* 28 O C 91=85 Ind Cas 553=A I R 1925 Oudh 465. The document was more than 30 years old and was produced from proper custody and all the witnesses were dead. Held that the presumption must be made under s 90 of the Evidence Act that the attestation was duly made. *Mahamed Hasan v Ali Haider* 12 O I J 1=85 Ind Cas 509. A partition *chattu* purporting to be more than 30 years old was produced in Court by a collectorate officer who deposed that the Record keeper of the collectorate directed him to produce it in Court. Held the presumption of genuineness under s 90 cannot be raised as there was no proof that it was in the collectorate before production nor did the proof establish that the collectorate custody was proper custody within section 90. *Purna Chandra v Radhakumaran* 90 Ind Cas 722. Where all the executants are dead the scribe is dead, the deed is registered and the executant admitted execution and receipt of consideration according to the endorsement of the Sub Registrar who is also dead there is a very strong case for applying the presumption permitted by this section. *Tal Bahadur v Rameshwar* 105 Ind Cas 581=A I R 1927 Oudh 710=40 W N 965. All that can be presumed under this section is that a document was executed by the person who purported to be the executant but the Court cannot presume the correctness or genuineness of every statement appearing in the document. *Khetra Mohan v Bhurab Chandra*, 95 Ind Cas 1021=A I R 1927 Cal 229. *Abdul Ghani v Isagur Mahamed* 111 Ind Cas 361. Genuineness of *jamtia* or *bal* papers more than seventy years old can be presumed under this section. *Anand Krishnar v Indrajit Coomarr*, 15 C L J 129.

**Purporting** Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the handwriting of any particular person or persons were written by the authorised accountants of the temple to which the accounts, purport to relate, nor does section 114 of the Act any further help the matter *Naina Pillai v Ramanathan*, 33 M L J 84. Section 90 of the Evidence Act, says that a document which is more than 30 years old and purports to have been preferred or signed by a particular person was in fact prepared or signed by such person. But where a party producing such a document cannot show and the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old does not make it admissible without proof under s 90 of the Evidence Act. *Charittar v Karilash Behari* 3 Pat L J 306=4 Pat L W 213=44 Ind Cas 422=(1918) Pat 145. By 'Purporting' is meant 'stating itself to be,' but this statement being hearsay would be concluded were it not for this section which contains an excellent provision if it is not misunderstood *Mark Et* p 68.

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**Thirty years—Mode of reckoning** Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the handwriting the necessity does not arise until time has made such testimony unavailable. At first under the English Common law, this requirement was satisfied by the simple and indefinite motion that the deed must be ancient. In some of the old books the average age of a man was computed to be sixty years, and as a witness attesting a document must be of age it was supposed that an attesting witness would be dead at the end of forty years. So a forty years old document was considered an ancient document. *Gilbert Evidence*, 100, *Benson v Olive*, Bunbury 280 *Clarkson v Woodhouse*, 3 Doug 169. But this reckoning was too strict, because the witnesses were more likely to have been mature persons and therefore at least thirty years of age, and another thirty years would suffice to bring them near the end of the spin. So ever since the second half of 1700 S, the period of thirty years has sufficed to constitute an ancient document. *Dean of Ely v Stewart* 2 Atk 44, *Omychund v Baker*, 1 Atk 21, 49 R v *Faringdon*, 2 L R 466, 471 R v *Ryton*, 5 T R 259 *Chelsea Water Works v Cowper*, 1 Esp 275, *March v Collnett* 2 Esp 665, *Wigmore* § 2138. The period of thirty years signifies of course the period in which the specific document has been in existence. The purporting date is of itself nothing for any body may have forged the written date. Accordingly this existence of the document thirty years ago must be somehow shown. *Forbes v Hale* 1 W Bl 532, *Wigmore* § 2138. Hence in the case of a Will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument. *Doe v Wolley*, 8 B & C 22. In applying the presumption allowed by s 90 of the Evidence Act, the period of thirty years is to be reckoned not from the date upon which the document is filed in Court but from the date on which it having been tendered in evidence its genuineness or otherwise becomes the subject of proof. *Munu Sreen v Rhedoy Nath* 5 C L R 135. But in another case it has been held that where a document is not thirty years old when it was produced, there is no presumption as to its genuineness on the ground that it was 30 years old at the time when the case was tried and the evidence was recorded. *Churany Lal v Kallu*, 12 A L J 507. Under this section a Court can presume the genuineness of a document which was not thirty years old either on the date of the suit or on the date of its production but was thirty years old on the date when arguments were heard. *Mahadeo v Nasiban* 51 Ind Cas 363. The period of thirty years mentioned in this section is to be reckoned from the date when its genuineness is put in controversy and not from the date when it was exhibited in Court. *Ladha Singh v Hukam Devi* 4 Lah 233=75 Ind Cas 77 see also *Gosala Kanda v Pul Cherla* 82 Ind Cas 487. Thirty years shall be counted from the date of its genuineness being subjected to proof. *Fonda Robb v Pichu R Ili* A. I R 1925 Mad 184.

**Proper custody** The Court added that it was only necessary to show the age of over thirty years and that they came from a natural and reasonable custody and from a place where they might be expected to be found. *Burr Jones* § 303, *Sreekanth v Rynarain*, 15 W. R. 1, *Anus v Ram*.

**S. 90** 1901 Proper custody does not necessarily mean the most appropriate custody, the custody of the person entitled in law to hold the document, but either that or any other custody which in the circumstances of the case appear to the Court to be consistent with its genuineness. *Doe v Phillips*, 8 Q. B. 178, *Doe v Keeling*, 11 Q. B. 881. *Lilly Fr. Ltd v Ld* 385. In *Meath v Winchester* 3 Bing N. C. 183, 200, *Tindal, C. J.* said "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper there may be various and many that are reasonable and probable though differing in degree, some being more so, some less. And in these cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine." "It is not necessary that the custody from which an ancient document comes should be strictly according to the legal right, it is enough if it be brought from a place of deposit where in the ordinary course of things such a document, if genuine might reasonably be expected to be found." *Wignmore* § 2139. The question is therefore especially one to be left to the determination of the trial Court on the circumstances of the particular case (*Doe v Keeling*, 11 Q. B. 881). Various phrases of definition have been suggested by way of guidance (*Doe v Samples*, 3 Nev. & P. 251=8 A. & E. 151 154) but none can be regarded as fixed. The general principle is conceded on all hands, and has received varied application according to the facts of each case. *Wignmore* § 2133. Mere absence of attestation is not fatal to the admission of an ancient document coming from proper custody. *Mohesh Roy v Boodhun*, 18 W. R. 315, see also *G. H. Grant v Bygnath* 21 W. R. 279. A proper custody means the custody of the person who would have been the proper person to keep it. *Thaloor Pershad v Bashmatty Koer*, 24 W. R. 428.

It is not necessary that the documents should be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance. *Tayudin v Gouvid* 5 Bom. L. R. 144=27 B. 452. Although a person appointed manager by the Court of the property of an insane person ought to restore a document in his possession as such manager to the proprietor when he is removed from the management his failure to do so does not having regard to the explanation to s. 90, make the custody of the document improper within the meaning of the Evidence Act. *Shyama Charan v Abhuram* 3 C. L. J. 306=10 C. W. N. 733=33 C. 511. A record keeper's custody is a proper custody. *Elcouree v Kylash*, 21 W. R. 45. so also the custody of an old servant of the family where he is in possession of several other papers of the family. *Hanchintamani v Muro Lal Shiman*, 11 B. 89.

The English cases sanction a liberal construction of what may be deemed proper custody. The practice of conveyancing in England the complication of transactions and titles affording multiplied means of exposing falsehood, and the careful preservation of muniments by the owners of estates, have made a rule convenient and beneficial in England which cannot be applied so indulgently in India without encouraging forgery and fraud. Consequently, in the Indian Courts ancient documents brought in, without possession to support them, and without proof of any acts done in connection with them, would generally have almost no weight as a ground of inference. *Timangangavda v Rangangavda* 11 B. 94 note=P. J. 1878 240. The custody of a *pattah* more than thirty years old, in favour of the female holder's father, such holder having been in possession of the land ever since the father's death for forty years without interruption was held to be a natural and proper custody within the meaning of section 90 of the Evidence Act. *Trailolia Nath v Shurno chingom* 11 C. 539. Mere proof of the production of a document more than thirty years old from the record of a Collector's office (even assuming the

proceedings of such office to be as good for this purpose as those of the Court) where it had been previously filed would not raise a legal presumption in favour of its genuineness, but it must be shown that it had been so filed in order to the adjudication of some question of which the Collector had cognizance, and that it had come under the cognizance of the Collector *Gudadhur Pal v Bhyrubi Chandra Bhattacharjee* 5 C 918 As to documents so old that they cannot be proved by direct evidence, proof of custody must be given *Gouparoy v Wooma Soonduree Debia* 12 W R 472 If the custody thereof, so far as the witnesses can speak to it has been and is the custody in which judging from the purport of the document itself and the other circumstances of the case it would naturally be expected to reside then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties *Chundra Kant v Brojonath* 13 W R 109 Whether the custody of a document is a proper one under section 90 of the Evidence Act, is a question to be decided upon the circumstances of each case *Rai Dinomoni v Jogalchander* 23 Ind Cas 773 Where documents sixty years old are produced from proper custody, that is, from the custody of the lessees who are in possession of the mouza under the documents the presumption under s 90 of the Evidence Act applies to them and they should be admitted without proof *Ramlal v Satya Airanjy*, (1921) Pat 49=1 Pat L T 474=5 Pat L J 563=57 Ind Cas 786 Where a mortgage deed more than 30 years old comes from custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage *Ramachari v Sadho Saran* A I R 1924 All 869 The mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of this section *Rajendra v Gopal*, 4 Pat 67=A I R 1925 Pat 443

**May presume** It is in the discretion of a Court whether it will raise the presumption, in favour of a document for which s 90 provides But this discretion is not to be exercised arbitrarily, but must be governed by principles which are consonant with law and justice And while, on the one hand great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons *Gourinda Harra v Protap Narain* 29 C 740 When a document, which is over thirty years old has been tendered under s 90 of the Act it is for the Court to determine which is a matter for judicial discretion, whether it will make the presumption mentioned in the section or will call upon the party to offer proof of the document, stating its reasons in the latter event, and, in the former, whether the presumption has been rebutted or not *Srinath Patra v Kuloda*, 2 C L J 592 The effect of the presumption is weakened by circumstances which tended to raise doubts as to its authenticity *Madan Mohan v Kumar Rameswar* 7 C L J 615 The presumption allowed by this section is not a presumption which the Court is bound to make *Hanuman v Ramcharitra* A W N 1901, 28 As to the presumption which a Court may make under s 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such material as *para bark* and palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures so that the term execution is rather a convenient expression than a correct description of the actual proceeding *Ma Lon v Maung Uyo* U B R (1892 1896) Vol II, 350 A Court is not bound to presume the genuineness of the signature of a document upwards of thirty years old even though produced from proper custody *Uggor Kant v Hurro Chunder*, 6 C 209 Under section 90 of the Evidence Act read with section 4 of the same Act, the Court has a discretion to call for proof of a document although it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised *Safiqunnisa v Shaban Ali Khan*, 7 O C 290 The words "may presume" in this section ought generally to be construed in the more rigorous of the sense allowed by s 4 and in view of the danger of a blind acceptance of a document as genuine for all purposes, merely because it purports to be more than 30 years old and is produced from the proper custody,

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before any such document can be held rightly entitled to receive the benefit of the presumption for which s 90 makes provision, it should as a rule not be found wanting when adjudged by the very reasonable test laid down in *Barkun v Lalhun*, 9 C L R 427, namely, as to whether it has been produced on these previous occasions when it would naturally have been produced if in existence at the time, and as to whether it has ever been acted on previously to its production in Court. *Mehar Anu v Nur Muhammed*, 110 P L R 1902. So it is not obligatory, under this section upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but the discretion must be judicially exercised. *Imrit Chaman v Sridhar Pandey*, 15 C L J 7. *Husaini v Basit*, 110 Ind Cas 415=5 O W N 424. Whether the Court should presume the genuineness of the last document depends upon the special circumstances of each case. *Ponnambalath v Kasoth*, 21 M L J 981. This section leaves it to the discretion of the Court whether or not in certain circumstances it will make the presumption there contemplated. *Tika v Mahabir Prasad* 19 O C 92=36 Ind Cas 629. The question of making a presumption with regard to the genuineness of a document under this section is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate Court should be slow to interfere with such discretion. *Mahomed v Rahim* 57 P W R 1915=44 Ind Cas 559. The presumption arising under this section can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf. *Sher Ahmed v Ibrahim*, 52 Ind Cas 314. The raising of a presumption under this section as to the genuineness of a document is a matter which is eminently within the discretion of the trial Court. *Har Prasad v Bihama*, 61 Ind Cas 959. Where the evidence of the execution of a deed is available which if tendered would satisfy the requirements of s 68 of the Evidence Act the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant. *Raghubar v Sanual* 8 O L J 23=3 U P L R (J C) 9=61 Ind Cas 125. The presumption referred to in this section is one which the Court is not bound to make and notwithstanding that the elements mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. Where the plaintiff did not rely upon such presumption but adduced evidence in order to prove the genuineness of a document but such evidence was disbelieved by the Court they cannot complain if such presumption was not made by the Court. *Surendra Nath v Sambhu Nath*, 104 Ind Cas 219=A I R 1927 Cal 870. Under the circumstances mentioned in this section the Court may presume that it was duly executed and attested by the persons by whom it purports to be executed and attested. The section does not say that the Court must presume the document to be genuine. *Nararappa v Thimmiah* 7 Mys L J 57. In the case of documents more than thirty years old, the genuineness of which is disputed it is necessary for the Court to consider the evidence external and internal of the document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution. The Court is not bound to make the presumption merely because of the alleged age of the document. *Mansukh Pana v Irkam bai* 31 Bom L R 1279=A I R 1930 Bom 39.

**Unsuspecting appearance.** A third requirement is that the document must in appearance be unsuspecting. *Wigmore* § 2140. "On inspection it must exhibit an honest face otherwise it is not such an ancient document that its countenance will pass muster. Age will not sanctify our marks of fraud." *Per Jackson in Hill v Aisbit* 58 Ga. 586 589, *Wigmore* § 2140. When a document is suspicious, on the face of it and when the very place of importance has been erased and re-written presumption under this section does not arise. *Dalton Meor v Bharos Kumbi* 95 Ind Cas 261=A I R 1926 A 537. Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved, and

there are circumstances both external and internal, which throw great doubts upon the genuineness of the document the Court can in the exercise of the discretion vested in it under s 90 of the Evidence Act decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion executed by a Judge under s 90 *Shafiq un nissa v Shafan Ali*, 6 Bom L R 750

**Old Copies** The use of a copy of an old deed, instead of the original raises two or three questions somewhat different in their bearings, the significance, moreover, of the circumstance that an old original deed offered has been recorded is connected with the question of record copies and the two sets of questions may not be considered together. It may be assumed at the outset that the general principle requiring the original to be produced or else accounted for as lost or the like, has been satisfied, because if it is not, a copy is of course inadmissible on grounds irrespective of the present question. It may further be kept in mind that, by statute or otherwise, the official record (or a copy therefrom) of a lawfully recorded deed the original having been accounted for or disposed with, is receivable to prove the execution and contents of the original, but this rule does not enable one to use an unauthorized record. Thus, when the record is unauthorized some other mode of proving the deed must be resorted to. Keeping these principles in mind the various situations may be distinguished into four (1) an alleged ancient original lost the contents testified to orally, or copy proved by a competent witness on the stand (2) an alleged ancient original lost an alleged ancient non official copy offered, (3) an alleged ancient original lost an alleged official record copy offered though not made in pursuance of law *Higmore* § 2143. This section applies to copies as well as originals. Proof of proper custody of a document is required as a condition of its admissibility before it can be taken to be an ancient document but no particular mode of proof has been prescribed by the Act *Krishnasami v Ananthachari* 4 Mys L J 264, *Saryu Dey v Ram Hurakh* 18 Ind Cas 250. This section of the Evidence Act does not make it incompetent for the Court to draw any presumption as to the genuineness of an ancient document merely because a copy of the same and not the original was produced in evidence *Ponnam baleth v Haronath*, 21 M L J 931. The use of the words "is produced" in s 90 of the Evidence Act, does not limit the operation of the section to cases in which the document is actually produced in Court. The presumption of this section is therefore applicable to a copy of a document which had been lost and was more than 30 years old *Ishri Prosad v Lalhys Kumar*, 22 A 291 = A W N 1900 82 *Sheo Lal Singh v Choudhury Goor Naram* 7 Ind Cas 218, *Nanu Nan v Kantan Ashta* 2 L W 509 = 20 Ind Cas 386. But this section cannot apply unless it is shown that the original has been lost or destroyed *Jyoyamba v Vengalal shnu* 7 M L J 117 = 5 Ind Cas 827. Where there is no evidence at all as to the making of a private copy of a document more than 30 years old, proof would be necessary that it was compared with the original before it would be admitted in evidence *Hota Veera v Venka Krishna*, (1923) M W N 454 = 73 Ind Cas 66.

Where the alleged ancient original is lost and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, recollects its contents or took a copy, the difficulty in assuming genuineness is that the element of unsuspicious appearance can never be furnished since the original is lacking perhaps also the element of natural custody will usually also be lacking *Higmore* § 2142. As regards such a copy Madras High Court said 'But there is absolutely no proof of the document. The writer is unknown and it does not even purport to be written by any particular person. The date of its making is also unknown and, therefore it can not be said with any certainty that it is thirty years old nor does it purport to be thirty years old. If, therefore the document is to be admitted in evidence it must be proved some way or another. It has not been proved by any witness and the presumption in section 90 cannot apply for that only relates to documents which purport or are proved to be thirty years old, and are produced from proper custody. This is not one of such documents and therefore, the limited presumption of section 90 can not apply. One of the



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cases relied on by the Government Agent for admitting Exhibit F is *Ponnambaleth Porappayan v Karoth Sankaran*, 12 Ind Cas 453, but from the brief judgment of that case, it does not appear that the copy was not proved but, on the contrary it would appear that there was some evidence adduced in regard to the copy. Where the alleged ancient original is lost and an ancient purporting copy is offered, made by a private hand, and the purporting maker being unknown and deceased it seems to have been long accepted that this suffices, and the copy may be received under the ancient document rule *Wigmore* § 2113. The same rule is applicable where an alleged ancient original is lost and an alleged official record copy offered, though not made in pursuance of law. *Ibid*. When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s 90 of the Evidence Act, may be made where a document over thirty years old is produced from proper custody, ought not to be made. *Appathura v Gopala*, 25 M 674. This section is not limited to cases in which the document is actually produced in Court and consequently secondary evidence of an ancient document is admissible without proof of execution of the original when the document is shown to have been lost and to have been last heard of in proper custody. *Suam Singh v Karim Balsh*, 99 P R 1910=128 P W R 1910=186 P L R 1910=8 Ind Cas 353. In the case of a copy of a document 30 years old s 90 Evidence Act, empowers the Court to presume that the copy is in the hand writing of the person in whose hand writing it purports to be. Though this section does not refer to stamps, when the Court of first instance has drawn a certain presumption which the law empowers it to draw, and especially when that presumption has reference to stamping, a Court of appeal ought not lightly to interfere with the exercise of the discretion vested in the Court of first instance. *Manabikrama v Nillambur*, 31 Ind Cas 579. Where the production of the original document is a physical impossibility, the Court is entitled to raise a presumption under s 90 of the Evidence Act regarding the same on the production of certified copy. *Raj Bahadur v Bindeshri*, 5 O L J 219=46 Ind Cas 344. The presumption mentioned in this section is applicable to copy produced. *Banuarial v Dugal Nath* 29 C L J 577=52 Ind Cas 825. *Jakkam Reddi v Subramania Aiyar* 16 L W 839. *Subramanya v Seethayya* 16 L W 463=(1922) M W N 614=46 M 92. Court may presume genuineness of signature authenticating a copy. *Seethaya v Subramanya Somayajulu* 56 Ind Cas 146=52 M 453=31 Bom L R 756=19 C L J 566. So it is clear that the presumption under this section with regard to documents 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original. *Brij Ashore v Beni Prasad*, 6 O W N 880=A I R 1929 Oudh 483. The Court may presume the genuineness even of an unregistered document thirty years old from a copy of such document if the original is proved to have been duly executed, and further it is also proved that the original is since lost. But such a presumption can only be made after a careful consideration of all the circumstances of the case. *Brij Raj v Basant*, 118 Ind Cas 154=A I R 1929 All 561.

In some cases it has been held that no presumption can be made under this section, in favour of any document unless such document itself is produced before the Court invited to make the presumption. The production of copy is sufficient. *Sripaya v Kanhaiyalal*, 15 N L R 192=53 Ind Cas 947. *Nathuram v Jagannath* 55 Ind Cas 426=16 N L R 106 see also *Appathura v Gopala* 25 M 674. But in view of the decision in *Seethaya v Subramanya*, 56 Ind Cas 146=52 M 453=31 Bom L R 576=49 C L J 566=33 C W N 578 (P C) the above cases may not be considered as good law.

**Presumption of genuineness whether presumption of executant's authority to sign or grant.** Where the executant of a document purports to sign it on behalf of others the fact that it is more than thirty years old, though it would under the provisions of section 90 of the Evidence Act raise a presumption in favour of the genuineness of the document would not dispense with proof of the authority of the executant to sign it on behalf of others so

as to bind them or those claiming under them *Ubtal Rai v Dalhal Rai*, 3 C 557 Where it is not shown that the executant of an ancient document was entitled to grant such a document, mere production of it would be no proof of title *Uggar Kant v Hurio Chunder*, 6 C 209 The provisions of s 90 of the Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear, but that can not and does not prove the authority of the executants to bind other persons *Maharam v Telamunddin*, 15 C L J 220=16 C W N 567, *Sheo Nandan v Ram Lagan*, 13 A L J 921, *Kashi Singh v Ram Narain*, 19 O C 321, *Lol man v Ganga*, 60 Ind Cas 96

This section does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section *Kashi Nath v Jagat Kishore*, 20 C W N 643=23 C L J 533=35 Ind Cas 298 The presumption that arises under s 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority *Tanakeswar Pal v Sush Chandra* 27 C W N 964 Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents for the executants had authority from the executants to do it *Haji Shaikh v Sukhrum Singh* A I R 1923 All 420=73 Ind Cas 989, *Raman Kant v Bhimnandan*, 50 C 526=1924 Cal 82=85 Ind Cas 220

But the Allahabad High Court in a Full Bench case has held that the presumption permitted by s 90 of the Evidence Act in the case of a document purporting to be 30 years old that it was duly executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him *Haji v Sukhrum* 22 A L J 857=1925 All 1=47 A 31 (F B), *Balkoran v Mt Dulai*, 24 A L J 920=97 Ind Cas 292

**Genuineness presumed or not presumed by original court** Where the Court of first instance presumed a document to be genuine under s 90 of the Evidence Act, it was competent for the first appellate Court to hold that it should not be presumed to be genuine and to reject it without calling for further proof of the same *Ramen v Teerapperdayan*, 11 M L T 69=(1912) 1 M W N 117 The Appellate Court should always be extremely slow to overrule the discretion exercised by a Judge under s 90 of the Evidence Act *Shafiq un nissa v Shaban Ali* 26 A 581 (P C)=9 C W N 105=6 Bom L R 750=7 O C 290=31 I A 217=8 Sir 674, *Rani Dinamoni v Jagatchunder* 23 Ind Cas 773 When the reasons assigned by the lower appellate Court as to the applicability of the provisions of s 90 of the Evidence Act are erroneous in law the High Court can interfere in second appeal *Imrit v Sridhari*, 15 C L J 7 In *Parantwa Zutendia v Subramania* 26 Ind Cas 117, *Sankaran Nair J* said "The presumption which the Court has to raise under section 90 Evidence Act as to the genuineness of a document 30 years old, is one of fact and stands on the same footing as any other piece of evidence and the question being one of fact the High Court, in second appeal will not interfere with a finding given on it by the lower Court But in the same case *Tyabji J* said Such a presumption is one of law and the High Court can in second appeal interfere and see if the findings of the lower Court are correct Where it did not appear from the record that the District Munsiff had drawn the presumption under this section in receiving certain documents in evidence and the Appellate Court refused to apply the presumption and decided the question of genuineness of the documents on the evidence *Hid* that the Appellate Court acted rightly *Methayin Chetti v Vayya Dyan* 108 Ind Cas 412

**Ancient document—Corroborative evidence** It is well settled that mere production of an ancient document unless supported by some corroborative

**S. 90** evidence of acting under it is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof, it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual course of such transactions in brief though absence of proof of possession does not affect its admissibility, it undoubtedly affects the weight to be attached to the document. *Suoromoyi v Swendra*, 42 C L J 14=89 Ind Cas 747=A I R 1925 Cal 1189

**Suspicious circumstances** Where there were circumstances giving rise to grave suspicions as to the genuineness of the Will alleged to have been executed by the last male owner the presumption allowed by this section of the Evidence Act could not be drawn. *Gujar Singh v Meher Singh*, 34 Ind Cas 168=97 P W R 1916. A Will purported to be executed in 1887 was brought to light for the first time in 1907 when it was produced in a Court of law. In 1910 an application for probate in respect of it was made but it was ultimately withdrawn. At that time only one of the attesting witnesses was said to have been alive yet no further attempt was made to bring the Will into Court till some ten years later when even that attesting witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the Will before 1907, held that the applicant cannot get the benefit of s 90. *Channulal v M. Puna* 75 Ind Cas 660=1923 Nag 169

**Rule should be applied with proper care and caution** The rule laid down in s 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution. *Prailokia Nath v Sharno Chungom* 11 C 539. The presumption of genuineness under this section in respect of a document alleged to be more than thirty years old must be applied with caution. *Ganhai Bibi v Ghulam* 82 P L R 1909=4 Ind Cas 923. *Amur v Nur Mohammed* 82 P R 1903=110 P L R 1902. There is a very considerable danger in accepting documents without care and caution simply because they purport to be more than thirty years old. *Ghulam v Allah Din*, 241 P L R 1913=19 Ind Cas 964. Before a Court is justified in making a presumption in favour of the genuineness of any such document it should be satisfied *alundi* that there is good ground for accepting it as a true document. *Jesa Lal v Mussamat Ganga Devi* 81 P R 1913=321 P L R 1913=20 Ind Cas 868=211 P W R 1913. The rule of presumption embodied in this section is one to be applied with exceeding caution in India. *Sripaya v Kanhaya Lal* 15 N L R 192=53 Ind Cas 947 see also *Ugralant v Harro Chunder* 6 C 209 (221), *Gobinda v Protap* 29 C 740, *Shaukh Husain v Goreldhan Das* 21 B 1. *Gobinda v Pulin*, 31 C W N 215, *Vaidyanath v Natera*, 41 M L J 310. *Lakman v Ganga* 60 Ind Cas 96, *Hur Prasad v Bikram*, 61 Ind Cas 959. The presumption contained in this section has always got to be applied with a good deal of caution. Regardless of the question as to whether the document in question forms the foundation of the party's right or whether it was sought to be used as a piece of evidence, the Court may, in a proper case rely upon the presumption contained in this section. *Gobinda v Pulin Behary*, 31 C W N 215=93 Ind Cas 147=A I R 1927 Cal 102

**Explanation** This is to provide for cases in which the custody is not perhaps, that where it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody not improper. Thus in the two first illustrations (a) and (b) the documents are produced from their natural place of custody in (c) the documents ordinarily would be with the owner B but under the circumstances A's custody is proper. In the *Bishop of Meath v The Marquis of Winchester* 3 Bing N S 183 a document relating to a Bishop's see might be produced either by his descendants or his successors in the see. So an unexpired lease is admissible, if it be produced by the lessor *Plaxton v Dare* 10 B & C 17, or of the lessee *Hall v Ball* 3 M & G 212

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

**91** When the terms of a contract, or of a grant, or of

Evidence of terms of contract, grants and other dispositions of property reduced to form of document

any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given

in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

*Exception 1* — When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved

*Exception 2* — Will [admitted to probate in British India] may be proved by the probate

*Explanation 1* — This section applies equally to cases in which the contracts, grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one

*Explanation 2* — Where there are more originals than one one original only need be proved

*Explanation 3* — The statement in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact

*Illustrations*

(a) If a contract be contained in several letters all the letters in which it is contained must be proved

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved

(c) If a bill of exchange is drawn in a set of three, one only need be proved

(d) A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion

\* These words in s 91 *Exception 2* were substituted for the words "under the Indian Succession Act" by the Indian Evidence Act Amendment Act, 1872 (18 of 1872) s 7

- S 91.** Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.
- (e) A gives B a receipt for money paid by B. Oral evidence is offered for the payment. The evidence is admissible.

**Principle** This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract to place themselves above the uncertainties of oral testimony, and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements. Written contracts presume deliberation upon the part of the contracting parties, and it is natural that they should be treated with careful consideration by the Courts, and with a disinclination to disturb the condition of matters as embodied in them by the act of parties. *McKelvey's Ex* § 291 "One of the most common and important of the concrete rules subsumed under the general notion that the best evidence must be produced, and that one with which the phrase 'best evidence' is now exclusively associated, is the rule that, when the contents of a writing are to be proved, the writing itself must be produced before the tribunal, or its absence accounted for before testimony to its contents is admitted." *Greenl Ex* § 563 (a), *Dinomoy v Roy Luchmput*, 7 I A 8, 15 *Taylor Ex* §§ 391, 401 "The rule with regard to writings is that oral proof can not be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement." *Per Couch C J in Kedar Nath Dutta v Shamlal*, 11 B L R (O C J) 405 and cited with approval by Lord Curzon in *M Subramonian v Lutchman*, 50 C 338 = 38 C L J 41 = 28 C W N 1 = 44 M L J 602 = 50 I A 77 P C

• **Scope of the section** It is likewise a general and most inflexible rule that, wherever written instruments are appointed, either by the requirement of law, or by the contract of parties to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy of principle, because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence of policy, because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. *Starkie on Ex* p 649 cited in *Kashunath v Chandu Chanan*, 5 W R 68 (69) "Returning now to the rule says *Mr Taylor*, "which requires the contents of a document to be proved by the document itself, if its production be possible, it will be found that the cases on the subject may be arranged in three classes, the first class relating to those instruments which the law requires to be in writing, the second, to those contracts which the parties have put in writing, and the third to all other writings the existence or contents of which are disputed, and which are material to the crime." *Taylor* § 393

In the first place oral evidence can not be substituted for any instrument which the law requires to be in writing such as records public documents, official examinations, deeds of conveyance of lands Wills other than nuncupative promises to pay the debt of another and other writings mentioned in the Statute of Frauds. In all these cases the law having required that the evidence of the transactions should be in writing no other proof can be substituted for that as long as the writing exists and is in the power of the party. *Greenl Ex* § 86 In the second place, oral proof can not be substituted for the written evidence of any contract which the parties have put in writing. Here the written instrument may be regarded in some measure as the ultimate fact to be proved especially in cases of negotiable securities and in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreements. The written contract is not collateral, but is of the very essence of the transaction.

If for example, an action is brought for the use and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy he must produce it, or account for its absence, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be devolved on the defendant *Breuer v Palmer*, 3 Esp 213, confirmed in *Ramsbottom v Tunbridge*, 2 M & S 434, *R v Rauden*, 8 B & C 703 *Strotter v Boor* 5 Bing 136 *per Parke J*. But if the fact of the occupation of land is alone in issue without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing, for here the writing is only collateral to the fact in question *R v Inhabitants of Holy Trinity* 7 B & C 611 *Doe v Haney*, 8 Bing 239 241. The same rule applies to every other species of written contract *Greenl Ev* § 87. Save and except the above two classes of writings, there is a third class of document which contains any writing, the existence of which is disputed and which is material either to the issue between the parties, or to the credit of witnesses. The contents of such writings should be proved in accordance with the provisions of section 64 *supra*, "I have always" says Lord Tentenden, in *Vincent v Cole*, 1 M & M 258 "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses however honest as to the contents of written instruments they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." But where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence. As for example, if a written communication be accompanied by a verbal one, to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it. Thus, also, the payment of money may be proved by oral testimony, though a receipt be taken *Ranbert v Cohen*, 4 Esp 213 *Jacob v Lindsay*, 1 East 460 *Doe v Cartwright*, 3 B & A 326, *vide* *Expt* 3 to this section. In stating that oral testimony can not be substituted for any writing included in either of the three classes above mentioned, a tacit exception is made in England in favour of the parol admissions of a party, and of his acts amounting to admissions, both of which species of evidence are always received as primary proof against himself and those claiming under him although they relate to the contents of a deed or other instrument, which are directly in issue in the cause *Earle v Pelen*, 5 C & P 542, *per Parke B*, *Newhall v Holt*, 6 M & W 662, *Slatterie v Pooley*, 6 M & W 664, *Bethell v Blencowe*, 3 M & Gr 119 *Howard v Smith*, 3 M & Gr 251. "The reason" says *Mr Baron Parke*, "why such statements or acts are admissible without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth arising from the very nature of the case, where better evidence is withheld, whereas what a party himself admits to be true, may reasonably be presumed to be so." *Taylor* § 410. But in India oral admissions as to the contents of a document are not relevant, until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents under the rules hereinafter contained, or unless the genuineness of a document produced is in question (*vide* s 22). When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest secondary evidence may be given of the existence condition or contents of the said original. [*vide* section 65(b)] Whereas in section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract, no such limitation are imposed under section 91. Having regard to the juxtaposition of sections 91 and 92 and the deliberate omission from section 91 of such words of limitation it must be taken that even a third party if he wants to establish a

**S. 91.** particular contract between certain others, either when such contract has been reduced to a document or when under the law such contract has to be in writing, can only prove such contract by the production of such writing. *Samrat Arjunkar v Chenchu Madalur* 1 I R 1928 Mad 179=109 Ind C 18 A binding family arrangement dealing with immovable property of the value of Rs 100 or upwards can be made orally. If made orally there being no document no question of registration arises. If however it is in fact reduced to the form of a document it is a question of fact in each case to be determined on a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it is written. If the terms are not reduced to the form of a document registration is not necessary and while the writing cannot be used as a document of title it can be used as a piece of evidence e.g. as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct. *Ramgopal v Fulshi Ram* 26 A L J 92=A I R 1928 All 641 (1 B) The object of s 10A of the Dekkan Agriculturists Relief Act being to set out the real nature of the transaction by admission of oral evidence which would be otherwise excluded by the ordinary law it may be taken that the legislature intended that the section should override not merely section 92 but also where necessary section 91 of the Evidence Act. *Rasappa v Thyaya* 31 Bom L R 1266 This section prohibits the reception of the evidence in proof of the terms of the document except the document itself. It does not prohibit the reception of evidence to prove the mere fact of partition even though there is an unregistered partition deed. *Binnu Chetty v Panchammal* (1926) M W N 15=92 Ind Cas 1028=A I R 1926 Mad 102 A receipt for money does not fall under this section. *Sardar Singh v Iqbal Narain* 27 O C 380=A I R 1925 Oudh 257 Where in a suit upon a promissory note executed by the *Varia* of a joint Hindu family the plaintiff wanted to have a decree on the original cause of action against all the members of the family namely the debts oral evidence is admissible to prove this different cause of action. *Hari Mohan Ghosh v Sowrendra Nath* 41 C L J 535=88 Ind Cas 1025=A I R 1925 Cal 1153 Where the question is as to the extent or area of the Mahal settled with the defendants it is not the duty of the Court and it would be contrary to its duty to admit any antecedent documents for the purpose of contradicting the terms of the settlement made. Any antecedent documents and maps can be used solely for the purpose of identifying the thing demised. *Titul dhari Singh v Kesho Prasad* 41 C L J 386=3 Pat L R 114=6 P L T 349=27 Bom L R 819=88 Ind Cas 103=26 P L R 257=48 M L J 611 (P C) There is a distinction between evidentiary admissions and admissions by the pleadings. Section 58 of the Evidence Act, governs admissions by the pleadings. Although a sale deed is inadmissible in evidence as being unregistered an admission by the (vendor) defendant in his preliminary examination of an agreement alleged in the plaint to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold is not excluded by section 91 of the Evidence Act and renders proof of the agreement unnecessary. *Sadhu v Nga Si* U B R 1907 Evidence 1 When men agree to preserve by writing the remembrance of past events of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written the truth of the written act must be established by the acts themselves that is by the inspection of the originals. *Upendra v Umesh Chandra* 12 C L J 25=6 Ind Cas 316 The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old. It should therefore be complete in itself and embody distinctly the terms of the new contract. Should it fail to do so the principle laid down in section 91 of the Evidence Act would apply and extraneous evidence to prove the terms of the contract would be inadmissible. *Jnanendra v Gopal Das* 31 C 1026=8 C W N 923 Where a boy was taken in adoption by a Hindu widow some 34 years ago in virtue of an *anumatipatra* from her husband, and all parties by their acts and conduct recognized the validity of the adoption and it was the case of no one that the power to adopt was not strictly pursued

*Held*, that it was not necessary to prove the *anumat patra*, in order to prove the adoption and that to facts like these, section 91 of the Evidence Act had no application. *Ganoda v Girish*, 4 Ind Cas 400. As required by ss 250 and 251 of the Code of the Civil Procedure, the warrant must have been in writing and therefore, under s 91 of the Evidence Act, the fact, that the warrant gave authority to the process server for making the arrest, could not be proved except by the production of the warrant or by secondary evidence of its contents and no circumstances appeared on the record which could render secondary evidence admissible. *Shew Ko v King Emperor*, 3 L B R 128. Previous conviction should, regard being had to the provisions of this section and section 511 Cr Pro Code be proved by copies of judgment or extracts from judgments or by any other documentary evidence of the fact of such previous conviction and the examination of the accused in respect of those convictions is having regard to s 312 Cr Pro Code without legal warrant or justification. *Yasin v King Emperor*, 28 C 689=5 C W N 670. When a dying declaration is recorded by a Magistrate the writing itself is not evidence but the precise statement made by the deceased must be proved by the Magistrate who recorded the statement or some one who heard it. This section does not apply to such a document. *Goundas v Emperor*, 36 C 659=13 C W N 680=10 Cr L J 186=2 Ind Cas 841. Section 91 of the Evidence Act has no application to matters embodied in the special diary under s 172 of the Criminal Pro Code. *Noor Mahomed v Emperor*, 18 Cr L J 1022=42 Ind Cas 766. An agreement not to execute is part of the adjustment of the suit within the meaning of section 375. Where such an agreement was not part of the record of Court it is reduced to the form of a document namely a record of Court, as required by s 375 Civil Procedure Code (1882) no extraneous evidence oral or documentary, regarding the terms of the compromise is under this section, admissible in that suit and its execution proceedings. *Hukam Chand v Radha Kisan* 11 N L R 110=29 Ind Cas 939. Where a Muhammadan executes a deed of gift which is found to be inadmissible in evidence, oral evidence is admissible to prove that the gift has been validly made in accordance with Muhammadan law. *Ali Baksh v Ghuras*, 28 Ind Cas 180=18 O C 122. Where the terms of a compromise are found to be set out in a petition the petitioner is to prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms. *Bharora v Sidhar*, 12 A L J 998. There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney. The fact can be proved by evidence, *alunde*, and so far as third parties are concerned, none the less so because the agent was appointed under a written document executed by the principal. There is nothing in section 91 or section 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power of attorney, though the terms which govern such relationship appear to be in writing. *Lala Nanalchand v Mohammad Ali*, 279 P W R 1912. The object of s 10 A of the Dekkan Agriculturists Relief Act, namely, the decision as to the real nature of the transaction by admission of the oral evidence which otherwise would be excluded by the ordinary law whether section 92 or the like of the Evidence Act is to override not merely Evidence Act s 92 but also where necessary s 91. *Dasappa v Tayanra* A I R 1930 Bom 79. The provisions of this section are not applicable to permission granted by municipalities under s 114 for connecting the private drain with the municipal drain. *Ibdalla v Ambadas*, A I R 1930 Nag 130.

When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a writing. Where a transaction in the shape of a contract grant or other disposition of property has been reduced into writing by oral agreement of the parties the writing becomes general the exclusive memorial thereof and no evidence may be given to prove the transaction except the document itself or secondary evidence of its contents where such evidence is admissible. *Phup Fr Ill Ed* p 522. Where negotiate at a distance by letters and telegrams—first an offer then and then a revision of the offer then a halt upon an important term after



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offer of its concession in return for the concession of some prior term now to be changed, and finally an acceptance of this concession, and thus the end of the negotiations,—where are the terms of this contract to be found? Obviously, in this congeries of letters and telegrams as mutually modifying and completing each other. The whole of the contract is not in one document. Nor, on the other hand, does the whole of any one document, (probably) represent a part of the contract, because some of its terms have been impaired and replaced by other documents in the series. On the other hand, if instead of leaving the net effect of the negotiations to be showed from the mass of writings, a single document is finally drawn up to replace them and to embody their net effect, and is signed or otherwise effected by the parties, this document will now alone represent the terms of the act. The process of embodying the terms of a jurial act in a single memorial may be termed the Integration of the act, i.e., its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and incoherent shape, have no longer any jurial effect, they are replaced by a single embodiment of the act. In other words, when jurial act is embodied in a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act. *Wigmore* § 2125. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. *Pouell &c* p 181. The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to seek to prove the terms of the contract referring to the original oral agreement and this section applies not only to cases where the contract has been originally made by parol but is subsequently reduced to writing. Where the parties reduce the terms of a contract into writing it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whichever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course to any rules as to secondary evidence. *Kuppi Saami v. China Saami* 28 L. W. 231=111 Ind. Crs 671=A I R 1928 Mad 546. Having regard to the terms of this section what the Court has got to do is to find out the real contract between the parties. *Meenal Shisundaram v. Chenchu* 109 Ind. Cas 18=A I R 1928 Mad 459. The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved because of the inadmissibility of the document. *Mung Tun v. Ho Fu* 111 Ind. Crs 172=A I R 1928 Rang 196. But where an award in writing which effected a partition of joint family properties, plainly and unambiguously held that extrinsic evidence was admissible to explain or control its terms to show for instance, that there was no separation between two of the members inter se. *Babu v. Guldass*, A I R 1928 Mad 1064=55 M. L. J 132=112 Ind. Crs 184. The agreement to refer to arbitration is not a contract, grant or other disposition of property and so this section does not apply to it. *Babu Ram v. Lala Ram* 116 Ind. Crs 83=4 I R 1929 All 115. Although a half may be created by word of mouth, once the terms of the dedications have been put in writing the document itself or secondary evidence of the same should be tendered. *Mahomed v. Bibi Marian*, 8 Pat 484=117 Ind. Crs 638=A I R 1929 Pat 410. When a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of hundred rupees or upwards but without the execution of a registered instrument oral evidence is not admissible to prove the transaction. *Maung Sa v. Maung Lo* A I R 1925 Rang 291. Where a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself and when the negotiable instrument is inadmissible in evidence the suit must fail. *Rampi Das v. Shuja Uddin*, 95 Ind. Cas 701. In a suit on promissory note if the plaintiff cannot have recourse to the promissory note as a

piece of evidence, this section does not prevent the plaintiff from proving his case from other evidence *Ranchhod v Harjibhai*, 28 Bom L R 631=95 Ind Cas 847=A I R 1926 Bom 357 Where an *amalnama* evidencing a settlement of land is inadmissible in evidence for want of registration no evidence is admissible on the question as to the persons for whom the settlement was made or as to the extent of their shares settled *Hem Chandra Roy v Sashi Bhushan*, 63 Ind Cas 863 This section forbids any evidence to be given of the terms of a contract, or of a grant or of any other disposition of property, when they have been reduced to the form of a document, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible *Maung Pan v Ma Baw*, U B R (1892 1896) Vol II, 347

**Terms of a contract** The general rule laid down in section 91 of the Act is that when the terms of a contract have been reduced to writing, no evidence shall be given in proof of terms of the contract except the document itself or, in certain cases, secondary evidence of its contents But this rule is subject to the important exceptions contained in ss 95 and 97 *Karuppa Gounden v Pona Thambi*, 2 M L T 336=30 M 397 An oral agreement whereby the joint and several liability of the executors of the promissory note for the balance due on it is split up with the consent of all parties into a several liability on the part of each executor to the payee of the note is not obnoxious to this section *Rangaswami v Somasundaram* 27 L W 820=107 Ind Cas 646=A I R 1928 Mad 173=51 M L J 150 From the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document *Kundan Lal v Sahu Bilhari* 51 A 530=27 A L J 333=116 Ind Cas 293=A I R 1929 All 251 The language of this section is clear and definite and wherever the terms of the contract are reduced to writing and that writing is for any reason, inadmissible in evidence the promisee must lose his remedy if independently of the document, he has no complete cause of action *Ramsaran Das v Tulsi Ram* (1922) Lah 417=67 Ind Cas 565 This section excludes the oral evidence of an agreement as well as of what took place when the agreement was made to prove the agreement if the written instrument is not produced *Vijay Lalech v Ganesh*, 61 Ind Cas 896 This section is uncompromising and whenever the terms of a contract are reduced to writing, and for any reason inadmissible in evidence the promisee must lose his remedy *Gurdas v Ishu Das*, 3 Lah L J 157=60 Ind Cas 107, see also *Ebrahimbhoy v Hassan*, 23 Bom L R 767=63 Ind Cas 492 This section refers to cases where the contract has by the intention of the parties been reduced to writing and the document itself constitutes a part of the contract of loan but if the hundies were by way of collateral security and the terms had been agreed upon orally then it is the oral terms of the contract which are to be looked at and may be proved and this section is no bar *Lolmal v The Sind Bank*, 13 S L R 180=57 Ind Cas 391 If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract In the latter there is a binding contract and the reference to the mere formal document may be ignored 1 Pat L J 789=(1919) Pat 307=53 Ind Cas 833 When it was admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms the suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration *Gobinda v Ram Chandra*, 29 C L J 508=51 Ind Cas 915 Oral evidence to prove what the defendant meant by the words of a contract was inadmissible under this section *Metropolitan Engineering v Heller Engine* 22 C W N 116=15 C 451=47 Ind Cas 395 Where the agreement between the parties has been reduced to the form of a document, the provision of

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section will bar the admission of evidence other than the document *Mung Paul v Ma Myat* L B R (1872—1892) 650 *Raj Kumar v Nabi Baksh*, 9 O C 296. Construction of a document containing a contract of guarantee is controlled by final expression of obligation written by obligor himself in his own language *Maug Lo The v Arnachellum*, U B R (1897—1901) Vol II 38. Where there is a proposal in writing for a contract to be entered into at a later date it is doubtful if oral evidence of terms, not to be found in the written proposal, is admissible *Maug Shau v Maung Tun Gyar*, 9 C W N 147 (P C)=32 C 96=31 I A 158. A question as to who the contracting parties are is not a question as to the terms of the contract, within the meaning of this section *Venkata Subbiah v Gobindarajulu* 18 M L J 1=3 M L J 29=31 M 15. Where an agreement is inadmissible, oral evidence is barred *Ishan Singh v Thalur Das* 89 P R 1908=115 P W R 1908, *Samsam v Ram Parshad* 4 O C 365. Section 375 of the Code of Civil Procedure does not require that the agreement or compromise itself shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit or in other words that a note of the terms should be made in the proceedings. The agreement or compromise itself that is made out of Court may be in writing or by word of mouth. If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise *Boya v On Gang* 3 L B 243. Ordinarily when the terms of a contract preceded by proposals negotiations conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract), but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms *Kotam Reddi v Vematalant*, 20 M L J 41=(1916) 2 M W N 33=31 M L J 210=35 Ind Cts 18. When the terms of contract for payment of interests were reduced to writing and the written instrument was excluded from evidence by reason of the provisions of s 10 B of the Court of Wards Act oral evidence was not admissible under section 91 of the Evidence Act to prove the terms of contract *Ram Bahadur v Dussuri* 17 C L J 399=19 Ind Cts 848. The rule of evidence, which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer *Bay Nath v Salig Ram*, 16 Ind Cts 33.

**Terms of a grant.** Under this section the only evidence as to grant when it has been reduced to the form of a document is the document itself unless secondary evidence of its contents is admissible. Secondary evidence will be admissible only under the terms of section 65 of the Act and where a document is not proved to have been lost, Cl (C) of s 65 cannot be invoked *Mahomed Khan v Shoo Bhulh*, A I R 1929 Oudh 447=6 O W N 859. Under section 85, sub section (2) of the Bengal Tenancy Act a sub lease by a ruyat purporting to create a permanent tenancy is inadmissible for registration and if notwithstanding it is unregistered, it must be deemed as unregistered under section 49 of the Registration Act, such a document is inadmissible in proof of any transaction affecting such property. Oral evidence of such grant is also excluded by section 91 of the Evidence Act *Jarip Khan v Durga Bena* 16 C L J 144=15 Ind Cts 416=17 C W N 59.

**Documents inadmissible for want of registration—whether secondary evidence is admissible.** Where the document containing the transaction is inadmissible for want of registration, no other evidence of the contents of the contract can be received *Nga Sheia v Nga Kang*, L B R (1872—1892), 133.

The combined operation of s 49 of the Registration Act and section 91 of the Evidence Act is to completely shut out all the terms of the transaction of partition. In other words it would prevent the plaintiff from proving that in

that partition certain property was allotted to a particular person. But it would not prevent other evidence being adduced to prove that one of the parties to it died separate from the rest of the family and in separate possession of certain property. An unregistered partition deed can be used to prove the intention of the parties. *Jyoti Bai v Ratan Singh*, 99 Ind Cas 418 = A I R 1927 Nag 113. So also the fact whether one of the parties was in possession of the property can be proved by oral evidence and the partition deed can be relied upon to determine the nature of the possession. *Hari Ram v Sheo Kanan*, 100 Ind Cas 153, see also *Thobila Chariar v Thulasiammal*, 39 M L T 276 = 103 Ind Cas 281 = A I R 1927 Mad 830, *Mg Po v Ma E Mai*, 74 Ind Cas 47 = 1923 Rang 57, *Nand Lal v Dhamikdhar*, 4 Pat L T 657, *Narsingdas v Uttamchand* A I R 1923 Lah 392. Unregistered sale deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence. *Sheo Kanan v Churan Lal*, 98 Ind Cas 910 = 28 P L R 88. Where an agreement or any other transaction is reduced to writing and under it any right to immovable property is affected, such writing ought to be registered. *Sriramsubba v Venkaterajnam*, 86 Ind Cas 860 = A I R 1925 Mad 945 = 22 L W 109. A partition can be effected orally, but if parties put it into writing but do not register it even though the properties are worth more than Rs 100 it is wholly inoperative. This section precludes oral evidence being given in such a case. It is true that relationship such as partnership, landlord and tenant, etc., may be proved from documents embodying such relationship, but not so the facts and terms of a partition deed. *Mg Po Leen v Ma E Mai*, 1 Bur L J 111. Secondary evidence of a lost unregistered document affecting an interest in an immovable property and therefore required to be registered is not admissible in evidence of any transaction affecting such property. But such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. *Mahau v Ma Shue*, 44 Ind Cas 91.

An unregistered deed of lease cannot be given in evidence in proof of the terms of the lease and its existence excludes all extrinsic evidence on the point. Oral evidence of the execution of such a document is admissible in proof of the oral agreement to lease made before the execution of the document, in order to support a claim for specific performance of the oral agreement. *Chaganlal v Kashuram*, 71 Ind Cas 33 = 1923 Nag 76, see also *Budhan Tel v Madan Mohan*, 1923 P 111. Where a lease deed is inadmissible in evidence being unregistered the tenancy can be proved by other evidence as by the doctrine of part performance. *Damodar v Masoodan Singh*, 105 Ind Cas 172. *Tikaram v Sukka*, 111 Ind Cas 358 = A I R 1928 Nag 338. Though a lease for agricultural purposes for more than a year can be made orally, still if the lease is in fact reduced to writing, it cannot be received under s 17 of the Registration Act unless registered. The document itself being inadmissible, this section shuts out other evidence of the transaction. *Maharam Jani v Bry Bhikhan*, 3 Pat 349 = 79 Ind Cas 26 = 5 Pat L T 511, *Ram Chandra v Tuma*, 14 Bom L R 390 = 36 B 500 = 15 Ind Cas 830. *Jasoda Nandan v Ram Kuar*, L R 3A 537, *Budhan Tel v Madanmohan*, 3 Pat L T 485 = 68 Ind Cas 653. An unregistered deed of lease is not admissible to prove that the property to which it relates was let for a term of three years nor can oral evidence of the terms of the lease be tendered in such a case. *Nadar v Rank*, 63 Ind Cas 90. The plaintiffs having agreed to convey a house to T received the purchase money executed a sale deed which was left unregistered, and subsequently brought a suit for possession of the house. On default of the plaintiffs to produce the sale deed secondary evidence was let in to prove the sale, and the suit was dismissed. *Held*, on second appeal that under section 17 of the Registration Act, the deed was compulsorily registrable and section 49 made it inadmissible to prove the sale. Section 91 of the Evidence Act prohibits the admission of secondary evidence of sale deed. *Gangabisan v Tukaram*, 5 N L R 70 = 2 Ind Cas 244. Section 49 of the Registration Act prohibits unregistered lease from being given in evidence whether the suit be for specific performance or for damages, and section 91 of the Evidence Act forbids any other evidence from being given of the agreement. *Streeramulu v Ramaswami*, 33 M L J 596.

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section will bar the admission of evidence other than the document *Munir Paul v Ma Myat* L B R (1872-1892) 676 *By Kuar v Naba Janksh* 90 C 296 Construction of a document containing a contract of guarantee is controlled by final expression of obligation written by obligor or himself in his own language *Mauzy Lo Thet v Irrachellum*, U B R (1897-1901) Vol II 380 Where there is a proposal in writing for a contract to be entered into at a later date, it is doubtful if oral evidence of terms, not to be found in the written proposal is admissible *Mauzy Shau v Mauzy Fun Gyau*, 9 C W N 140 (P C) = 32 C 96 = 31 I A 188 A question as to who the contracting parties are is not a question as to the terms of the contract within the meaning of this section *Tenlata Subbiah v Gobindarajulu* 18 M I J 1 = 3 M L J 29 = 31 M 15 Where an agreement is inadmissible, oral evidence is barred *Bhan Singh v Halu Das* 49 P R 1908 = 115 P W R 1908, *Samsam v Ram Parshad* 1 O C 365 Section 375 of the Code of Civil Procedure does not require that the agreement or compromise itself shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit or in other words that a note of the terms should be made in the proceedings The agreement or compromise itself that is made out of Court may be in writing or by word of mouth If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise *Baya v On Gaing* 3 L B R 213 Ordinarily when the terms of a contract preceded by proposals, negotiations conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract) but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms *Kolam Reddi v Sennalalant*, 20 M L J 11 = (1916) 2 M W N 33 = 31 M L J 240 = 35 Ind Cas 18 When the terms of contract for payment of interests were reduced to writing and the written instrument was excluded from evidence by reason of the provisions of s 10 B of the Court of Wards Act oral evidence was not admissible under section 91 of the Evidence Act to prove the terms of contract *Ram Bahadur v Dussan*, 17 C L J 399 = 19 Ind Cas 348 The rule of evidence which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received, the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer *Bay Nath v Salig Ram* 16 Ind Cas 33

**Terms of a grant** Under this section the only evidence is to grant when it has been reduced to the form of a document is the document itself unless secondary evidence of its contents is admissible Secondary evidence will be admissible only under the terms of section 65 of the Act and where a document is not proved to have been lost, Cl (C) of s 65 cannot be invoked *Mahomed Khan v Sheo Bhukh*, A I R 1929 Oudh 447 = 6 O W N 859 Under section 85, sub section (2) of the Bengal Tenancy Act a sub lease by a ruyat purporting to create a permanent tenancy is inadmissible for registration and if, notwithstanding it is unregistered it must be deemed as unregistered under section 49 of the Registration Act, such a document is inadmissible in proof of any transaction affecting such property Oral evidence of such grant is also excluded by section 91 of the Evidence Act *Jarip Khan v Dufu Bena*, 16 C L J 144 = 15 Ind Cas 416 = 17 C W N 59

**Documents inadmissible for want of registration—whether secondary evidence is admissible** Where the document containing the transaction is inadmissible for want of registration, no other evidence of the contents of the contract can be received *Nga Shee v Nga Kaung* L B R (1872-1892) 133

The combined operation of s 49 of the Registration Act and section 91 of the Evidence Act is to completely shut out all the terms of the transaction of partition In other words it would prevent the plaintiff from proving that in

that partition certain property was allotted to a particular person. But it would not prevent other evidence being adduced to prove that one of the parties to it died separate from the rest of the family and in separate possession of certain property. An unregistered partition deed can be used to prove the intention of the parties. *Jyoti Bai v Ratan Singh*, 99 Ind Cas 418=A I R 1927 Nag 113. So also the fact whether one of the parties was in possession of the property can be proved by oral evidence and the partition deed can be relied upon to determine the nature of the possession. *Hari Ram v Sheo Karan*, 100 Ind Cas 153, see also *Ahobila Chariar v Thulasiammal*, 39 M L T 276=103 Ind Cas 281=A I R 1927 Mad 830, *Mg Po v Ma E Mai*, 74 Ind Cas 47=1923 Rang 57, *Nand Lal v Dhanul dhan*, 4 Pat L T 657, *Narsingdas v Uttamchand* A I R 1923 Lah 392. Unregistered sale deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence. *Sheo Karan v Churan Lal*, 98 Ind Cas 940=28 P L R 88. Where an agreement or any other transaction is reduced to writing and under it any right to immovable property is affected, such writing ought to be registered. *Sriramsubba v Venkateratnam*, 86 Ind Cas 860=A I R 1925 Mad 945=22 L W 109. A partition can be effected orally, but if parties put it into writing but do not register it even though the properties are worth more than Rs 100 it is wholly inoperative. This section precludes oral evidence being given in such a case. It is true that relationship such as partnership, landlord and tenant, etc., may be proved from documents embodying such relationship, but not so the facts and terms of a partition deed. *Mg Po Leen v Ma E Mai* 1 Bur L J 111. Secondary evidence of a lost unregistered document affecting an interest in an immovable property and therefore required to be registered is not admissible in evidence of any transaction affecting such property. But such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. *Mahaan v Ma Shue* 44 Ind Cas 91.

An unregistered deed of lease cannot be given in evidence in proof of the terms of the lease and its existence excludes all extrinsic evidence on the point. Oral evidence of the execution of such a document is admissible in proof of the oral agreement to lease made before the execution of the document, in order to support a claim for specific performance of the oral agreement. *Chaganlal v Kashiram* 71 Ind Cas 33=1923 Nag 76, see also *Budhan Tel v Madan Mohan* 1923 P 111. Where a lease deed is inadmissible in evidence being unregistered the tenancy can be proved by other evidence as by the doctrine of part performance. *Damodar v Masoodan Singh*, 105 Ind Cas 172. *Tikaram v Sukka*, 111 Ind Cas 358=A I R 1928 Nag 338. Though a lease for agricultural purposes for more than a year can be made orally, still if the lease is in fact reduced to writing it cannot be received under s 17 of the Registration Act unless registered. The document itself being inadmissible, this section shuts out other evidence of the transaction. *Maharaj Jani v Bry Bhikhan*, 3 Pat 349=79 Ind Cas 26=5 Pat L T 511, *Ram Chandra v Tama*, 14 Bom L R 390=36 B 500=15 Ind Cas 830. *Jasoda Nandan v Ram Kuar*, L R 3A 537, *Budhan Tel v Madanmohan* 3 Pat L T 485=68 Ind Cas 653. An unregistered deed of lease is not admissible to prove that the property to which it relates was let for a term of three years nor can oral evidence of the terms of the lease be tendered in such a case. *Nadar v Rank*, 63 Ind Cas 90. The plaintiffs having agreed to convey a house to T received the purchase money executed a sale deed, which was left unregistered, and subsequently brought a suit for possession of the house. On default of the plaintiffs to produce the sale deed secondary evidence was let in to prove the sale, and the suit was dismissed. *Held*, on second appeal, that under section 17 of the Registration Act, the deed was compulsorily registrable and section 49 made it inadmissible to prove the sale. Section 91 of the Evidence Act prohibits the admission of secondary evidence of sale deed. *Gangabaisan v Tukaram*, 5 N L R 70=2 Ind Cas 244. Section 49 of the Registration Act prohibits unregistered lease from being given in evidence whether the suit be for specific performance or for damages, and section 91 of the Evidence Act forbids any other evidence from being given of the agreement. *Streeramulu v Ramaswami*, 33 M L J 596.

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Documents not properly stamped—Admissibility of other evidence.—A *pro note pryabho* otherwise than on demand, bearing a one anna stamp is an insufficiently stamped document and is, under section 34, Stamp Act, inadmissible in evidence for any purpose even on payment of penalty. In such a case a person is not entitled to fall back upon the original consideration of the contract as no other evidence of the terms of the document which is the best evidence in the case is admissible under this section. *O Gorman v Mahtab Singh*, 92 P R 1898, *Chandan Singh v Amritsar Banking Co*, 2 Lah 330=1922 Lah 307=66 Ind Cas 201.

Where a plaintiff is able to prove the loan independently of and without the assistance of a promissory note, which cannot be admitted in evidence for some reason, he can fall back upon a claim for money lent. *Ram Sarup v Jasodha*, 9 A L J 72=34 A 158=13 Ind Cas 138. So a creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law. *Udaram v Laxman* 104 Ind Cas 470=A I R 1927 Nag. 241. Where a person sued to recover money on the basis of a *sarihat* which was not duly stamped, but the *sarihat* appeared to be a mere acknowledgment of loan. Held, that if the plaintiff was able to prove *alunde* by oral evidence that the defendant had the money he was entitled to a decree. *Launjan Chande v Parsotam Chande*, 25 A L J 567=103 Ind Cas 634=A I R 1927 All 503.

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other evidence being given to prove discharge by payment. *Ram Prasad v Nathu Ram*, A I R 1923 Nag 32.

If a creditor has a cause of action for recovery of money for his debt or has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence. *Kashu Prasad v Panna Lal* 74 Ind Cas 359=L R 4 A 377=1923 A 529. A promissory note which is insufficiently stamped if sued upon may give rise to three kinds of transactions. Either the contract may be considered as contained wholly in the promissory note or bill of exchange as in ill (b) to s 91 of the Indian Evidence Act, in which case the plaintiff cannot sue on the promissory note—he can not sue at all, or secondly, the promissory note may be regarded as a conditional payment of the amount of the loan in which case, of course if the promissory note is insufficiently stamped, it is only a worthless piece of paper and the plaintiff may sue on the loan, or thirdly, the promissory note may be passed as security for the loan, in which case, there is no necessity for the plaintiff to sue on the promissory note at all and, whether it is properly stamped or not, he can bring a suit on the loan. *Jacob & Co v Vinnsey*, 29 Bom L R 432=102 Ind Cas 138=A I R 1927 Bom 437. Apart from the promissory note there is always a contract to repay a loan and such a contract can be proved independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. *Dhaneshwar v Ramrup*, 7 Pat 845=111 Ind Cas 482=9 Pat L T 471=A L R, 1928 Pat 426. *Chedu Singh v Jagannath*, 26 A L J 416=108 Ind Cas 912=A I R 1928 All 297, *Nanku Singh v Gurja Bux*, 6 O W N 640=119 Ind Cas 865=A I R 1929 Sind 399, *Ram Sarup v Jasodha Kunwar*, 9 A L J 72=13 Ind Cas 138=34 A 158. But where the money was borrowed simultaneously with the execution of a promissory note by the borrower and it appeared that the note was unstamped. Held that the promissory note could not be sued upon and that it was not a case in which the suit was maintainable on the basis of the original contract either as there was none. *Velata v Mumammal*, 6 Mys L J 157. If a hundi is an embodiment of the whole of the contract between the parties and is not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, other evidence to prove the terms of such contract can not be allowed. But where the hundi embodies only a part of the contract between the parties, it cannot be said that the whole contract is reduced to the form:

of a hundi and the section 91 does not exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone *Kundan v Sahu*, 51 A 530=27 A. L. J 333=116 Ind Cas 293=A. I. R. 1929 All 254 Debt covered by pro-note cannot be proved by independent prior agreement where pro note is inadmissible for want of stamp *P Somnaya v M Venkata subbarayadu* 85 Ind C 380=A. I. R. 1925 Mad 351 If a contract of loan is complete before the pro-note is passed, the plaintiff may sue on the completed contract without the pro-note but if the pro-note contains the contract the suit must be on the pro-note and if that is insufficiently stamped the suit must be dismissed *Lokumal v The Sind Bank* 13 S. L. R. 169=57 Ind Cas 386, *Maung Ky v Ma Ma Gol* 12 Bur. L. T. 137=54 Ind Cas 84 F. B., *Nga Wan v Nga Chet*, U. B. R. 1907, 3rd Qr. Evidence, 5 Where the respondent obtained a decree against the applicant for the recovery of a debt alleged to be due on a promissory note and the note was not proved, but independent evidence of the obligation was admitted, held that the independent evidence of the obligation was admissible *Maung Hlaw v Ngassat*, U. B. R. (1897 1901), Vol. II. 390 Where a plaintiff bases his causes of action on a promissory note, which he alleges had been lost, he cannot prove the contents unless he succeeds in proving the loss of the document apart from the note in which the contract was recorded *Siray Husain v Bulaki Ram*, 5 A. L. J 162=A. W. N. 1903, 91 There seems to be a consensus of rulings to the effect that independent evidence may be given of the original consideration, even when a pro-note has been executed and when for any reason the document is excluded The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be placed on the pro note, and in which the note is merely evidence of, or a collateral security for, an obligation already existing *Mrs L. Ewing v G. White*, U. B. R. (1897 1901) Vol. II, 391 Where money is lent on conditions contained in a promissory note executed and given at the time of the loan, and such note is inadmissible in evidence, being insufficiently stamped the payee is not entitled to set up a case independent of the note *Parsotam v Taley Singh*, 26 A. 178=A. W. N. 1903, 178 Secondary evidence of a document inadmissible under section 34 of the Stamp Act cannot, according to ss 65, 91 of the Evidence Act, be given *Bakshi Ram v Kalka Ram* 42 P. R. 1895 A person who takes a promissory note on account of a pre existing debt may, if the document becomes inadmissible in evidence, sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost or parted with the same But if the original cause of action is the promissory note itself and does not exist independently of it he cannot succeed without the instrument, according to s 91 of the Evidence Act as the instrument is the only contract between the parties *Sheo Das v Kanhaiya Lal* 61 P. R. 1888 Where a promissory note itself is the agreement of loan a plaintiff cannot sue on the original consideration and the promissory note must be proved *Ram Singh v Perumal*, 9 S. L. R. 150=32 Ind Cas 582, *Bally Singh v Bhuguan*, 7 Bur. L. T. 95=23 Ind Cas 975=7 L. B. R. 101

When it is proved that certain hundis were renewed from time to time and were handed over to the drawers who held them at the time of the suit but the last hundis were executed on insufficiently stamped paper and could not be admitted in evidence, held that the plaintiffs could fall back upon the hundis that were given prior to the last renewals, and secondary evidence could be admitted to prove them *Jagan Prasad v Indra Mal* 12 A. L. J 361=36 A. 259=23 Ind Cas 589 Where the contract in case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, Courts cannot resort to inconsistent or consistent implied contracts in such cases, simply because the contract as entered in the promissory note cannot be admitted in evidence *Muthu Sasrugal v Visuanath Panikara*, 14 M. L. T. 520=(1914) M. W. N. 58=26 M. L. J. 19

Any matter is required by law to be reduced to the form of a document Oral evidence can not be substituted for any instrument which the law requires to be in writing, such as records public and judicial documents, official information or examinations, deeds of conveyance of lands, Wills, other than nuncupative, promises to pay the debt of another person, etc, *Taylor* § 399 In all these



**S. 91** cases the law having required that the evidence of the transaction should be in writing no other proof can be substituted for that, so long as the writing exists and is in the power of the party *Ibid* Instances of this class in India are —

(1) Judgments and decrees in civil cases *Vide* Or XX, and Or XXVI of the Civil Procedure Code

(2) Depositions of witnesses in Civil cases, *Vide* Order XVIII of the Civil Procedure Code

(3) Judgments and orders in criminal cases *Vide* §§ 367, 421 of the Criminal Procedure Code

(4) Deposition of witnesses in criminal cases *Cr Procedure Code*, sections 354—362

(5) Examination of an accused person *Cr Pro Code* s 361

(6) Confessions of an accused person *Cr Pro Code* s 364

(7) Lease of immovable property from year to year or for any term exceeding one year *Vide* s 107 of *T P Act* But this does not include an agreement to lease *Nanda v. Sarat*, 5 Ind Cas 562

(8) Deed of mortgage when the principal money secured is one hundred rupees or upwards, other than a mortgage by deposit of title-deeds *Vide* s 59 of the *T P Act*

(9) Gift of immovable property *Vide* s 124 of the *T P Act*

(10) Sale of immovable property of the value of one hundred rupees and upwards *Vide* s 54 of the *T P Act*

(11) Exchange of immovable property of the value of one hundred rupees and upwards *Vide* s 118 of the *T P Act*

(12) Proof of previous conviction or acquittal in criminal cases *Vide* s 511 of the *Criminal Pro Code*

(13) Acknowledgment of debt under s 19 of the *Limitation Act*

(14) Acknowledgment of debt by part payment of debt under s 20 of the *Limitation Act*

(15) Assignment of copy right *Vide* s 5 of the *Copy Right Act*

(16) Agreement without consideration (*Vide* s 25 of the *Contract Act*)

(17) Agreement to refer matters to arbitration (*Vide* *Exception 2* to *Section 28* of the *Contract Act*)

(18) Transfer of actionable claim (*Vide* s 130 of the *T P Act*)

(19) Trust of immovable property (*Vide* s 5 of the *Trusts Act*)

(20) Hindu Wills and Wills under the *Indian Succession Act* generally *Vide* §§ 57, 63 and 66 of the *Indian Succession Act* (XXXIX of 1925)

The examination of witness by a police officer under section 162 *Cr Pro Code* does not come within the class of documents referred to in this section and the police officer can speak to it by going into the witness box *Pitmal v Emperor*, 88 Ind Cas 449=26 *Cr L J* 1137 The principle underlying s 360

(1) of the *Criminal Procedure Code* should be made applicable on the grounds of public policy to the substance of the examination of a complaint on oath if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilised as a basis for a possible perjury in future for it would be unsafe to use against a complainant what on face of it purports to be only a substance and not the full version of his examination But under the present state of the law, it cannot be contended that the substance of the oral examination is inadmissible in evidence under s 91 of the *Evidence Act* in proof of the statement therein contained *Bhagvathi Bai v Emperor*, 89 Ind Cas 713=26 *Cr L J* 1401 Having regard to the provisions of s 154, *Code of Criminal Procedure* and s 91, *Evidence Act*, the only legal proof of the terms of a complaint of a cognizable offence to the police is the written record of the same, excepting where secondary evidence of its contents is admissible It would be most unsafe if in cases under s 211, *Penal Code*, a policeman's report of what a complainant contended could be accepted as sufficient proof of its contents without insisting on the production of the document itself if it were in any way procurable *Queen v Nga* L B R (1872—1892) 572

**Mortgage** When in a suit for redemption of a mortgage the existence of the mortgage was not proved and the plaintiff sought to recover possession on

the strength of his title and the defendant resisted the same on the ground of a contract of sale in his favour. *Held* that the plaintiff could let in evidence to rebut the existence of such a contract. *Held* also that a *pyat paing* which reported an actual sale could not be considered as a document recording the terms of a contract for the purpose of section 91 of the Evidence Act. *Maung Kin v Maung Sun*, 5 Rang 679. Where on the back of a mortgage deed an endorsement of the payment was made and it was also added that the mortgages were extinguished the endorsement requires registration. But oral evidence is admissible to prove the payment of mortgage amount, apart from the endorsement. *Labhu Ram v Saxanar*, 100 Ind Cas 129=A I R 1927 Lah 237. If there is evidence that a formal deed of mortgage was drawn upon a palm leaf then secondary evidence of its contents will be admissible. If however it should transpire that a formal deed was drawn up and executed by signing then secondary evidence will be inadmissible for lack of stamping. *Ma Saw v Maung Ba*, 5 Rang 650. Where A executed two mortgages in favour of B, who had arranged to finance him by getting C to honour his drafts on the guarantee of B and subsequently B transferred the mortgages to C with the consent of A. *Held* on those facts that A could not go behind the recitals in the instrument of transfer and have an account taken as to what was due on the mortgages. *William Aratoon v Bank of Bengal* 31 C W N 179 (P C)=A I R 1926 (P C) 129=1926 M W N 828. Where a mortgage was alleged to be in writing but the same was proved by circumstantial evidence such as recitals in deeds referring to the mortgage extracts from account books and by a transfer of a share of the mortgage. *Held* that the written mortgage not having been proved the circumstantial evidence was not rendered inadmissible by s 91 of the Evidence Act or s. 49 of the Registration Act. *Narsikalyandas v Parshotam* 30 Bom L R 1277=A I R 1928 Bom 434. Where the mortgage deed provided that interest should be paid at one per cent per mensem compoundable yearly and the defendant alleged in a suit on the mortgage that the contract between the parties was that only simple interest should be paid. *Held*, that the evidence in support of the alleged oral agreement was inadmissible under §§ 91 and 92 of the Evidence Act. *Bihari Lal v Abdul Aziz*, 27 A L J 866=119 Ind Cas 92. Where the plaintiff alleged a mortgage and the defendant alleged a sale but no registered document was produced. *Held* that oral evidence was admissible to prove the nature of the transaction. *Maung Po v Ma Le* 3 Bur L J 238=84 Ind Cas 468=A I R 1923 Rang 102. A mortgage which ought to have been by a registered instrument cannot be so proved by other forms of evidence. *Maung Tun v Maung Khan* 2 Rang 441=A I R 1925 Rang 61. In the absence of a document accompanying the title deed in the case of mortgage by deposit of title deeds, it would have been open to the plaintiff to prove orally what was the intention with which the document was deposited and whether it was meant to be considered as a security. But as the defendant executed a document in writing the Court must refer to it in order to ascertain what the contract was. *Chumal v Pital Das* 24 Bom L R 502=68 Ind Cas 1005=A I R 1922 Bom 440. According to section 91 of the Evidence Act the terms of a mortgage can only be proved by the production of the mortgage deed or of secondary evidence of its contents in case it is shown to be lost or destroyed or the opposite party who has the document fails to produce it after notice. *Mi Le Byn v Mi Shue, Mya*, U B R 1907 4th Qr. Evidence 13. *Fateh Singh v Man Singh*, 131 P R 1883. *Gyri v Samandar*, 276 P L R 1913=20 Ind Cas 280.

**Sale** Where property is conveyed by an unregistered sale deed though the document cannot be relied upon for the purpose of establishing title it may be referred to for the purpose of understanding the nature of the contract between the parties and to prove delivery of possession. To such a case this section does not apply. *Keshwar Mahton v Sheonandan*, 10 Pat L T 449=A I R 1929 Pat 620. Section 49 of the Registration Act must be read together with section 17 of that Act and s 91 of the Evidence Act. The section does not preclude an unregistered document, which is required by law to be registered from being given in evidence as to the terms of the contract for sale. *Maung Tu Pe v Maung Sein*, 7 R 414=A I R 1929 Rang 293. This section only prohibits

**S 91.** Evidence of the terms of a disposition of a property and the word "terms" is applicable to both classes of documents mentioned in section 91. Consequently where the existence of a sale is in question and not its terms oral evidence is not inadmissible. *Tara Radavalu v Yellamanda*, 95 Ind Cas 584 = A I R 1936 Mad 872 = (1926) M W N 384. On behalf of the plaintiff a *Lobala* purporting to have been executed by the plaintiff's vendor in defendant's favour in respect of the property in suit valued at Rs 99 but which was not completed and registered was also put in evidence. Held that notwithstanding that the value of the property which the document purported to convey was less than Rs 100, a sale of the property if it was made by a document could only be made by a registered instrument under s 54 of the Transfer of Property Act, but having regard to section 91 of the Evidence Act, it might be used as evidence of the nature and terms of the transaction which fell through to corroborate the plaintiff's story that the defendant negotiated for the purchase of the property from the vendor of the plaintiff who had title to the property. *Brayaballav Akhoy*, 30 Ind Cas 251. Evidence of prior contract of sale is admissible where the sale has failed to take effect for want of registered conveyance. *Ug Mijal v Ma Dun*, 3 Bar L J 78 = 81 Ind Cas 857 = A I R 1921 Rang 214. Where unregistered deed of sale is inadmissible in evidence other evidence of the contract of sale is inadmissible. *Parmeshri v Autar Singh*, 8 Lah L J 173, *Baggu v Tara Singh*, 5 P L R 1919. The plaintiff can rely upon an oral sale accompanied by delivery of possession in a case where a sale deed was executed in evidence thereof for a consideration of a sum less than Rs 100 but not registered. *Sheo Dyal v Raja Muhammad*, 20 O C 33 = 38 Ind Cas 671. When the property sold is less than Rs 100 in value and the sale is effected or completed by delivery of possession, there is no reason why the transaction should not be evidenced by a writing in the terms of a conveyance even though the document is not registered. The document does not confer and is merely evidentiary, but having regard to section 91 of the Evidence Act it may be the only evidence of the nature and terms of the transaction, though that section would not exclude proof of the fact of the delivery of possession. *Shaikh Juman v Mahomed* 21 C W N 1149. An oral evidence to show that the transaction effected by a registered deed, though it purported to be a sale, was really a mortgage is not admissible. *Ma Paik v Ma Nuar Paik* 34 Ind Cas 153 = 9 Bar L T 174. A vendee of immovable property under a registered deed if required to prove his title must do so by the production of the deed or by the foundation for the admission of secondary evidence with regard to it. No oral evidence of that sale can be adduced under section 91 of the Evidence Act. *Safar Ali v Mohesh* 23 C L J 122 = 34 Ind Cas 956. After acknowledging the receipt of consideration in the deed of sale, a vendor is not estopped from showing that he had actually received the consideration stated in the deed. *Puthi v Nand Kishore*, 25 Ind Cas 27.

**Deposition.** Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. *Ganapathi v Sakharayappa* 115 Ind Cas 147 = A I R 1929 Mad 187. But under Order 18, rule 5, C P Code, it is necessary that the deposition of a witness in an appealable case in order to bind him to the statement recorded therein should be read over to him. This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury. Section 91 of the Evidence Act excludes oral evidence of its contents. *Emperor v Nabab Ali* 51 C 236 = 25 Cr L J 1027 = 81 Ind Cas 803, see also *Imam Din v Niamut Ullah*, 1 Lah 361 = 58 Ind Cas 630. *Empress v Maya Deb* 6 C 762 = 8 C L R 292, *Crown v Ali Shue* 1 L B R 268, but see *Elahi Baksha v Emperor* 45 C 825 = 27 C L J 377 = 22 C W N 646 = 45 Ind Cas 258 = 19 Cr L J 498. In ordinary cases a Magistrate trying a criminal charge must take down the evidence and then the record thus made is the only admissible proof of what was said; but in a summary trial the Magistrate need not generally record the evidence and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing they may be proved by the presiding officer or by persons who heard them, in order to establish the fact that they were made.

*Howard v Rustamji*, Rat Un Cr C 334 The accused was charged in the alternative with having given false evidence either before the chief constable in a police investigation or before a Magistrate in a criminal trial. *Held* that the statement made to the chief constable by the accused, and reduced by him to writing, was not admissible in evidence against the accused, the only evidence as to such statement that would be admissible for the purposes of such a case as the present being the oral testimony of the constable, who could however, refresh his memory by referring to the statement reduced by him to writing, and that the oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under this section. *Queen Empress v Bapu Narain*, Rat Un Cr C 401 Under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made under section 80 of the same Act, it is admissible only when it was taken in accordance with law. *Kadir Pakiri v, Emperor*, 18 Cr L J 966=42 Ind Cas 326

**Confession.** The oral confession of his guilt made by an accused before a Magistrate was inadmissible in evidence. *Emperor v Maruti*, 21 Bom L R 1065 One S stated to a Bench of Magistrates that he was willing to compromise a case pending in their Court if the opposite party paid him Rupees nine seven of which were paid to their Peshkar. The Peshkar was sent for and admitted having received Rupees five from S, but when he was prosecuted he denied the receipt of the money. One of the Magistrates was examined and proved the confession. *Held* that the statement of S was not a complaint but a confession of guilt, punishable under s. 161, Penal Code, and should have been recorded like a confession. *Held* further that the statement of the Peshkar being recorded when departmental enquiry was going on was not a matter required by law to be in writing, and section 91 of the Evidence Act had no application. The Magistrate therefore was competent to prove the confession. *Haidar Baza v King Emperor*, 12 A. L. J 306=36 A 222=15 Cr L J 569=25 Ind Cas, 321. Where statements made by an accused person are inadmissible in evidence, secondary evidence of the contents of those statements are inadmissible also under this section. *Queen Empress v Viran*, 9 M 224=2 Weir 125, *Reg v Bu Bala*, 10 B H C 166 The confession of an accused person made to a Magistrate holding an enquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act, and no evidence can be given of the terms of such a confession, except the record, if any made under s. 364, of the Code of Criminal Procedure. *King Emperor v Gulabu*, 11 A. L. J 286=14 Cr. L J 211=19 Ind Cas 307=35 A. 260

**Acknowledgment of debt.** Secondary evidence of the contents of an acknowledgment, used to keep alive a cause of action beyond the ordinary period of limitation, can be given where the original is proved to have been lost or destroyed the effect of paragraph 2 of section 19 of the Limitation Act of 1877 not being absolutely and always to exclude secondary evidence in such a case. Para 2 of the above section belongs to that branch of the law of evidence contained in section 91 of the Evidence Act. *Shambu Nath v Ram Chandra Saha* 12 C 267 Section 19 of the Limitation Act (XV of 1877) says clearly that oral evidence of the contents of an acknowledgment may not be received nor has the Act made any saving of acknowledgments received or given back before the Act came into operation. *Zulmussa v Mohidee*, 12 B 268

**Search list.** A search list is not evidence of the facts stated therein and this section, therefore has no application to it. It is simply a declaration, not on oath or affirmation or subject to cross examination, made by a police officer and the persons present at the search, that certain formalities were observed and certain events took place. Oral evidence may, therefore, be given as to what took place at the time of the search. *Public Prosecutor v Sarabu Chennaya*, 2 Weir 776 This section, presupposes that, where a certain matter is required by law to be reduced to writing the writing is itself evidence of the matter so reduced and the section does not apply if the writing is not evidence of the matter. A search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter. *Public Prosecutor v Sarabu*,

- S. 91.** 33 M 413-8 Ind Cas 809-11 Cr L J 716 The search list prepared under s 103, Criminal Pro Code, is proper evidence of the matters which it should contain, viz, the properties found and the place where they were found *In re Mamunadi*, 2 Weir 17-2 Weir 515 The provisions of this section do not apply to the case of a search list prepared under s 103 of the Criminal Procedure Code *In re Solai Natch*, 8 Ind Cas 178-21 M L J 281-11 Cr L J 576

Application of section 91 to an oral statement made by a witness to a Police officer "In discussing the non applicability of section 91 of the Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary I shall show that the distinction between the oral statement made by the witness and entry in the diary is a distinction in substance. The argument that the use of an oral statement made by a witness to an investigating police officer when reduced to the form of a document is inadmissible by section 91 of the Evidence Act, is not free from flaws. The argument in the first place cannot establish that section 162 of the present Code of Criminal Procedure prohibits the use of oral statements made by a witness to the investigating officer and that is the point in question. In the second place section 91 of the Indian Evidence Act has no application to an oral statement made to an investigating police officer, for it is not a matter which is required by law to be reduced to the form of document (see *Reg v. Uttam Chand*, 11 B H C R 120 and *Empress v. Kali Churn* 8 C 154). In the third place the entry in the diary of the police officer, correctly speaking is not the statement either oral or written by the witness for any legal purpose. It is by habit of thought induced in those who have constantly to deal with the depositions of witnesses that the entry in diary is mistaken for the statement made by a witness by the application of the true 'statement to such entry in ordinary parlance. This call for some elucidation. No one can doubt that speech and writing are two distinct objective entities perceptible by two different senses. Speech is heard by the ear and writing is seen by the eye. A deaf person is not a possible witness to a speech nor a blind person to a writing. Both are means for expressing ideas. A may state orally that a certain event happened or may write that it happened, but in order to constitute the oral or the written statement of A to be his act in the eye of the law it must have been made with a consenting mind as his own juristic act. A making an oral statement within the hearing of B, C and D. The oral statement of it under section 8 illustration (c) of the Evidence Act, is a fact, and by section 60 of that Act it must be proved by direct evidence which is the statement by B, C and D that they heard A say so and so. Now suppose that when A made that oral statement, B took it down in writing. Can B be allowed when called as a witness to prove the oral statement made by A, within his hearing, to produce his own writing and to depose that this is the statement which A made? In my opinion he cannot be allowed to do so to prove the oral statement made to him by A. It can make no difference if B happens to be an investigating police officer. If he is called to prove an oral statement made to him by A, his direct testimony will be the statement that he heard A say so and so, and his entry in the diary will in no way be regarded as the act of A which is sought to be proved. The case of statement made by a witness before a Court is different. His oral statement is required by law to be reduced to the form of a document, and that writing which in fact is the act of presiding officer of the Court is, the consequence of the consent of the witness, deemed to represent his own oral statement and his own juristic act' Per Karamat Husain J in *Rustam v. King Emperor*, 7 A L J 468 (481)

**Exception 1** A presumption of due appointment to office is raised by showing that the person is acting notoriously as such officer. This strictly involves two elements 'first the acting secondly the notoriety or openness of such action, or, as sometimes put, the repute of being such officer. But often the first element alone is mentioned as essential *Greenl Ev* § 38(a). This presumption is based on the maxim *omnia præsumentur rite esse acta*, that is that will be presumed to have been done which ought to have been done. The general rule is that where the contents of a writing are desired to be proved, the

writing itself must be produced, or its absence is sufficiently accounted for before other evidence of its contents can be admitted *Greenl Ev* § 563(a) For similar reason, and from the strong presumption arising, from the undisturbed exercise of a public office, that the appointment to it is valid it is not in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office until the contrary appears, and it is not material how the question arises, whether in a civil or criminal case nor whether the officer is or is not a party to the record. *R v Gordon*, 2 Leach Cr C 581, *Berryman v Wise*, 4 T R 366, *McGabe v Alston* 2 M & W 206, 211 *Radford v McIntosh* 3 F R 632 *Cross v Kaye* 6 T R 663 *James v Brown* 5 B & Ald 243, *R v Jones*, 2 Campb 131, *R v Verelst*, 3 Campb 432, *Greenl Ev* § 563(g)

**Exception 2** Copy of the Will and the copy of the grant of administration together form the probate *Delany v Rahamat Ali* 32 C 710 (713)=9 C W N cccxiii section 2(f) of the Indian succession Act XXXIX of 1925 An executor can not assert or rely on his right in any Court without showing that he has previously established it in the Probate Division the usual proof of which is, the production of a copy of the Will by which he is appointed, certified under the seal of the Court. This is usually called the probate or letters testamentary. In other words nothing but the probate (or letters of administration with the Will annexed, when no executor is therein appointed, or the appointment of executors), or other proof tantamount thereto of the admission of the Will in the Probate Division is legal evidence of the Will in any question respecting personality *William on Executor 11th Ed* 206 It can only be granted to an executor *Behary Lal v Jango Mohan*, 4 C 1 Probate of a Will can not be refused on the ground simply that it is what lawyers in ancient time called "inofficious" *Rammal v Kalkoli* 22 C W N 315=43 Ind Cas 208 Under this exception the contents of a Will of which a probate has been granted may be proved by the probate Section 227 of the Indian Succession Act (XXXIX of 1925) lays down that probate of a Will when granted, establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such But this section does not apply to the Wills of Muhammadans as well as to the Wills of the Hindus, Buddhists, Sikhs or Jains who do not belong to the Provinces of Bengal, Assam or Bihar and Orissa or who do not live within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay The property vests in the executor by virtue of the Will not of the probate The Will gives property to the executor, the grant of probate is the method which the law specially provides for establishing the Will So long as the probate exists it is effectual for that purpose *Kamal Lochan v Ashuttam* 4 C 360 (362) The law on the subject is the same as in England *In re Eliezel Joshua Abraham*, 21 B 139 Probate is an evidentiary ceremony *Smith v Miller*, 1 T R 180 *Ganapathi Iyer v Suamali* 36 M 375 *Mathradas v Goculdas* 10 B 168 *Jehangeer v Kulibai*, 27 B 281 *Bai Hinkar v Mani Lal* 12 B 621 The probate is only conclusive as to the appointment of executors and the validity of the contents of the Will *Hormusjee v Bai Dhanabai* 12 B 161 *Whitaker v Hume* 7 H L C 124, *Braynath v Anandamoyee* 8 B L R O C 208 *Balgangadhar v Sakurbari*, 26 B 762 *Chintaman v Ram Chandra* 31 B 589 The probate shows that it was duly executed by the executor *Bhabangana v Horendra* 17 C W N 145=16 Ind Cas 48

**Explanation I** The learning on this head says Mr Norton 'must be sought for in works on contract etc Suffice it here to say that a contract or grant or disposition may as well as be executed by several as by one document Like the familiar in case of a contract the terms of which are to be gathered from a series of letters passing between the parties *Allen v Bennett* 1 Taunt 169 *Jarlson v Low* 1 Binn 9 *Phillimore v Barry* 1 Camp 513 *Warner v Wellington* 25 L J Ch 662 *Bellamy v Defruham*, 15 Ch D 481 It will suffice if the contract can be made out in all its terms from any writings of the party provided such writings contain internal evidence connecting them together *Spiridon v Colterell* 20 Ch D 90, *Taylor* § 1026 An envelope of

**S 91** a letter in which the name of one of the parties is written is sufficiently connected with the letter *Peace v Gairnes*, (1897) 1 Q B 698, *Taylor* § 1026. It is sufficient if the contract can be plainly made out, in all its terms, from any writings of the party, or even from his correspondence. But it shall be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence. *Boydell v Drummond*, 11 East 112, *Greenle v* § 268 *Cox v Middleton* 23 L J Ch 618, *Ridgway v Whorton*, 24 L J Ch 46 *Caddell v Skiamore*, 3 Jur N S 1185.

**Telegrams** "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings. If there be any difference it results from the fact that messages are first written by the sender and are again written by the operator at the other end of the line thus causing the inquiry which is the original. The original message, whatever it may be, must be produced it being the best evidence and in case of its loss or of inability to produce it from any other cause the next best evidence the nature of the case will admit of, must be furnished. If there was a copy of the message existing it should be produced, if not then the contents of the message should be shown by parol testimony. *Scott and Jarnagin on Telegraphs* § 340 341. Many cases are cited in the above work from which it is held that in all controversies between the sender of the message, and the company the original message is the one left at the office by the party sending it but where a man sends a proposition to another man by telegraph and gets a reply accepting the offer the original message so far as binding the acceptor is concerned is the copy delivered to him at the other end. The message as communicated to the acceptor and his reply as delivered to the operator to be returned are what would govern in construing the contract, provided both parties voluntarily and of their own accord sent their messages by the telegraph and thus adopted the company as their agent. So when a contract is made by telegraph which must be in writing by the Statute of Frauds, if the parties authorize their agents either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph that constitutes a contract in writing under the Statute of Frauds because each party authorizes his agent, the company or the company's operator to write for him and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal and by his express direction with a steel pen in inch long attached to an ordinary penholder or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by use of the finger resting upon the pen nor does it make any difference that in one case common record ink is used while in the other case a more subtle fluid known as electricity, performs the office. We know that by the admirable system regulating the government of the telegraphic companies, the original despatch is preserved and may be at all times procured for the proper purposes. The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy. If the despatch is sought to be used in evidence the original must be proved and its execution proved precisely as any other instrument or its absence accounted for in the same mode before the copy can be received. *Houley v Whipple*, 48 N H 488, *Burr Jones* § 53. By the decided weight of authority the question whether the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words upon the question for whom the telegraph company is agent. If there is but a single communication the despatch as delivered at the place of destination is the best evidence. In such case the telegraph company is the sender's agent but if the message were sent in response to a request by letter to telegraph a reply it appears to us that the company would be the receiver's agent and the despatch as handed for transmission the original. And generally in controversies arising between sender and the receiver when the company can be considered the agent of the sender of the message the message received at the place of destination is to be deemed the original. *Durlee v Vericent C Ry Co* 29 Vt 127, *Burr Jones* § 210. In proving a contract by telegram the best evidence is the telegram containing the offer as received

at the point of destination and the despatch containing the acceptance as delivered for transmission *Durr Jones* § 210 S 91

**Broker's books and bought and sold notes** A broker when he closes a negotiation, as the common agent of both parties usually enters it in his business books and gives to each party a copy of the entry or note or memorandum of the transaction. The note which he gives to the seller is called the sold note and that which he gives to the buyer is called the bought note. *Vide Benjamin on Sales* § 276. A broker is often spoken of as a middle man or negotiator between two parties (*Story on Agency* p. 29, *Fairlie v Fenton* L. R. 5 Ex. p. 169). He frequently acts as agent of each. "The engagement of a broker is like that of a proxy, a factor agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in execution of what every one of them entrusts him with" (*Domah, Bk. I, tit. 17, cited in Story on Agency, p. 29, in notes*). But primarily he is deemed merely the agent of the party by whom he is originally employed. To make the others liable to pay him brokerage, it must be shown that he has been employed by such party to act for him, or that in the contract such party has agreed to pay the brokerage. *The Municipal Corporation of Bombay v Cuenji*, 20 B. 124, 129, 130. The bought and sold notes ordinarily does not constitute a contract of sale, but only serve the purpose of recording it. *Durga v Bhayan Lal*, 31 C. 611 (P. C.) = 8 C. W. N. 489 = 15 M. L. J. 106, *Jadu Rai v Bhabatarn*, 17 C. 173 (177). In *Junna Das v Srinath Roy*, 17 C. 176 (N.). *Mr Justice Trevelyan* said: "If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible but if they intend only to reduce into writing a portion of the terms of the contract, then I think they are entitled to give parol evidence of the terms which they did not intend to reduce into writing. Now when bought and sold notes are exchanged, is it usually intended that these notes should constitute the whole of the contract? I think not. *Mr Benjamin* in his work on the law of 'sales' lays down as the result of the authorities that the bought and sold notes do not constitute the contract. I think this proposition is clearly borne out by the case of *Senwright v Archibald*, 20 L. J. Q. B. 529 = 17 Q. B. 115. [See especially the decision of *Mr Justice Erle* in that case], and also by the case of *Porton v Crofts* 33 L. J. C. P. 189. In both these cases the distinction between making a contract and a memorandum showing that the contract has been made is pointed out. The result of those cases is that broker's notes as a memorandum may satisfy the Statute of Frauds, but not exclude parol evidence. In *Clarton v Shau*, 9 B. L. R. 252 *Su Richard Couch*, and *Marlby* treated the bought and sold notes, not as the contract but as information sent by the broker to his principals. Of course bought and sold notes unobjected to may be evidence of contract but they do not necessarily constitute the whole contract. Although they differ, *Clarton v Shau* *supra* shows that parol evidence of the contract may be given." In *Jadu Rai v Bhubatarn* 17 C. 173, 195 *Pigot J* said: "It may perhaps be a question looking at the case of *Cowie v Ramfrey* 3 M. I. A. 448 which governs this Court whether in Calcutta bought and sold notes do not by custom presumably constitute the contract unless this be disproved once the authority of the broker is established." See also *Kalli v Coramally* 14 B. 102. But where there is a variance between a bought and sold notes there is no contract. *Greson v Ruck* 4 Q. B. 737 (747). Where bought and sold notes have been falsified the plaintiff is entitled to fall back on his original contract. *Durga Prosad v Bhayan Ali* 31 C. 614 (P. C.) = 8 C. W. N. 489. For a fuller discussion as regards the evidentiary value of bought and sold notes *Vide* 8 C. W. N. cccxxx and cccxxviii.

A contract intended to have been entered into between the plaintiff and the defendant, was entered by a mistake on the part of the broker, in the sold notes having been made between a third person and the defendant. In a suit brought by the plaintiff on the contract, oral evidence was given to show that the contract was really made between the plaintiff and the defendant. The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and



**S 91.** gave judgment in favour of the plaintiff contingent on the opinion of the High Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held* that there was a contract between the parties for breach of which the plaintiff could sue for damages. *Mahomed Bhow v Chatterjee* 20 C 851. In *th Sham v Shole Moolna Chetty* 1 C W N 13=27C 403 (P C) a contract was made through a broker for the purchase of a quantity of paddy at a settled price. The bought and sold notes were in English. The sold note was signed by the Respondent and taken with the bought note to the Appellant *th Sham Shole* who before signing wrote thereon in Chinese 'yellow rice will not be accepted will not accept if wet'. The respondent did not know Chinese and did not notice the addition until after dispute. The paddy supplied contained a considerable quantity of yellow rice. The appellant took delivery of part but refused the rest. The respondent sued for breach of contract and damages. *Held* that the contract was not concluded until the bought and sold notes had been signed. They were the only evidence of the contract. If the one did not agree with the other a contract would not be proved by them and therefore the suit failed. See also *Meghway v Durga* 51 C 57.

**Explanation II.** Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart each counterpart being executed by one or some of the parties only each counterpart is primary evidence as against the parties executing it. *Section 62 Expt I.* As an instance of this explanation take bills of exchange, of which there are usually executed called the 1st 2nd, and 3rd of exchange and bills of lading which are usually in duplicate, often in triplicate. *Rule illustration (c) Art Et 269.*

**Explanation III.** The facts referred to in this section are the terms (a) of a contract (b) of grant (c) of a disposition of property. If therefore a document relates exclusively to something other than any of these facts as for instance if it be a simple receipt illustration (e) or if though it be the written contract etc., (*Steepully v Ioharam* 7 W R C R 381) it relates to some other independent fact as for instance the payment of the consideration money [Illustration (d)] the fact of payment may be proved orally as well as by writing. A receipt is thus frequently proved, notwithstanding it is also evidenced by writing. *Smith v Young & Co* 439 *Sayer v Glassop*, 2 Ex 409. *Evans v Morgan* 2 C & J 453. *Rambert v Cohen* 4 Esp 213. A receipt is not a contract or a grant or disposition of property within the meaning of this section and it does not preclude other evidence of payment. *Sardar Singh v Iqbal Narain* 80 Ind Cas 57. The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other evidence being given to prove discharge by payment. *Ramprosad v Nathu* 68 Ind Cas 494. Where a document relied on as evidencing a prior mortgage by deposit of title deeds is held to constitute a simple mortgage by itself and being unregistered, to be inadmissible in evidence under section 49 of the Registration Act other evidence is admissible to prove the terms of the equitable mortgage and section 91 of the Evidence Act is no bar to the reception of such evidence. *Ethumalai v Balakrishna* 44 M 965=41 M L J 297. An occupancy tenant relinquished his holding and signed a memorandum of the relinquishment in a book kept by the landholder showing transactions between him and the tenant. The memorandum was not stamped or registered. *Held* that the relinquishment was not required by this section to be in writing but might be made verbally or in writing or by action, and so might be proved *abundantly* even if the memorandum were inadmissible in evidence, as to which the Court expressed no opinion. *Rai Singh v Vansittart* A W N 1889 3. A receipt for rent is not a contract and the law does not require it to be in writing. *Moh v Madho* 1 C P L R 16. The consideration for a contract is not one of its terms within the meaning of this section. *Provat Chandra v Cherao Ali* 1 C L T 320=33 C 607=11 C W N 62. Where a receipt for earnest money is not admissible in evidence payment of the amount can be proved *abundantly* by virtue of section 91 of the Evidence Act. *Chhutan v Moh Chand* 18 P R 1917=28 P W R 1917, see also *Sharaf Ali v Jogandar* 98 P R 1916.

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Existence is distinguished from terms of contracts, or of a grant or any other disposition of property. Extrinsic evidence is sometimes admissible to prove the existence as distinguished from the terms of a transaction or relationship which has been reduced into writing. Thus the existence of a partnership may be shown without producing the deed (*Iderson v Clay*, 1 Stork R 405), *Phip Et* 405. This section provides that when the terms of a contract, grant or disposition of property, have been reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract grant or disposition of property except the document itself. This however refers only to the method of proof of the terms of contract grant or disposition of property, it does not exclude other proof of the transaction itself and thus being so, the Courts are entitled to consider the other evidence adduced in proof of the transaction. *Mt Mahduman v Sayed Altaf Hussain A I R 1922 P 222*. The fact of a partition having taken place may be proved by oral evidence, although the deed embodying the terms of the partition can not be proved for want of registration *Bishan Das v Ram Singh* 34 P L R (Lab) 43=61 Ind C's 399. Where the original deed of relinquishment or surrender where there has been a writing is not produced section 91 of the Evidence Act unless as in the case of documents required to be in writing only bars proof of the terms of the surrender except by secondary evidence within the meaning of section 68 but not proof of the matter itself *Touler v Secretary of State* 13 L W 230=61 Ind C's 812. Where an unregistered deed of lease is rejected as being inadmissible in proof of a lease there is nothing to prevent the evidence of witnesses who speak to the existence of the relationship of landlord and tenant between the parties being admitted. A tenancy can be proved without proving the lease if there be any *Aago v Tukaram*, 49 Ind C's 843. Where the plaintiff in a suit for rent showed that the suit was not based exclusively on a *Kabuliyat* executed by the defendant, but also on the collection of rent, and the plaintiff did not produce the *Kabuliyat*, but filed collection papers to prove that the defendant was holding at the rate claimed by the plaintiff in the year collection papers were admissible in evidence as they were not put in proof of the terms of the *Kabuliyat* and section 91 of the evidence Act did not apply. A rate is presumed to hold in any year at the same rent as in the preceding year *Gouri Sankar v Minnat Ali*, 2 Ind C's 636. Though an unregistered deed cannot be looked at as to establish the sale of immoveable property it can be looked at as evidence of the payment of money *Sambu Hanmantia v Nana Narayan*, 13 Bom L R 967=35 B 438. Although the terms of the partition deed can not be proved by parol evidence, still it can be proved by oral evidence that the properties claimed by the plaintiff as the joint family property are separate or joint properties *Chhotu Lal v Mahalore* 19 Bom L R 322=41 B 466=40 Ind C's 83. It is doubtful whether the 'terms of a contract' include the date of the contract *Ma Hla v Maung Shue* 9 Bur L T 250. The mere fact that the parties signed the award would not constitute it a deed or partition. Every case must be decided upon its own facts and the real question is whether a document in question is a true award of arbitrators or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape payment of stamp duty. Under section 91 Evidence Act the only evidence that can be tendered of the terms of a document would be the document itself, but there is nothing in that section to prevent plaintiffs from proving *alundi* that a partition took place between S and D though of course plaintiffs could not be entitled to give secondary evidence of the details of such partition *Sukh Dial v Mani Ram* 29 P R 1915=27 Ind C's 489=29 P L R 1916.

**Public documents** Public documents are in general given no exclusive authority by law as instruments of evidence. Thus an entry of marriage (*Fians v Morgan* 2 C & J 453 *R v Wilson* 3 F & T 119) or of the nationality of a ship (*R v Seferg* I R 1 C C R 264) in a public register or the certificate of the registration of a company (*Agricultural Cattle Co v Fitzgerald* 16 Q B 432, *R v Langton* 2 Q B D 296) *Phip Et* p 509. The fact of birth, baptism marriage, death or burial may be proved by parol testimony, "though a narrative or memorandum of the events may have been entered in registers which the law required to be kept." The reason for the above is that

**S 92** the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but can not exclude other evidence, though its non production may afford ground for scrutinizing such evidence with more than ordinary care *Juandas v Frampt*, 7 B H C R 45 p 63 *Evan v Morgan*, 2 C & J 453, *R v Alison*, R & R 190, *Lady Lamerick v Lord Lamerick*, 32 L J P & M 22, *Taylor* Vol I 5th Ed 413

**92** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms

*Proviso (1)*—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [\*want or failure] of consideration, or mistake in fact or law

*Proviso (2)*—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document

*Proviso (3)*—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved

*Proviso (4)*—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents

*Proviso (5)*—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract

*Proviso (6)*—Any fact may be proved which shows in what manner the language of a document is related to existing facts

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The words 'want or failure' were substituted for the words "want of failure" by s. 8 of the Indian Evidence Act Amendment Act, 1872 (18 of 1872)

## Illustrations

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(a) A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1000 on the first March, 1873. The fact that at the same time an oral agreement was made that the money should not be paid till the thirty first March cannot be proved.

(c) An estate called "the Rumpore" estate is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) A enters into a written contract with B to work certain mines the property of B upon certain terms. A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words 'Bought of A a horse for Rs. 500'. B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written—'Rooms Rs. 200 a month'. A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

**Principle.** The principle underlying this section is the same as that underlying section 91. The process of embodying the terms of a jural act in a single memorial may be termed the Integration of the act, *i. e.*, its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts in their former and incoherent shape, have no longer any jural effect: they are replaced by a single embodiment of the act. In other words when a jural act is embodied in a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act. *Higmore* § 2425. So there is a general rule, sometimes spoken of as the "oral evidence rule", which declares evidence, the effect of which is to vary the terms of a written instrument, or to change cut down or alter the effect thereof, to be inadmissible. *McKelvey v. Evans* § 293. The rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral testimony, and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements. Written contracts presume deliberation upon the part of the contracting parties, and it is natural that they should be treated with careful consideration by the Courts, and with a disinclination to disturb the condition of matters as embodied in them by the act of the parties. The general rule, therefore, precludes the introduction of testimony to show that the parties meant other than they have said in the

**S 92** writing itself. But it sometimes happens that writings are procured to be executed by fraud, or do not contain all the agreements between the parties, having been used only to cover certain matters, while others are left to oral understanding, or there may be other circumstances which make it unsafe to confine the parties strictly to writings made between them. In such cases the Courts have admitted oral testimony, not for the purpose of varying the terms of the written instrument itself, but for the purpose of proving facts which affect the standing of the parties with respect to the writings. These cases are usually treated as exceptions to the general rule, though not strictly such. *See Kebley's Evidence* § 291. The rule is ancient. Lord Bacon said "The law will not couple and mingle matters of specialty which is of the higher account, with matter of averment which is of inferior account in law" (*Bacon's Maxims*, Re. 23). "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory." *Countess of Rutland's Case* 5 Coke, 27 b.

**Scope of the section.** When the terms of a contract grant or other disposition of property have been reduced to writing by the parties, it is to be considered as containing all those terms and therefore there can be between the parties and their representatives, or successors in interests, no evidence of the terms of the contract grant or other disposition of property, other than the contents of the writing. The same rule is applicable where any matter required by law to be reduced to the form of a document has been so reduced. (Idea section 91.) In *Pickering v Dowson*, 4 Hunt 779, 786 *Gibbs J.* said "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness and afterwards we agree in writing for the purchase of the horse that it shortens or corrects the representations and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case." So "where the whole matter passes in prose all that passes may some times be taken together as forming parcel of the contract. But if the contract be in the end reduced into writing nothing which is not found in the writing can be considered as a part of the contract. Per *Abbott C J.* in *Kain v Old* 2 B. & C. 627 634 see also per *Parke B.* in *Knight v Barber*, 16 M. & W. 66, section 91 *supra*. It is a most important rule says *Lord Blackburn* in *Angell v Duke* 32 L. J. Rep N S 320 that where there is a contract in writing it should not be added to it the written contract is intended to be the record of all the terms agreed upon between the parties. Where there is a collateral contract the written contract does not contain the whole of the terms. *Wigmore* § 2425. In this connection it should be observed that it is not a rule of evidence because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact. It is a rule of substantive law because it deals with the question where and in what sources and materials are to be found the terms of a juristic act. In the next place this rule has no necessary relation to any rule of law requiring acts to be done with a particular formality such as writing. *Wigmore* § 2425.

The rule relied on by the plaintiff's only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement. Per *Pollock C B.* in *Harris v Pickett*, 4 H. & N. 1, 7 "The rule is perfectly clear" said *Lord Thelwall* that where there is a deed in writing, it will admit of no contract that is not part of the deed. *Inham v Child* 1 Bro. C. C. 92. So "where two parties enter into a contract and put it into single writing, that writing determines the terms of the bargain. Per *Martin B.* in *Langton v Higgins*, 4 H. & N. 401 403 see also *Eden v Blake* 13 M. & W. 614 (618), *Brown v Byron* 3 E. & B. 703.

The admissibility of oral evidence to vary the terms of a written document etc. is not governed by the English Law but by this Act and hence, in order that oral evidence may be admissible it must come under one or other of the provisions of this section. *Harok Chand v Bishwan Chunder* 8 C. W. N. 101.

The language of this section is says *Mr. Field* "not quite free from ambiguity the words 'No evidence of any oral agreement or statement shall be admitted as

between the parties to any such instrument, etc. correspond with and have clear reference to the words 'contract, grant or other disposition of property' in the beginning of the section, but their application to any matter required by law to be reduced to the form of a document is not so evident. If the matter required by law to be reduced to writing be a deposition, for example, evidence of an oral statement appears to be admissible for the purpose of contradicting the writing in cases other than those included in the provisos that follow' *Field L. 7th Ed* 271. But according to *Mr Justice Woodroffe* there is no such contradiction. Section 91 deals with three classes of documents namely (1) contract, grant, or any other disposition of property the terms of which have been reduced to the form of a document, (2) contract, grant or any other disposition of property, the terms of which are required by law to be reduced to the form of a document and (3) any other matters such as deposition of witness confessions etc., which are required by law to be reduced to the form of a document. So the reduction of an act to a writing, so as to bring it under section 91 may be made as well for an unilateral act (i.e. an act involving a single party only) as for a bilateral act (i.e. an act involving two or more parties). Section 92 unlike s 91 deals only with those matters which are either contracts, grant or other disposition of properties (i.e. bilateral acts) which have been reduced to the form of a document by the parties as well as those bilateral acts which the law requires to be reduced to the form of a contract. Therefore these acts or matters must be contracts grants or other disposition of property. So this section does not include such matters which the law requires to be reduced to the form of a document which are not contracts grants or other disposition of property. *Woodroffe L. 8th Ed* 611. The deposition of a witness does not fall within this section and oral evidence is admissible to contradict the deposition so recorded. The presumption raised by section 80 is only a rebuttable one. *Field L. 7th Ed* 271, *Woodroffe L. p* 611. Section 92 is also not applicable to unilateral acts of private persons.

Parol evidence of a verbal transaction is not excluded by the fact that a writing was made concerning or relating to it, unless such writing was in fact the transaction itself, and not merely a note or memorandum of it, or portion of the transaction. *Coal Cas Ev* 340. In *Allen v Pink*, 4 M & M 140 *Lord Abinger C B* said. 'The general principle is quite true that if there has been a parol agreement, which is afterwards reduced by the parties into writing that writing alone must be looked to ascertain the terms of the contract, but the principle does not apply here, there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant, the contract is first concluded by parol and afterwards the paper is drawn up which appears to have been meant merely as a memorandum of the transaction or an informal receipt for the money, not as containing the terms of the contract itself'. This section does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the terms of the document. *Abdulla v Maung Ne* 119 Ind Cas 738 = A I R 1929 Rang 240. While ordinarily oral evidence would be excluded by a written document by virtue of section 92 of the Indian Evidence Act or any law for the time being in force, yet in case where the *Delian Agriculturists' Relief Act* applies that bar ceases to operate and the Court can make enquiries, the bar of statutory prohibition no longer existing because of section 10 A of that Act. *Dada v Bihari* 29 Bom L R 1419 = 105 Ind Cas 751 = A I R 1927 Bom 627. This section merely prescribes a rule of evidence. It does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. *Munna v Aaram* 107 Ind Cas 638 See also *Bygnath v Haju Valley*, 26 Bom L R 787 = 45 M L J 339 (P C). In a suit on promissory note, the defendant can prove a separate oral agreement that a condition precedent to the attaching of any obligation to the contract evidenced by the promissory note was that there should not be any obligation attaching under it unless there was a final balance of account on certain transactions against the defendant which he failed to pay. *Bhogi v Afshori*, 50 A 754 = 26 A L J 696.

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The terms of a registered instrument cannot be contradicted or varied by any unregistered writing, where the contract regulating the rights of the parties is in a registered document, that registered document must bind and govern those rights until varied by another registered document or by a judicial decision. *Shiba Prasad v. Smarendra* 11 Ind Cas 131. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract contained in the registered mortgaged bond was split up. *Im Boman v. Smit Kumar* 25 C L J 21-11 C 162=21 C W N 740. Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money. *Daul Ram v. Lala Ram* 15 A L J 257=9 A 300. Where a partition deed was silent as to certain paddy belonging to the family which was subsequently sought to be divided. Held that oral evidence was admissible under the provisions of section 92 cl (2) of the Indian Evidence Act to show that in fact the paddy had not been divided by the partition deed. *Dhaisami Raddiar v. Raja Gopala*, 1 L W 329-34 Ind Cas 712. The law in India generally is a codified law, and so far as the substantive law is concerned the codes are exhaustive, not only as to the rules to be followed but also as to the extent of the discretion vested in the Courts. There is little analogy between the status of this codified law and the position occupied by the common law of England, and Courts of India are not justified in relaxing or avoiding the statute law in the same way as Courts of Equity in England deal with the rules of common law. The effect of section 92 is to exclude evidence of every kind adduced to prove an oral agreement of which proof is forbidden by the section including the circumstantial evidence derived from the acts and conduct of the parties to the instrument in question whereas oral evidence of mortgage is put forward whether it be to wholly supplant or merely to supplement the terms of a written sale, clearly there is a contradiction of or an addition to the written evidence of the transaction, and that is sufficient to bring s 92 into operation. The word contradict in this section must be given its ordinary meaning and therefore the distinct opinion drawn by Messrs *Imur Ali and Woodroffe* viz that we cannot vary add to or subtract from the written evidence of the terms of a transaction but we may wholly contradict it by proof of an entirely different contemporaneous oral agreement is not sound. *Gujarmal v. Sitaram* 3 N L R 19.

**Integration of bilateral documents.** The mere circumstance that some writing has been made by parties for the better recollection of the terms of their transaction does not itself make that writing the sole memorial of the transaction even to the extent covered by the writing. There may have been no integration at all in spite of the written notes, i.e. no attempt to make the writing embody the transaction or any part of it but merely to furnish an aid to the writer's recollection or a written admission for the other party's satisfaction. The essential idea remains for it that the writing is something distinct from the transaction itself. *Higmore* § 2429. *Dahson v. Styal* 4 Esp 163, *Hansbottom v. Timbridge* 2 M & S 434. *Doe v. Cartwright* 3 B & Ald 526. *Allen v. Poul* 4 M & W 140, *R v. Hargrave* 2 A & E 114. When the parties during their negotiations reach a final agreement but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to ascertain and enforce their terms for the subsequent reduction to a memorial was a separable condition and leaves the prior agreement valid until supplanted. *Higmore* § 2429. So a writing which is merely a memorandum referring to an oral agreement between the parties does not preclude the parties from showing the full contract as orally agreed upon. If the document is merely a memorandum and it does not appear that it was intended to contain all the terms of the agreement between the parties, parol evidence as to the agreement is admissible. The fact that a writing exists does not shut out oral testimony unless it appears that the writing was intended to embody the terms of the agreement and speak for the parties. *McKeeley's Li* § 297.

**Partial integration, General test for applying the Rule, Collateral agreement.** The most usual controversy arises in case of partial integration,

i. e., where a certain part of a transaction has been embodied in a single writing but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied but not to the remainder. It is of course incorrect to a time that what was not so embodied was in truth a part of the same transaction; it may have been a totally distinct transaction merely coinciding in time. For example a buyer at an interview with a promoter, who comes from a distant city and compresses all their affairs into a short interview may within the same half hour in articles of incorporation authorize an overdraft, sign a mortgage and join in a committee's report to stockholders. Or a purchaser of land negotiating with a broker may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent to sell another piece. In such instances the transactions are so clearly distinct that each one if integrated will certainly be embodied in writing, wholly distinct from the others and regardless of whether the others are reduced to writing at all, and no controversy can plausibly arise. But in those instances in which a negotiation concerns one general subject—such as the purchase of a single lot of land having buildings on it—and yet several more or less separable features of bargain, the valuation between the writing and the whole bargain is usually difficult to ascertain and forms a perpetually recurring controversy. To say that the question whether the parties intended to embody 'the whole of the transaction' or only a part is therefore hardly correct because by hypothesis that the writing does represent the whole what is finally done on the subject covered by it and because to assume that the subject not covered was a 'part' of the transaction covered would be inconsistent and would involve holding that the writing, which embodies the transaction does not embody that part of it. More correctly, the enquiry is whether the writing was intended to cover a certain subject of negotiation, for if it was not, then the writing does not embody the transaction on that subject and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect parts of the same transaction and therefore if reduced to writing at all they must be governed by the same writing. In searching for a general test for this enquiry three propositions at least are capable of being generally laid down. (1) whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto. In this respect the contrast is between voluntary integration and integration by law. Here the parties are not obliged to embody their transaction in a single document yet they may if they choose. Hence it becomes merely a question whether they have intended to do so. (2) This intent must be sought where always intent must be sought namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered we must compare the writing and the negotiations before we can determine whether they were in fact covered. (3) In deciding upon this intent the chief and most satisfactory index for the Judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in writing. If it is mentioned covered or dealt with in the writing, then presumably the writing was meant to represent all of the transactions on that element, if it is not then probably the writing was not intended to embody that element of the negotiation. *Wigmore* § 2436. In *Webb v. Plummer*, 2 B. & Ald. 716, 750, *Batby* J said: "where there is a written agreement between the parties it is naturally to be expected that it will contain all the terms of their bargain. But if it is entirely silent as to the terms of gutting, it may let in the custom of the country as to that particular. If however, it specifies any of those terms, we must then go by the letter alone." *Dulson v. Zimna* 10 C. B. 602, 610. Where the writing covers only part of the transactions between the parties and there are oral agreements relating to the same subject, such agreements may be shown. If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions



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The terms of a registered instrument cannot be contradicted or varied by any unregistered writing, where the contract regulating the rights of the parties is in a registered document that registered document must bind and govern those rights until varied by another registered document or by a judicial decision. *Shiba Prasad v Samarendra* 11 Ind Cas 131. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract contained in the registered mortgaged bond was split up. *Ram Barmian v Sant Kumar* 21 C L J 24 11 C 162=21 C W N 710. Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money. *Laid Ram v Pita Ram* 15 A L J 257=39 A 300. Where a partition deed was silent as to certain paddy belonging to the family which was subsequently sought to be divided. Held that oral evidence was admissible under the provisions of section 92 cl (2) of the Indian Evidence Act to show that in fact the paddy had not been divided by the partition deed. *Duraisami J. J. J. v Raja Gopala*, 4 L W 329=31 Ind Cas 712. The law in India generally is a codified law, and so far as the objective law is concerned the codes are exhaustive, not only as to the rules to be followed but also as to the extent of the direction yielded in the Courts. There is little analogy between the status of this codified law and the position occupied by the common law of England and Courts of India are not justified in relying on or avoiding the statute law in the same way as Courts of Equity in England deal with the rules of common law. The effect of section 92 is to exclude evidence of every kind adduced to prove an oral agreement of which proof is forbidden by the section including the circumstantial evidence derived from the acts and conduct of the parties to the instrument in question whereas oral evidence of mortgage is put forward whether it be to wholly supplant or merely to supplement the terms of a written sale, clearly there is a contradiction of or in addition to the written evidence of the transaction, and that is sufficient to bring s 92 into operation. The word 'contradict' in this section must be given its ordinary meaning and therefore the distinction drawn by Messrs *Amir Ali* and *Woodroffe*, *ii*, that we cannot vary add to or subtract from the written evidence of the terms of a transaction but we may wholly contradict it by proof of an entirely different contemporaneous oral agreement is not sound. *Gujamal v Sitaram* 3 N L R 19.

**Integration of bilateral documents.** The mere circumstance that some writing has been made by parties for the better recollection of the terms of their transaction does not itself make that writing the sole memorial of the transaction even to the extent covered by the writing. There may have been no integration at all in spite of the written notes i.e. no attempt to make the writing embody the transaction or any part of it but merely to furnish an aid to the writer's recollection or a written admission for the other party's satisfaction. The essential idea remains for it that the writing is something distinct from the transaction itself. *Higmore* § 2429. *Dulson v Stool*, 1 Esp 163. *Lambottom v Timbridge* 2 M & S 434, *Doe v Cartwright* 3 B & Ald 326. *Allen v Paul* 4 M & W 140. *R v Wangle*, 2 A & E 514. When the parties during their negotiations reach a final agreement but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to a certain and enforce their terms for the subsequent reduction to a memorial was a separable condition and leaves the prior agreement valid until supplanted. *Higmore* § 2429. So a writing which is merely a memorandum referring to an oral agreement between the parties does not preclude the parties from showing the full contract as orally agreed upon. If the document is merely a memorandum and it does not appear that it was intended to contain all the terms of the agreement between the parties, oral evidence as to the agreement is admissible. The fact that a writing exists does not shut out oral testimony unless it appears that the writing was intended to embody the terms of the agreement and speak for the parties. *McKelvey's Li* § 297.

**Partial integration.** General test for applying the Rule, Collateral agreement. The most usual controversy arises in cases of partial integration,

where a certain part of a transaction has been embodied in a single writing but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied but not to the remainder. It is of course incorrect to assume that what was not so embodied was in truth a part of the same transaction; it may have been a totally distinct transaction, merely coinciding in time. For example a banker at an interview with a promoter, who comes from a distant city and compresses all their affairs into a short interview may within the same half hour sign articles of incorporation, authorize an overdraft, sign a mortgage and join in a committee's report to stockholders. Or a purchaser of land negotiating with a broker may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent to sell another piece. In such instances the transactions are so clearly distinct that each one if integrated will certainly be embodied in writing, wholly distinct from the others and regardless of whether the others are reduced to writing at all, and no controversy can plausibly arise. But in those instances in which a negotiation concerns one general subject—such as the purchase of a single lot of land having buildings on it—and yet several more or less separable features of the bargain, the valuation between the writing and the whole bargain is usually difficult to ascertain, and forms a perpetually recurring controversy. To say that the question is whether the parties intended to embody 'the whole of the transaction' or only a part is therefore hardly correct, because by hypothesis that the writing does represent the whole what was finally done on the subject covered by it, and because to assume that the subject not covered was a 'part' of the transaction covered would be inconsistent and would involve holding that the writing which embodies the transaction does not embody that part of it. More correctly the enquiry is whether the writing was intended to cover a certain subject of negotiation for if it was not, then the writing does not embody the transaction on that subject and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction and therefore if reduced to writing at all they must be governed by the same writing. In searching for a general test for this enquiry, three propositions at least are capable of being generally laid down: (1) whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto. In this respect the contrast is between voluntary integration and integration by law. Here the parties are not obliged to embody their transaction in a single document, yet they may if they choose. Hence it becomes merely a question whether they have intended to do so. (2) This intent must be sought where always intent must be sought namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered we must compare the writing and the negotiations before we can determine whether they were in fact covered. (3) In deciding upon this intent the chief and most satisfactory index for the Judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in writing. If it is mentioned covered or dealt with in the writing, then presumably the writing was meant to represent all of the transactions on that element; if it is not then probably the writing was not intended to embody that element of the negotiation. *Wigmore* § 2130. In *Webb v Plummer*, 2 B & Ald 716, 750 *Balyby* I said 'where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain. But if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If however, it specifies any of those terms, we must then go by the letter alone.' *Dulson v Zimma* 10 C B 602, 610. Where the writing covers only part of the transactions between the parties, and there are oral agreements relating to the same subject such agreements may be shown. If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as

**S. 92** do not purport to be covered by the document but which supplement or complete it may be proved. Here again, there is no varying of the terms of a written instrument. It is only because it has been sought to stretch the rule to cover cases that it never was intended to cover that we have this apparent exception to it. Any oral agreement relating to the document itself and made subsequent to it may be shown. Such an agreement as only modifying or explaining or in some way affecting the written agreement is thus admissible. *Coe v Hobbs* 72 N Y 111, *Kennebec v Portland Co* 6 Gray (Mass) 204, *Cross v Lord Nugent* 5 Binn & Adol 67, *Levy v Ashleigh*, 73 Law L Ch 122. There are some peculiarities in the application of this principle. They arise out of other rules of law not connected with evidence, which prevent the introduction of that which so far as the rules of evidence go, would be admissible. Thus it is held though the authorities are conflicting that where a contract is such as the intent of fraud requires to be in writing no collateral oral agreement will be allowed to be shown. *Hill v Blak* 97 N Y 216. It is also held that the collateral oral agreement must have an independent consideration in order to be admissible. *Coe v Hobbs* 72 N Y 111. As a principle of the law of contracts it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it and the above decisions are therefore strictly logical. *McKelvey's Et* § 296.

**Parol evidence rule**—Nature of. Notwithstanding the phraseology generally employed in the cases relating to what is called the 'Parol Evidence rule' it seems to be true that very few of them illustrate anything in the law of evidence. They are mainly concerned with questions about the legal effect and implications, in point of substantive law, of requiring, or agreeing upon a writing, or with the principles governing the construction of documents or the like, and not with the merely evidential quality or operation of extrinsic facts, or any rules of law relating to these. As when it is said that parol evidence is not admissible to add to a Will a form of saying that you cannot give effect to anything as being part of a Will, which has the required form of a Will. The reason that the evidence is not admissible is that the fact which it tends to prove is of no importance. Whenever the substantive law does give effect to such a fact as in the case of fraud, then of course it may be proved. But the rules of evidence are in no respect different in two cases—the difference is that a ground of action or defence is open in one case which is not open in the other. *Thayer Cas Et* 2nd Ed 820.

**As between the parties to such instruments.** The parties to the suit were not the parties to the note and contract. The rule which excludes parol testimony for the purpose of varying or contradicting a written contract, is combined to the parties to the contract, or other privies, and does not prevent strangers thereto from introducing such evidence. *1 Grant Ec* § 279, *McMaster v Ins Co of North America*, 55 N Y 222, *Elderly v Emerson* 23 N Y 555, *Badger v Jones*, 12 Pick 371. 'The plaintiff was not a party to the note and contract between Wilson and the defendant and was therefore not bound by it. If it speaks falsely, or fails to speak the whole truth he is not to blame, and can show the truth even by the testimony of one of the parties who is legally bound by its terms. We think that the evidence was properly admitted.' *Per Gardner J in Kellogg v Thompson* 142 Mass 76. So the rule under consideration is applied only in suits between the parties to instrument as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who if it were otherwise might be prejudiced by things recited in the writings, contrary to the truth through the ignorance, carelessness, or fraud of parties and who therefore ought not to be precluded from proving the truth however contradictory to the written statements of others. *Grant Ec* § 279, *Holt v Collier* L R 16 Ch D 718, *Chemical E L Co v Howard* 150 Mass 496, *Taylor* § 1149, *R v Cheadle* 3 B & Ald 833. The exception in favour of strangers is to present a fraudulent operation of the instrument upon their rights. *Taylor v Baldwin*, 10 Borch 582. There are many cases which hold that in a controversy between a party to an instrument and a

stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arises between the parties to an instrument which they have made the written memorial of their agreement. *Venable v Thompson*, 11 Ala 147, *Paull v Young* 51 Ala 518 *Burr Jones* § 449. It is to be observed however that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument. *Woodcock v Robinson*, 148 Pa 503 *Broune Parol Et* § 28 *Burr Jones* § 450. So that where one, although not a party to the instrument, bases his claim upon it and seeks to render it effective in his favour as against the other party to the action by enforcing a right originating in the relation established by it, or which is founded upon it, the parol evidence rule applies. *Schultz v Plantinton* 141 Ill 116 *Sayre v Burdick* 17 Minn 367. The language of the section in term applies and applies alone as between the parties or their representatives in interest. Accordingly whatever evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions. *Per Lord Shun in Maung Kyin v Ma Shue La* 22 C W N 257 (262)=45 C 320, *Malaly v Ko Po Nyein* 114 Ind Cis 676=A I R 1929 R 86, *Annada v Hanqobind* 27 C W N 496 *Ganga v Pandoo* 4 N L R 115 see also *Jagat Mohun v Ralhal*, 2 C L J 338 *Bageshri v Panchoo* 28 A 473=3 A L J 314 *Chhullo v Jugga Singh*, 8 Ind Cis 501. This section excludes evidence of any oral agreement for the purpose of contradicting varying adding to or subtracting from the terms of a contract which have been reduced to the form of a document 'as between the parties to any such instrument or their representatives in interest'. In the case of 10 A 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between themselves. Possibly this was what was intended in enacting section 92, but it may be observed that what the section itself says is not the parties to the instrument which *prima facie* would seem to include every one concerned. *Polai Gungayah v Kmail* U B R (1892-1896) Vol II 354 *Mul Chaud v Vidho* 10 A 421. See also *Tara Honce v Shubnath* 6 W R 191, *Kenmora v Simnasa* 11 M 213. This section is applicable to an instrument 'as between the parties to any such instrument or their representatives in interest' but it does not prevent the proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. *Maung Kyin v Ma Shue La* (1911) 2 M W N 30=14 C L J 276 (P C)=13 Bom L R 797=1 A L J 1184.

Section 92 limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto or their privies. It leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different from what it purports to be. *Saboo v Naulal Sing*, 104 Ind Cas 796 *Mahomed Sultan Mohudeen v Anthul* 101 Ind Cas 653=52 M L J 557, *Ma Ma v Maung Aung* 111 Ind Cas 832=A I R 1928 Rang 214 *Mahomed Ishag v Fakemunnessa*, A I R 1928 Oudh 172=5 O W N 825, *Maung Thein v Maung Pyn* 5 Rang 836=108 Ind Cas 734=A I R 1928 Rang 61 *Narra v Koppanti* (1925) M W N 214=87 Ind Cas 216=A I R 1925 Mad 775=49 M L J 250 *Hiraji v Ishnu*, 1923 Bom 129 *Bhullan v Khushi*, 21 A L J 932 *Jairan v Jayaram* 20 A L J 777, *Sulimras v Kalipada* 45 Ind Cas 13. If a father is one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. The other members of the joint family cannot dispute the transaction effected by the manager of the family on the ground that the transaction was really a different one from what it appears to be on the face of the document. *Pamachandra v Kashunath*, 27 Bom I R 211=87 Ind Cas 801=A I R 1925 Bom 238. This section applies to all parties to a document whether on the one side or the other. It is not open to parties to a document on the same side to prove as against each other, that a document to which they are parties, though purporting to be a sale is in reality a mortgage.

**S. 92.** *Young Fun v Young Po*, 77 Ind Cas 923, see also *Mulchand v Malho Ram*, 10 A 121 *Shamshad v Ahmed Wali* 2 A 337, *Young Fun v Young Po*, 1 Bur L J 160 *Khyb v Angra* 51 Ind Cas 902, *Bishnu v Dulloo* 21 O C 16 = 17 Ind Cas 193 *Mehta v Mahan* 13 Ind Cas 667 126 P L R 1912 = 67 P R 1912 Where the transaction is truly *benami*, i.e. where the purchaser has been affected in the name of the nominal purchaser, the contract would be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser there being no writing between them, no difficulty can arise under this section in proving oral agreement *Lazimbur Keshar* 18 Bom L R 144 = 33 Ind Cas 390, see also *Pathammal v Syed Kalam* 27 M 329

Where a party to a written contract in title to a criminal proceeding against another party to such contract which involves consideration and determination of what the contract between the parties was no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting or varying, adding to or subtracting from the terms of the written contract, unless such oral evidence is admissible under one or more of the provisions to section 97 of the Evidence Act. *Huntoll J* Section 92 of the Evidence Act should not be held to apply to criminal proceedings in that the real prosecutor in all such proceedings is the King Emperor who is the head of the State. To hold otherwise would lead to anomalies and injustice. *Tuomey J* where there is a private prosecutor he also must be regarded as a party for the purpose of the section. *Reid v So Hwang* 8 Ind Cas 952 = 11 Cr L J 738 = 3 Bur L 1 124

**Terms of any contract, grant or disposition of property.** It is settled law that the statement of the consideration for a transfer of property is not one of the terms of the grant within the meaning of section 92 of the Evidence Act when the instrument is executed by the transfer only. *Challanatala v Dina bhaitani* (1912) 1 M W N 164 This section is not confined to disposition instruments but applies to decrees also and to oral agreements between a decree holder and a judgment debtor. *Rajah of Kalahasti v Venu Venkatadri*, 70 M 897 = (1927) M W N 640 = 105 Ind Cas 248 = A I R 1927 Mad 911 = 3 M I J 33, *Lachin Das v Ramnath* 61 Ind Cas 990 44 A 258 = 20 A L J 65 but see *Ananda Prinja v Bijoy Krishna*, 91 Ind Cas 70 = A I R 1926 Cal 613 Where a party executed an agreement to work land on lease and in subsequent suit for rent pleaded that the agreement had been executed in pursuance of a *benami* transfer to protect the land for creditors. Held that oral evidence was admissible to show that there was no grant or disposition at all in law. *Abdul v Bilal*, 5 Bur L J 2 = 95 Ind Cas 512 = A I R 1926 Rang 94 Oral evidence is not admissible to vary the terms of registered mortgaged deed. *Jellmall v Saroon* 58 Ind Cas 30 An instrument varying the absolute terms of a sale deed can not be allowed to affect the sale deed unless it is registered and no oral evidence can be allowed to vary the terms of the deed of sale. *Pandu v Ganesh Das* 1 C P L R 81 Ordinarily a solemn and formal deed can not be set aside by parol evidence directly contradicting its terms except in special cases where fraud mistake suspense and other grants familiar to Courts of Equity are alleged. *Hessels Trustee & Co v Olhoy Chunder W R* (1804) 15, *James Fischer v Robert Fischer*, 6 M H C 593 *Kailash v Palnapha* L B L (1872-1892) 588 *Unedmal v Dam* 2 B 517 *Shaulh Mahomet v Kahu Prosad* 21 W R 320 *Khyroollah v Mayced* 11 W R 307 *Madh v Chandra v Gangadhar* 3 B L R A C 83 = 11 W R 450 *Cohen v Baitul Bengal* 2 A 598 *Mussamut Ram v Baboo Bihari*, 8 W R 339 Where a reversionary lease was granted on the 14th July 1895 to take effect from a future date viz. 1911 and the lease as well as the counterpart were duly registered and during the negotiation for the lease it was agreed between the lessor and the lessee that in consideration of the lease the latter should pay the former Rs. 500 annually for a period which was to expire before the lease takes effect. Held that the terms of the agreement is in no way inconsistent with the effect of the lease and as such it was not affected by s. 92 of the Indian Evidence Act. *Sufaramani v Aruna Chalam*, 25 M 603 (P C) = 29 I A 139 But where an agreement alleged by a party is actually contrary to a deed of gift, it is barred

under this section *Safdar v Albar*, 5 Ind Cas 497, see also *Kishomal v Vishandas*, 9 Ind Cas 299, see also *Coussy v Buzojji* 12 B 335 Oral evidence is not admissible to prove that a document which in terms is in out and out gift was really meant to be *donatio mortis Causa* *Benode Kishore v Ashutosh* 16 C W N 666 No oral agreement is admissible under section 92 of the Evidence Act for the purpose of altering the rent fixed by a registered lease *Bishambar v Lalhatullah* 2 Ind Cas 160

Any matter required by law to be reduced to the form of a document Evidence of oral agreement can not be given for the purpose of subtracting from the terms of a contract reduced to the form of a document *Lachman Singh v Mahan Patel* 4 C P L R 151 Under no circumstances is evidence admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of Civil Court Section 92 of the Evidence Act forbids the reception of such evidence whether the decree be treated as a document embodying the terms of a disposition of property or not *Karan Singh v Kanhaiyalal* 6 N L R 123=8 Ind Cas 279 A registered instrument of mortgage takes effect against any oral agreement relating to the hypothecated property and no parol agreement which purports to modify terms of the contract of mortgage by reducing the amount recoverable thereunder by taking away the right of sale, and by providing for the payment of the reduced debt by a sale of other property, can be proved, in view of the provisions of section 92 of the Act *Maharaj Singh v Hajah Bahant Singh* 3 A I J 271=11 A W N 1906 117=28 A 508 Where a mortgage decree was sold free from incumbrance and a portion of the purchased money was left in deposit with the purchaser the latter giving a receipt embodying the real contract between the parties with regard to the deposit held evidence could not be offered of a separate agreement empowering the purchaser to pay off an attaching creditor of the decree But evidence might be let in, to prove the object for which the deposit was made to explain the meaning of a sentence in the receipt *Khetulas v Shub Narain* 9 C W N 178 Oral evidence is not admissible between the parties to a deed which purports to be a mortgage or their representative in interest to prove that it was intended to be a sale *Zafaruddin v Alamuddin*, 11 O C 95 Where parties enter into a sale deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced, in the absence of fraud misrepresentation or failure of consideration, etc rendering the sale invalid *Sangra v Ramappa*, 11 Bom L R 1130=34 B 59=4 Ind Cas 257 This section applies only to cases where the whole of the terms of the contract have been intended to be reduced into writing This is shown by the words adding to which appear in that section If it were not for those words the Court should have been inclined to hold that section 92 only excluded evidence contradicting, varying adding to or subtracting from such of the terms of a contract as has been reduced into writing If the parties have intended to reduce all the terms of a contract into writing then no parol evidence is admissible but if they intended only to reduce into writing, a portion of the terms of the contract they are entitled to give parol evidence of the terms which they did not intend to reduce into writing *Jumna Dass v Srinath Roy* 17 C 173 Note 1 for the purpose of showing that a document does not and was not intended, to contain the whole of the contract between the parties, oral evidence may be given When evidence so given conclusively establishes that the whole contract is contained in the document or documents no evidence will be admitted to contradict, vary add to or subtract from its terms That being so to ascertain the intention of the parties all the Court has to do is to construe the written document or documents *Cohen v Sutherland* 17 C 909, *Biharee Lal v Kamnee*, 14 W R 309 Notwithstanding a paper writing which purports to be a contract may be produced it is still competent to the Court to find upon sufficient evidence that the writing is not really the contract And the right of groundless defence does not affect the rule itself *Ruthna Mudaliyar v Arumuga*, 7 M H C R 189 Broker's notes, as a memorandum may satisfy the Statute of Frauds, but not exclude parol evidence Bought and sold note unobjected to may be evidence of the contract but they do not necessarily constitute the whole contract.

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*Jamadar v. Srinath Roy* 17 C 173 N, see also *Clifton Shaw*, 9 B L R 24, 18 W R 111. The parties in a deed of usufructuary mortgage did not intend that any account should be taken at the time of redemption. The arbitrator found the income of the property and settled the amount to be paid thereon out of the income of Government demands and interests on the security. The remainder which was a fixed sum was to be annually paid to the mortgagor as surplus profit. The mortgages collected from the tenants sums which were realisable under a subsequent statute only by the proprietor mortgagor. The mortgages alleged that, by a subsequent agreement between the parties, the mortgagor was placed in possession of a part of the mortgage premises, the income whereof was sufficient to wipe out the annual debt. Held that as the arrangement was not in supersession or even variation of the mortgage, oral evidence was admissible to prove the transaction. *Jamaratar v. Fulsai Prasad* 11 C 1 J 207. The liability undertaken by the drawer and the acceptor of a bill of exchange is in no sense a joint liability, but they contract severally in different ways and are subject to different conditions. Neither the provisions of section 132 of the Contract Act nor those of section 92 of the Evidence Act preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. *Pargose v. The Bank of Bengal* 3 C 171.

Extrinsic evidence to control document is inadmissible. Evidence of oral agreement between the parties to a written and registered document distinctly adding to its terms another term which had been antecedently agreed to as one of the substantive parts of the whole contract witnessed by that instrument, is inadmissible under section 92 of the Evidence Act. *Shamlal v. Bannu Begum* A W N 1886, 10. The rule is that evidence of contemporaneous oral agreement to vary or to contradict a written instrument cannot be admitted. *Lalhu Ram v. Amu Khan* 14 P R 1889. No evidence of any oral agreement is, under this section, admissible to vary the terms of a *Kolati* which is on the face of it an unconditional sale. *Ramdoolal v. Radha Aata* 22 W R 167. When the plaintiffs brought a suit to recover damages for breach of contract, the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent. Held that such evidence was not admissible under section 92 of the Evidence Act. *Jadu Rai v. Bhubotaran* 17 C 173. The executants of bond as principals are not competent to adduce oral evidence of their being mere sureties. *Aga Saing v. Nga Lu Aung* U B R 1906, Evidence 13. When the terms of a bond are clear and unambiguous, parol evidence is not admissible to show that it was an assignment of future rent. *Hindoy v. Joyram*, 4 C L J 102. The oral evidence of intention is not inadmissible for the purpose of construing a deed or a certifying the intention of the parties. *Lalushen v. Legge* 2 Bom J R 523=22 A 149=4 C W N 153. Oral evidence to show that one of the executants of a bond signed it only as a surety was not admissible. *Mamun Ko v. U Keyaw* 5 Rang 168=103 Ind Cis 79=A I R 1927 Rang 199. Where a gift of the remainder which was invalid under the *Mahomedan Law* was sought to be validated by evidence as to the consent of the donee of the life estate to such an arrangement. Held that such oral evidence was clearly inadmissible. *Nabooma v. Khedra Hussain*, 1 L F 40 M 68=108 Ind C 637=A I R 1923 Mad 613. Contemporaneous oral agreement not to charge compound interest though bond may stipulate therefor and the fact of simple interest only being relied as a fact cannot entitle a party to vary effect of written contract. *Abdul Aziz v. Amanmul* A I R 192, Cal 276. Evidence of conduct of parties is inadmissible to contradict an unambiguous grant. *Gopal v. Ramadhar Singh*, A I R 1925 Pat 228 see also *Kesho v. Thakur* A I R 1925 Lah 180. A relinquishment of hereditary rights conferred on a person under a registered instrument can only be effected by another registered deed and oral evidence of a surrender or agreement to relinquish is barred by this section. *Narbadji v. Gopal*, 87 Ind C 39=A I R 192, Nag 459. An oral agreement by which the vendee was to return a portion of the consideration till he got possession of the entire property is inconsistent with the terms of the

registered sale deed and consequently under s 92 of the Evidence Act it cannot be proved *Mittlesum v Iyer v Dharmaraja*, 94 Ind Cis 302=(1926) M W N 209=A I R 1926 Mad 495 An oral agreement to relinquish the interest on the mortgage money is inadmissible in evidence under section 92 of the Evidence Act *Jauala Prasad v Mohan Lal*, 24 A L J 839=97 Ind Cis 162=A I R 1926 All 693 Where the consideration for a sale is entered in the sale deed at a certain figure, an oral agreement between the parties raising the consideration amount and leaving the sum with the vendee for litigation purposes is inadmissible in evidence under section 92 *Kallu Mal v Partab Singh* 92 Ind Cis 787=A I R 1926 Oudh 301 In a suit on the basis of a registered mortgage deed it is not open to the executants to set up and prove an agreement that the rate of interest to be charged was lower than that agreed upon *Sukh Lal v Muari*, 95 Ind Cis 1019=A I R 1926 Oudh 273 Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one *Jogendra Nath v Khoda Bux*, 1924 CIL 380 *Abdul Aziz v Amanmal*, 78 Ind Cis 742=1925 Cal 276 An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship Held that oral evidence cannot be let in to show that there was an agreement to deliver goods within a fixed time *Firm of Juanyo v Firm of Mathabai*, A I R 1924 Sind 127

In a suit on a joint and several promissory note payable on demand executed by A and B A can give oral evidence to prove that he joined in the loan only as security for B But he can not give oral evidence to prove contemporaneous oral agreement with plaintiffs, whereby plaintiffs agreed to recover the amount under the note in the first instance from B *Central Bank of India v Nadi Shah* A I R Sind 13 Where a person has executed a bond as the principal debtor he cannot adduce oral evidence to prove that he was merely a guarantor *Maung Ky v Pesia Kurpan*, 1 Bur, L J 157=70 Ind Cis 872=1923 Rang 15 (2) If a document is formally drawn up, it would not be open to the parties to adduce in proof a contemporaneous oral agreement *Moti Biswas v Hari pada Pal*, 1923 CIL 402=70 Ind Cis 790 *Tukaram v Jogannath* 1923 Bom 236 Evidence to show that the price for a sale of property is less than the amount recited in the sale deed is inadmissible *Lala Singh v Basdo* 71 Ind Cis 768=1923 A 129 Where the plaintiff contended that the two documents which formed the foundation of the suit formed a completed contract, whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a rival of a formal document evidencing the contract held oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and inadmissible *Harchand v Gorind* 41 M L J 608=47 B 335=28 C W N 73=50 I A 25=37 C L J 440=(1923) P C 47 Where the terms of an agreement to sell land are clear and formal and a certain sum of money was to be paid in four months evidence of an oral agreement cannot be let in to prove that a big portion of the money was to be paid on the day subsequent to the arrangement to sell *Khemchand v Dhalonal*, 15 S L R 180=67 Ind Cis 19 Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible *Lachmi Das v Babalali*, 44 A 28=20 A L J 65=69 Ind Cis 990 It is not permissible to a person who wishes to impeach a written document of sale to assume there must have been an oral agreement to reconvey and to ask the Court to believe that there must have been a representation made by the obligee to the obligor that the document would never be enforced as a sale deed but treated as a mortgage *Banadhor v Lalbhai* 24 Bom L R 239=66 Ind Cis 865 Where a promisor is sought to be enforced according to its tenor it is not open to the defendants, to let in evidence an alleged agreement that the promisor was executed only as security against an apprehended loss and that the accounts had to be looked into at a later date so as to ascertain the rights of the parties before the promisor could be enforced *Sri Ram v Firm of Gobha Ram*, 41 A 321=20 A L J 315=L R 3 A 453=67 Ind Cis 513 Oral evidence is not admissible for converting an absolute unconditional promise into a conditional defeasible one *Subbaya v Kuppasamy*, 41 M L J 541=1921 M W N 636 Where a promissory note is payable on demand an oral agreement



**S 92** provided for a different mode of satisfaction is inadmissible in evidence. *Thiruv. National Bank v. Mahanadil* 63 Ind. Cas. 718. Oral evidence of a surrender of a registered lease is inadmissible under this section. *Gowd Chandra v. Hiremath* 63 Ind. Cas. 483. A party to what is on the face of it a sale deed cannot in a suit with a person who is no party to the deed produce evidence to show that the deed was really a deed of gift. *Asfaq Hussain v. Syed Varan* 22 O. C. 222=57 Ind. Cas. 901. An instrument bond provided that on default in payment of two consecutive instalments the creditor would be entitled to sue for the whole amount due under the bond. Held that a subsequent oral undertaking on the part of the creditor to waive his right to enforce the payment of the whole amount in two successive defaults was a variation of the contract and was therefore inadmissible in evidence under section 92 of the Evidence Act. *Huralnarayan v. Lim Chandra* 17 Ind. Cas. 913. Oral evidence is not admissible to show that a transaction which is *ex facie* a sale is really a mortgage, except to prove fraud on the part of the party taking benefit under the deed. *Venkatachellam v. My. Govt.* 15 Ind. Cas. 860. See also *Gannu v. Bhatu* 12 Bom. 512=46 Ind. Cas. 661. Under this section oral evidence is inadmissible in evidence to prove that the interest mentioned in a promissory note is not payable either by custom or by agreement. *M. I. Pillay v. I. I. Maistry* 10 Bur. L. 1212. In a suit on a promissory note the question whether the defendant executant of the note signed it by way of security for others cannot be tried or determined except so far as it affects the question of consideration. *Durgacharan v. Lalji Varan*, 17 Ind. Cas. 917. In a suit to recover possession of the properties conveyed under a sale deed evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sums which one had promised to pay to the creditors of the other party. Held that such oral evidence is clearly inadmissible to prove that a different mode of operation was intended from the one which the executants stated and which they intended that the documents should state. *Venkata Subba v. Subramana*, (1917) M. W. N. 671=6 I. W. 703. To introduce condition into a document that is on its face absolute and unconditional is substantially to vary its terms within the meaning of section 92 Evidence Act. *Ranga Kodu v. Kuthari Ammal* (1917) M. W. N. 634. Oral evidence is not admissible to modify the significance of clear and positive terms of a *Kobuliya*. *Basiruddin v. Afsanenesa* 21 C. W. N. 860=10 Ind. Cas. 833. See also *Jagjivan v. Nathji* 18 Bom. L. 1, 90=32 Ind. Cas. 938. Extrinsic evidence of intention of the parties is inadmissible to construe a document. *Seetharamappa v. Suryadevara* 35 Ind. Cas. 111. Under this section no oral evidence is admissible to show that the interest mentioned in a promissory note was not payable nor could any usage or custom repugnant to or inconsistent with the express terms of the promissory note be proved. *Muthu Pratlappa v. Tundlu*, 36 Ind. Cas. 957. Where an endorsement on a promissory note contains no recital of consideration though such endorsement implies a contract between the endorser and the endorsee similar to the contract in the note, it cannot amount to a contract in writing that the promise is to be performed in consideration of the receipt of the full consideration for the note. Therefore oral evidence is admissible to prove what the real consideration for the endorsement was. *Aiyathurai v. Siva Rama Iyengar* 32 Ind. Cas. 233. Where a promissory note recites that cash was received for the execution of the note and it is sought to prove that the consideration was different from what was recited, held that such evidence is admissible and does not offend this section. *Nara Iyengar v. Dattaswami Reddy*, (1916) M. W. N. 174=31 M. I. J. 96=3 I. W. 589=3, Ind. Cas. 301.

Where a mortgage bond provided that each one of the mortgagors was liable for the whole amount of the mortgage, a subsequent verbal agreement providing that each individual mortgagor was to be liable only for his proportionate share of the amount being one materially varying the terms of the bond cannot be proved in evidence. Section 92 of the Evidence Act bars proof of such agreement. *Krishna Chavan v. Sanat Kumar*, 34 Ind. Cas. 609. Where the *muqaddima* by the tenant fixes the rent it is not open to him to let in oral evidence to prove that the contract has been raised, and any length of payment of a lesser rent will not help the tenant. *Maharaja of Bobbili v. Appala Naidu*,

(1916) M W N 139=32 Ind Cis 703 Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest the plaintiff is entitled only to 6 per cent interest under section 80 Negotiable Instruments Act Evidence of a contemporaneous oral agreement to pay interest at 12 per cent is not admissible under section 92 Evidence Act *Banwar Lal v Jagonath*, 1 Pat L J 71=35 Ind Cis 431 Where a subsequent arrangement, which is not one for satisfaction of the terms of the deed of mortgage, but is in direct contradiction of the terms of the deed of mortgage, it cannot be proved by oral evidence under this section *Muhammad Husain v Muhammad Ashgor* 19 O C 328 It is not open to a party to a written contract to prove a contract the terms of which are clearly inconsistent with the terms of the written contract *Banarashi v Lulla Mal*, 29 Ind Cis 950

Where a promissory note executed by defendants 1 and 2 contained an unconditional undertaking by the 2nd defendant to pay evidence is not admissible to prove that the 2nd defendant's liability was in reality to be conditional on the 1st defendant's failure to pay because it is clearly a variation of the contract between the parties and section 92 of the Evidence Act clearly forbids evidence of such a variation being adduced In India no equitable exceptions to the provisions of section 92 of the Evidence Act can be allowed *Namasamma v Ramasami* 24 M L T, 91=13 M L J 104=(1913) M W N 336=18 Ind Cis 696 Where the subject matter of an appeal is compromised by the parties by means of a written agreement, which recited that all matters in dispute was adjusted it is not open to any of the parties to tender oral evidence of a separate agreement not comprised in the written deed of compromise, on the ground that it related to a matter on which the compromise was silent *Rajaram Rao v Pulgram Ram* 17 Ind Cis 43 Where the area of demised land which was described in the lease as lying within certain specified boundaries was stated therein as 400 highas extrinsic evidence was not admissible to show that there was not the stated area within the specified boundaries Extrinsic evidence as to the negotiations which led up to the contract was inadmissible to vary the construction of the lease *Raja Durga Prasad v Rajendra Narayan* 19 C W N 66=19 C L J 95=11 A L J 1027=16 Bom L R 42 (P C) Where a sale deed recites as consideration a cash price of Rs 35,000 evidence of an oral contract that the amount was really Rs 36,000 cannot be let in The amount of the sale price is a term of the contract within the meaning of section 92 of the Evidence Act Evidence cannot be admitted to vary the provisions of the sale deed as to the amount of consideration fixed for the same *Adityam Aiyar v Ramkrishna*, 14 M L T 382=(1913) M W N 847=25 M L J 602=21 Ind Cis 458 It is not permissible to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations *Sayyid Abdulla v Sayyid Bisharat* 17 C W N 233=13 M L J 163=(1913) M W N 131=35 A 48=17 C L J 312=25 M L J 91 (P C) Oral evidence is not admissible to prove that a document which in terms is in and out gift was really meant to be *donatio mortis causa* *Benode Kishore v Ashutosh Mahapatra* 16 C W N 666=14 Ind Cis 720 Oral evidence to prove that parties to a sale deed which was duly executed and registered, subsequently rescinded it by mutual consent is inadmissible under section 92 of the Evidence Act *Bijjalallu v Veidulla* 15 Ind Cis 282 Oral evidence to show that one of the executors of a note of hand signed it only as security and that his liability was only to the extent of standing as surety for a month is inadmissible under this section *Harel v Bishnu* 8 C W N 101 Neither a contemporaneous oral agreement nor the subsequent acts and conduct of the parties can be proved under this section to show that the rent is less than what is stated in the registered *labuliyat* *Radharaman v Bhanam* 6 C W N 60, *Lalhatulla v Bishambhan* 12 C I J 646 Where a partition deed, in which special provisions were made for giving means of access to various portions of the partitioned property was silent as to means of access over the share in question, held that an alleged contemporaneous oral agreement to add to the terms of the partition deed was inadmissible in evidence by reason of section 92 of the Act *Krishnanajagu v Maraju* 28 M 495=15 M L J 255, see also *Sadaruddin v Chhaju*, 5 A L J 717=31 A 13=

**S 92** A W N 1908, 261=1 Ind Cas 558 Where after the execution of a deed of mortgage, it is only agreed between the parties that, for fresh advance, if any to be made by the mortgagee to the mortgagor a first charge would be given for the season's crop such agreement would be in defeasance of the mortgage and, as such, would be inadmissible in evidence under section 92 of the Evidence Act *Moran v Mittu Bibee*, 2 C 58 Under this section no oral evidence is admissible to show that certain deeds of sale are not deeds of sale but deeds of gift *Rahiman v Elahi Balsh* 28 C 70 Where the plaintiff in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, held that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document *Brown v Cutts* 5 C L R 487 Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties and it makes no difference that the evidence is put forward as evidence of a custom *Mr G Lee v Panchananda* 5 M H C R 135 Defendant was lessee under a joint lease by K and P, co owners of the premises Plaintiff having purchased an undivided moiety from P gave defendant notice to quit the moiety from the termination of the lease and sued for permission The defendant set up an oral agreement giving him an option of renewal of the lease but it could not be proved as being inconsistent with the terms of the lease the reception of evidence in respect of it being barred by the provisions of section 92 of the Evidence Act *Ebrahim v Curseti*, 11 B 644 Though undoubtedly a document may be explained by oral evidence oral evidence cannot be admitted to vary the terms of a written instrument whose terms are in themselves clear and undoubted *Rambuddhi v Ranee See Koonan* W R 1864 Act X Rul 23 Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta So, parol evidence was not admissible to vary or add to the terms of the contract which had been thus reduced to writing *Jadu Rai v Bhabotaran* 17 C 173 Where a written acknowledgment has its date unauthoritarily altered oral evidence to prove that date is inadmissible under para 2 of section 19 of the Limitation Act 1877 *Gulamali v Mnyabhai* 3 Bom I R 574=26 B 128 An alleged contemporaneous oral agreement to add to the terms of a partition deed which is silent as to the means of access in dispute, is inadmissible by virtue of this section *Krishna Maraju v Maraju* 28 M 495=15 M L J 255 Oral evidence is not admissible to prove a verbal surrender and abatement of rent of a holding held under a registered lease nor is the conduct of the parties for instance, payment of rent at a reduced rate admissible to prove the same *Sarat Chandra v Nitya Gopal*, 8 Ind Cas 47 A *Kabiliyat* was granted in perpetuity, the rent was made payable partly in kind and partly in cash and the parties expressly provided that, if the rent payable in kind was not duly delivered, the tenant would be liable for a specified fixed sum Held that oral evidence was not admissible to prove that the tenant had agreed to pay the price of the paddy at the current market rate and not at the rate specified in the *Kabiliyat*, upon failure to deliver it duly *Godai v Sarju* 12 C L J 649=7 Ind Cas 842

**The Writing is really not the contract** The law is that notwithstanding a paper in writing which purports to be a contract may be produced it is still competent to find upon sufficient evidence that the writing is not really the contract. *Gudlalar v Kunnator* 7 M H C R 189 In that case in delivering his judgment *Morgan C J* said 'I take the law to be that notwithstanding a paper in writing which purports to be a contract may be produced it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract And the risk of groundless defence does not affect the rule itself though it suggests caution in acting on it,' *Citing Pym v Campbell* 6 F & B 370 [I cite notes under proviso (3) *infra* where the case has been cited in full].

'The Madras case was decided without reference to the Indian Evidence Act and probably before the Evidence Act came into operation. But the principle of that case was affirmed by the Judicial Committee in *Baynath v Vally Mahomed Harce*, 86 Ind Cas 332=48 M L J 339=27 Bom L R 787=3 Pat L R 227=L R 6 A (P C) 57. So the authorities establish that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible.' *Ramdhani v Keval*, 90 Ind Cas, 929, see also *Woodroffe's Evidence* 8th Ed p 613. But in a recent Allahabad case *Ashworth J said*: 'The Appellant's counsel has referred to the following dictum in *Woodroffe and Amir Ali's* well known commentary, the Indian Evidence Act: 'Though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible. In support of his dictum two English decisions are relied upon namely, *Harris v Rickett* 28 L J Fx 197=1 H & N 1 and *Pym v Campbell*, 6 El & Bl 370=25 L J Q B 277. *Harris v Rickett*, *supra*, is no authority for the dictum as stated. It is authority for the rule that where the whole of a contract is not contained in a written document, it may be supplemented by parol evidence of a collateral agreement. Collateral means in effect not inconsistent with the terms of the agreement in question. Proviso (1) of section 92 gives effect to this rule or at least to so much of it as the Indian Legislature desired to incorporate in the Evidence Act. *Pym v Campbell* *supra* is authority for the rule that parol evidence is admissible to prove any collateral verbal agreement to the effect that a document apparently complete and operative on its face should be conditioned upon, and not operate, until the happening of a certain event which has not occurred. This rule is reproduced in proviso (3) of section 92 of the Evidence Act. They is no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was agreement at all or in other words, that a deed was meant to be inoperative.' *Lachmandas v Ramprasad* 49 A 680=A I R 1927 All 422 (424)=100 Ind Cas 1029=25 A L J 349, see also *Gyar Mal v Sitaram* 3 N L R 19.

**Cases where the oral evidence is admissible.** Where there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into possession of the property mortgaged in satisfaction of the interest and he was let into possession and remained in possession under the terms of the agreement, *held* that his was not a case under this section that the real agreement was not one which contradicted varied added to or subtracted from the terms of the written agreement that it was merely a provision as to how the interest should be paid and that therefore the oral agreement was valid. *Brindaban v Umrao*, A W N 1887 61. In a suit for money due on a promissory note payable on demand the defendant pleaded a contemporaneous agreement in writing allowing the repayment by instalments. *Held*, that the contract was as contained in the two documents, and the defendant was entitled to prove the contract by showing that there was a duly executed contemporaneous agreement in writing between the parties. *D Nagardas v Moses* 12 Ind Cas 896. Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment debtors is not inadmissible by reason of this section. *Ganga v Ram Oudh* 113 Ind Cas 760=A I R 1921 All 79. When property is purchased in the name of several persons jointly, a joint tenancy is created and parol evidence is admissible to prove that the joint tenants have become tenants in common. *Tan Chew v Cheel Sure* 56 I A 112=116 Ind Cas 385=A I R 1923 P C 72=56 M L J 643 (P C). Oral evidence is admissible to prove that a debtor under a Hundi upon which the suit is based, compounded with his creditors including the payee under the Hundi by agreeing to pay them 12 annas in the rupee in full and final settlement of their claims of which he had to pay 4 annas in the rupee in cash and to execute Hundis of the value of 8 annas in the rupee payable at a future date. *Kalumal v Kasumal* 23 S L R 294=114 Ind Cas 97. Parol evidence which shows that two documents executed and registered on the same day are part and parcel of one transaction, does not amount to leading evidence so as to vary the terms of the document. *Kishen Lal v Ramlal*, 25 A L J 723=103

**S 92** Ind Cas 399=A I R 1927 All 696 An oral arrangement providing for repayment of a mortgage debt from the usufruct of the mortgaged property may be proved. Such an arrangement does not amount to a lease nor does it constitute an usufructuary mortgage. It is only a means of discharging the debt by putting the simple mortgagee in possession of the mortgaged property. *Nookamma v Dharmayya* 53 M L J 863 This section prohibits only the proof of any contemporaneous oral agreement between the parties in variance of the terms of the document. Where the father purchased certain properties and took a sale deed in the joint names of his two minor sons and subsequently the individual share of each of the vendees was sought to be proved by evidence relating to the intention of the father. Held that section 92 of the Evidence Act was not a bar to the admissibility of such evidence as the sale deed was silent regarding the share of two vendees. *Mahomed v Amthil* 101 Ind Cas 655=52 M L J 557=38 M L T (H C 247) In the case of an outright sale by registered deed an independent contract to re-sell either orally by unregistered deed can be proved but where the contract is not an independent transaction but forms part and parcel of the original transaction and together constitutes a mortgage such contract cannot be proved. If the facts prove that the two transactions are not distinct and independent of each other but constitute a mortgage, the agreement to re-sell cannot be proved for want of registration but if the two transactions are distinct and independent of each other and the transaction evidenced by a registered deed is one of an outright sale then the agreement to re-sell can be proved. *Ma Nan v U Yang* 6 Bur L J 210=105 Ind Cas 482=A I R 1927 Rang 314 There is nothing to prevent the parties from entering into an oral agreement for the settlement of decrees for money. They have the same freedom to do so as to make narrative of contract by an oral agreement modifying the previous written contract so long as the contract is not required to be in writing and registered. It cannot be said that the judgment debtor selling upon a verbal agreement by the decree holder to accept some variations is barred from doing so by section 92 of the Evidence Act. *Ma Shue v Mang San*, A I R 1928 Rang 316=6 L J 773 Oral evidence to prove that the defendant gave the promise or not to the plaintiff on the understanding that it shall be an effective instrument if and when the liability arise upon his part to restore to the plaintiff his share of the capital is inadmissible. *Sheo Prasad v Gohud* 49 A 161=100 Ind Cas 32=25 A L J 305=A I R 1927 All 292 This section is no bar to the admission of oral evidence of circumstances to show the relation of the written instrument to existing facts. Consequently where there is a recital in a document that the debt was a cash loan oral evidence is admissible to prove that the debt was really rent partly overdue and partly falling due later. *Hayee Im v Maung Ba* 5 King 522=109 Ind Cas 189=A I R 1925 Rang 79 It can be proved by oral evidence that although a document is executed in favour of the persons one of them alone is solely entitled to the amount. *Mauna v Narain*, 107 Ind Cas 678 The plaintiffs leased certain properties to the defendant for certain years at a rent of Rs. 600 per annum and also executed a mortgage to him hypothecating certain other properties. The mortgage deed provided that credit entries should be made in respect of payments of amount. Along with the deed of mortgage the defendant executed a *Parthamnam* to the plaintiffs agreeing to pay Rs. 200 out of the rents for a certain charity to pay all or the last and credit the balance of the rents towards the mortgage debt. The plaintiffs alleged that the defendant failed to pay the said sum of Rs. 200 and the last and that the mortgage debt had been discharged. Held that *Parthamnam* was admissible and that section 92 of the Evidence Act had no application to the case because it was not oral but written and it was not a variation of the mortgage deed at all. *Imanathan v Sethuram* 27 L W 17=1 L J 140 M S=107 Ind Cas 868=A I R 1928 Mad 52 In a bond it was mentioned that the amount of Rs. 500 would be paid 'with interest at one rupee per month'. The question was whether interest should be at one rupee per month or only on rupee for Rs. 500 per month. Held that oral evidence was admissible to prove that the parties intended that interest should be paid at 1 rupee per cent per month and not provided for by section 92 of the Evidence Act.

*Velatatananappa v Rama Setty* 3 Mys L W 116 Oral evidence is admissible to prove a discharge and satisfaction of a mortgage bond *Krishna v Kashnau*, 90 Ind Cas 470 A recital on a sale deed that there is no incumbrance or that the vendor has a good title to convey is not one of the terms of contract and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract *Rama Subbu v Muthiah* 87 Ind Cas 199=A I R 192 Mad 968 Two Hindu daughters who had succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in those of the right of survivorship having been extinguished The lists were not produced but oral evidence was let in regarding the same Held section 92 of the Evidence Act did not apply and the oral evidence was admissible *Achalanta v Sundarasia Rou* 48 M 933=22 L W 395=(1924) M W N 613=A I R 1925 Mad 1267=19 M L J 266

Even where an agreement is silent as to the consideration under this section oral evidence is admissible to determine what the consideration was *Rameshwardas v Adu Toom*, 91 Ind Cas 371=A I R 1926 Sind 202 This section has no application where evidence of the conduct of the parties and then rights of the various members is let in to prove partition by the defendant in a suit *Ramuchettu v Panchammal*, 92 Ind Cas 1028=A I R 1926 Mad 102 Where a promissory note is executed by two persons oral evidence is admissible to prove that one of them executed it only as surety for the other *Moolji v Pinto* 92 Ind Cas 667=A I R 1926 Sind 156 This section does not prohibit the adducing of oral evidence to prove the discharge of a debt secured by a document *Ramayan v Jayanti Lal* 30 C W N 710=96 Ind 11=A I R 1926 Cal 906 The discharge of a mortgage bond partly by payment and partly by the release to the debt by the mortgagee can be proved by oral evidence *Mahim v Lalm Dayal* 12 C L J 582=A I R 1926 Cal 170 In a mortgage suit it is open to the mortgagor to prove that the mortgagee had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance *Bhaba Sundari v Ramlmal*, 14 C L J 269=A I R 1927 Cal 27 An oral agreement between the lessor and the lessee that the lessor should give credit for certain sums for having cut certain trees is admissible as the transaction is a mode of payment or a discharge or waiver of a portion of the rent due to the lessor *Shabbaz v Chhaprao* 94 Ind Cas 169=14 A L J 548=A I R 1926 All 445 Where a Bill of Lading evidences a contract of shipping no evidence of any oral agreement varying its terms is admissible *Standard Oil v Haridas Jethi* 79 Ind Cas 45 Where in a suit on a bond the defendant pleads no consideration for the bond and evidence is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, held that the evidence was excluded by section 92 of the Evidence Act *Baldeo v Ram Anon*, 23 A L J 850=82 Ind Cas 317 Where all the terms of a contract have not been reduced to writing oral evidence is admissible to prove the terms not embodied in the written instrument *Coalfields of Burma v H H Johnson*, 2 Rang 575=3 Bur L J 326=1927 Rang 128 Where a date is fixed in the contract for performing the contract, oral evidence to extend the period is not absolutely repugnant to the express terms of the contract so as to make it inadmissible *Gowindandas v Rouji* 76 Ind Cas 62 Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder, oral evidence can be let in to prove a contract of guarantee *Thalerao v Krishendas*, 76 Ind Cas 292=1925 Sind 9 Oral evidence is admissible to prove an agreement between the mortgagee and the would be purchaser of the equity of redemption as regards the terms on which the mortgage would release or assign his interest *Sailesh Chunder v Jelba* 10 C L J 67=1925 Cal 94 Parol evidence is admissible to prove a debt acknowledged in writing by the debtor when such acknowledged writing being untrumped is inadmissible in evidence *Thilhan Ram v Lal*, 74 Ind Cas 939=1923 Loh 301 Where by mistake of the parties the duration of a lease was wrongly entered in the written instrument evidence can be let in to prove the

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real intention of the parties *Durga Prasad v Husain Musalman*, L R 4 All 302 (Rev.) Where there is an out and out sale under a duly registered document, evidence of a contemporaneous oral agreement to the effect that the parties agreed to treat it as a mortgage is admissible *Talak Chand v Almarani* 23 Bom L R 818=A I R 1924 Bom 58 Oral evidence is admissible as to negotiations antecedent to execution of the mortgage instrument, showing that what was intended to be offered and accepted as security was a certain ancestral share of the mortgagor in the original estate which at the time of the mortgage was part of the separate account *Bepin Krishna v Jogeshwar* 26 C W N 36=34 C L J 256 This section does not exclude oral evidence to prove the adjustment of a decree within Order 21, r 2 Civil Procedure Code *Jangal v Chunnilal* 16 N L R 204=60 Ind Cas 316 A promissory note is generally taken as a security for an advance and does not contain the terms on which the advance was made, and the fact that a payment was secured by a promissory note does not exclude oral evidence of the terms and purpose for which the advance was made *Ba Shein v Emperor*, 13 Bur L T 239=64 Ind Cas 33 Where an oral agreement is made, which in respect of the manner of payment rescinds or modifies a contract grant or disposition of property required by law to be in writing or actually written and registered, and any payment is made in accordance with the oral agreement, whether in complete or partial satisfaction of the contract, section 92 of the Evidence Act does not exclude evidence of the payment or the oral agreement that explains it It does however exclude evidence of the agreement in respect of future payments not in accordance with the terms of the instrument *Sambho v Tukaram*, 59 Ind Cas 840 The appellants had for many years been allowed to over draw their account with the respondent Bank The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books The appellants annually gave the Bank a letter in a printed form in which they merely agreed to pay interest on the duly balances Held that section 92 of the Indian Evidence Act, did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests and that such an agreement could be implied for the appellants' long acquiescence in such a method of calculation *Haridas v Mercantile Bank of India* 44 B 474=38 M L J 387=18 A L J 359=55 Ind Cas 522=47 I A 17 (P C) Where in an agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement in order to reconcile the different statements regarding the property sold *Hussanally v Mangaldas* (1920) M W N 726 (P C) There is nothing in this section to exclude evidence of an oral agreement which contradicts, varies, adds to, or subtracts from not the terms of the contract but some recitals in the contract itself *Mukhi Singh v Ashun*, 51 Ind Cas 320 Where there is an oral agreement to grant a lease section 92 of the Evidence Act does not stand in the way of proof that there has been an agreement by implication or inferable from the circumstances as to the time of the commencement of the lease *Kailash Chandra v Byoy Kanta*, 23 C W N 190=50 Ind Cas 177 Where a *Kabuliyat* executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act to prohibit the landlord from showing that he never assented to or accepted the *Kabuliyat* *Hemantha v Barendra* 47 Ind Cas 1003 Oral evidence of a sale by the mortgagor to the mortgagee as discharge of the mortgage-debt is admissible under section 92 of the Evidence Act to prove discharge although the sale itself is invalid and does not affect any legal transfer of the property even though it is accompanied by delivery of possession *Tholakura v Pepakayala* 31 Ind Cas 678 Where a letter creating an equitable mortgage is not admissible in evidence for want of stamp and registration independent oral evidence is admissible to establish an equitable mortgage *Muthiah Chetty v Kothandaramaswami* 31 M L J 317=(1916) 2 M W N 221=1 I W 172=35 Ind Cas 861 Collateral agreement can be proved under this section *Venkata v Radha Krishna*, (1911) M W N 129=30 M L J 302=32 Ind Cas 911 Where after executing a

mortgage by conditional sale the mortgagor put the mortgagee in possession of the property mortgaged under an oral agreement authorising the mortgagee to enjoy the profits and devote the amount realized towards satisfaction of the interest, *held*, that there was nothing illegal in the agreement and evidence to prove it was admissible *Jagatpal v Hanam Singh*, 19 O C 166 = 34 Ind Cas 745. An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act *Sambanda v Chinnaiah*, 29 Ind Cas 860. Where the ostensible consideration shown in a document was the payment of a certain sum of money and to have been made by the defendant oral evidence is admissible to show the real nature of the transaction *Varayan v Pithoba* 11 N L R 34 = 25 Ind Cas 355. A receipt which says I release you from the liability to pay compound interest as written in the said mortgage bond is admissible in evidence. Registration is not necessary and the receipt operates as a full acquittance for the money already paid *Kailash Chandra v Sheikh Chennu*, 42 C 346. A executed a usufructuary mortgage in favour of B in respect of one property. Subsequent to this mortgage there was an arrangement between A and B whereby the mortgagee was put into possession of another property, or the understanding that the profits derived from the latter were to be applied to payment of the principal of the mortgage money. *Held* that oral evidence to prove subsequent arrangement was admissible in evidence *Bhauri v Shih Sahai* 18 Ind Cas 324. Parol evidence is admissible to prove whether one of the contracting parties was acting for himself or on behalf of a principal for such a question is not one relating to the terms of a contract under section 92 of the Evidence Act *South Indian Industrial v Rama Jogi* 27 M L J 501.

In a suit for money due on a promissory note payable on demand, the defendant pleaded a contemporaneous agreement in writing allowing the repayment by instalments. *Held* that the contract was as contained in the two documents, and the defendant was entitled to prove the contracts by showing that there was a duly executed contemporaneous agreement in writing between the parties *Nagoradas v Moses*, 12 Ind Cas 896. Section 92 of the Evidence Act does not preclude oral evidence of payment in extinguishment of mortgage rights, but not for proving an invalid oral conveyance of the equity of redemption by virtue of such payment *Ayyapputhura v Muthuluman Samy* (1912) M W N 854 = 23 M L J 339 = 15 Ind Cas 339 = 12 M L J 425. A letter written contemporaneously with a sale deed can be admitted in evidence to prove that the sale deed was not intended to be given effect to. Neither section 92 of the Evidence Act nor section 49 of the Registration Act would apply so as to prohibit the admissibility of the letter in evidence *Mutha Venkata v Pynda*, 23 M L J 652 = 12 M L T 579. Where, after the execution of a mortgage bond the mortgagor placed the mortgagee in possession of the mortgaged premises under an agreement by which the mortgagee was to continue in possession for seven years and to receive the profits in full satisfaction of his dues under the mortgage. *Held* that as the effect of the subsequent agreement was not to alter, contradict and to or subtract from the terms of original agreement but merely to provide means of satisfaction of the bond the agreement could be proved by oral evidence as section 92 of the Evidence Act did not apply *Kamala v Bibu Nandan*, 2 Ind Cas 13 = 11 C L J 39. Extrinsic evidence as to any oral assurance given by the grantor of the lease, that it was intended to last for ever, is admissible *Narsingh Dyal v Ram Narain* 30 C 833. Where a document records the terms agreed to at the time of the execution of another document the parties being the same, there is no objection, under s 92 of the Evidence Act to the admissibility of the former document, notwithstanding that it contradicts, varies, adds to or subtracts from the terms of the latter document *Mutha Venkata v Pynda Venkatachalapati*, 27 M 343. Though this section excludes in particular instances any oral agreement or statement yet evidence of conduct, e.g. return of *Kabuliyat*, is admissible for proving that such return was due to an intention to make the *Kabuliyat* inoperative *Shyamam Charan v Heras Mollah* 26 C 160. It is quite legal



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to explain a written document by oral testimony *Chunder Nath v Gunga Gobin do*, 1 W R 94, *Dhumpat v Jounahur Ali*, 8 W R 152 In a suit on a bond, evidence is admissible of a contemporaneous oral agreement by which the parties agreed that the debt should be liquidated from the usufruct of certain property which was assigned by the obligor to the plaintiff at the time for that purpose *Govind v Anund*, 4 C L R 274 A stipulation in document that no other payment except payment endorsed on the document itself shall be admitted does not exclude proof of payment by other evidence *Sasachellum v Govindappa* 5 M H C R 451 *Sultan Bibi v Magota*, 3 M L J 9 The provisions of this section do not prohibit the disproof of a recital on a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged *Jashudeva v Narasamma*, 5 M 6, *Doolah v Ramlal*, 7 W R 408, *Annagurubala v Krishna Sami*, 1 M H C L 457 *Indrajit v Lalchand*, 18 A 168=A W N 1896 16 *Hulum v Hvalal*, 3 B 159, *Bomaya Nayal v Irappa*, 2 M H C R 174 When the agreement to reduce rent is admitted by the lessor, the lessees can rely on it This section does not affect the case *Satyesh Chunder v Dhumpul*, 24 C 20 Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts and the instrument was not signed by the defendant nor was there any promise by the defendant to pay the debts the promise by the defendant to pay debts being outside the instrument does not come within the scope of Section 92, and oral evidence may be tendered which varies, alters, or modifies the promise *Tuvengada v Rangasami* 7 M 19 Oral evidence is inadmissible to prove some items of agreement entered into between the parties when some others have been reduced into writing in letters exchanged between the parties *Ambala v Gaultstain* 13 C W N 326=6 M L J 368=1 Ind Cis 85 The question whether a transaction, which, in its face, purports to be a gift or a sale is really a *benami* transaction, is purely one of intention Notwithstanding that a transaction purported to be a sale and a price was mentioned in the conveyance it was held on the evidence to be a gift and not a sale—the question being regarded as purely one of intention *Ismail v Hafiz* 10 C W N 570 (P C)=3 A L J 353=33 C 773 Section 92 of the Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document *Shari'h Muhammad v Ram Dutt* 5 P R 1896, see also *Rani Mahesha v Secretary of State* 67 P R 1894 Liability to pay money under a written contract may be transferred to another person by word of mouth with the consent of the creditor and the person taking upon him the liability for the original debtor, the old contract being entirely rescinded or put an end to Section 92, Evidence Act, has no application to such a case *Maharaja of Farukot v Ball Hobson & Co*, 69 P L R 1903=40 P R 1903

**Evidence of conduct or intention for varying, contradicting, etc** The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract or (2) of a subsequent oral agreement having the same effect In the former case the evidence is excluded by s 92 of the Evidence Act and in the latter case by proviso 4 to section 92 *Ridha Raman v Bhabani* 12 C L J 439=8 Ind Cis 790 In delivering the judgment *Rampuri J* said 'The appellant's plea relies on the cases of *Satyesh Chunder v Dhumpul Singh* 24 C 20 *Preonath v Madhu* 21 C 103 and *Khalil v Ali Hafiz* 23 C 25b In the first of these cases the oral agreement modifying the terms of the original registered agreement, and the *ratio decidendi* was that the plaintiff had admitted this agreement and that, therefore the defendant did not require to prove it and so the provision of section 92 did not bar him The later two cases are cases of ostensible conditional sales which it has always been permitted to be shown to be mortgages As pointed out in *Pahman v Iqbal Balsh* 23 C 70 such cases are admitted as exceptions to the general rule laid down in section 92 of the Evidence Act But there appears to be no ground for making any further exception to the rule embodied in the section or any further inroad upon the law If the plea of the



S 92. not be affected by any prior engagement, and even as between the parties themselves, I think that if in any case there really is any understanding or expectation contrary to the terms of a deed which has been acted on, this can only result from one of two things, *e. g.*, either the object is (as is commonly the case in this country) to deceive others and to retain the means of cheating others or the vendor whatever hope of reconveyance he may retain, deliberately puts himself as it were out of the pale of the law and cuts off from himself all legal right or remedy. That case was decided before the passing of the Indian Evidence Act I of 1872. In a subsequent case it has been held that no evidence of any oral agreement is, under this section admissible to vary the terms of a *kobala* which is on the face of it an unconditional sale. *Ram Doolal v Radha Nath* 23 W R 167 see also *Mulhab Chandra v Gangadhar*, 11 W R 450 = 3 B L R A C 83. In *Daumoddee Paul v Kaim Tasadar*, 5 C 300 = 4 C L R 419 it was held that this section altered the law as laid down by *Peacock C J* in *Kashi Nath v Chandu Charan* 5 W R 68 (I B), see also *Ram Dayal v Heera Lal* 3 C L R 386. What is the effect of this section on the Full Bench case was again considered in *Hem Chandra v Kish Charan Das* 9 C 528. There *Garth C J* for the Court consisting of *Garth C J* and *Muller J* observed 'It has now been argued before us that although the Full Bench case above referred to established the law in the year 1866 section 92 of the Evidence Act, which was passed in 1872, must be considered as having overruled the Full Bench decision and that the cases of *Ram Dayal v Heera Lal* 3 C L R 186 and *Daumoddee Paul v Kaim Tasadar* 5 C 300 = 4 C L R 419 have decided that section 92 of the Evidence Act has so altered the law. If I could see any ground for supposing, that the Full Bench case is not law at the present day or that section 92 of the Evidence Act either made or intended to make, any alteration in the rule of evidence which prevailed here before the Act was passed, and which was recognized as law in the Full Bench case I should consider that our proper course was to refer the question to another Full Bench, but when I look to the language used by *Sir Barnes Peacock* in that case, it seems to me that section 92 of the Evidence Act lays down in term the same rule as *Sir Barnes Peacock* then stated to be the law. And the principle upon which the judgment in the Full Bench case proceeded is one which in my opinion is perfectly consistent with that rule. It is a principle which has constantly been acted upon by Courts of Equity in England as well as by the Courts of this country, and notably by the Bombay High Court in the cases of *Hasha Khand v Jeshu Pranani* (unreported) and of *Bakshi v Govinda* 4 B 594. In the latter case there will be found an excellent judgment of *Mr Justice Melville* in which he very clearly explains this principle of equity and the mode and the circumstances under which it may be applied. I quite agree with that learned Judge, that the true ground upon which the equitable jurisdiction of the Court proceeds generally in cases of this kind is that of fraud, and this (as *Mr Justice Melville* observes) is very clearly stated by *Turner L J* in *Lincoln v Wright*, 4 Deg & J 16. That was a case in its circumstances very similar to the present. *Wright* had brought an action of ejectment against *Lincoln* to recover certain land, which the latter had conveyed to him by a deed which appeared on the face of it to be an absolute conveyance. *Lincoln* then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage and he relied in support of that contention, partly upon a prior agreement and partly upon the acts and conduct of parties. *Turner L J* says 'The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and *Wright* the transactions should be a mortgage transaction, it is in the eyes of this Court a fraud to insist on the conveyance as being absolute and prior evidence must be admissible to prove the fraud. The same view was also taken by *Cunningham* and *Maclean JJ* in *Kashi Nath v Hurrhur* 9 C 893.

So although prior evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee

treated the transaction as one of mortgage the Court will give effect to it as a mortgage and nothing more. It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct is no doubt evidence of the agreement out of which it arose, but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would not be strictly admissible under section 115 of the Evidence Act (1 of 1872). And, even when conduct falls short of a legal estoppel there is nothing in the Evidence Act which prevents it from being proved or when proved, from being taken into consideration. Courts of equity in England will always allow a party (whether plaintiff or defendant) to show that on assignment of a estate, which is on the face of it, an absolute conveyance intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds viz., past performance and fraud. The Courts of India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in section 115 covers the whole ground covered by the theory of past performance. This section does not say that in order to constitute an estoppel the acts which a person has been induced to do must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession on the understanding and belief that the transaction was one of mortgage and thus every instance of what the English Court call 'past performance' would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud. The Courts will not allow a rule or even a statute, which was passed to suppress fraud to be the most effectual encouragement to it, and accordingly in England the Courts, for the purpose of preventing fraud, have in some cases set aside the common law rules of evidence and the Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacles interposed by the Indian Evidence Act. In thus modifying the rules laid down by sections 91 and 92 of the Act, the Courts will not be acting in opposition to the intention of the Legislature which by enacting the provisions of section 26, clause (c) of the Specific Relief Act (1 of 1877) has shown an intention to relax the rules of the Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery. *Balshu Lakshman v Gorinda*, 4 B 591. So the principle of law laid down in the Full Bench case of *Kashinath v Chundry Churn* 5 W R 68, was approved or followed in various subsequent cases: *Phooloo v Geerish* 8 W R 515, *Hasha Akhand v Jesha Premji* 4 B 409 n. *Sheikh Parabat v Sheikh Mohammed* 1 B L R A C 87, *Bhary v Tejaram* 10 C 764. *Nundo v Prosunno*, 19 W R 333, *Bholanath v Kalperashad* 8 B L R 89. *Tenataratnam v Reddiah*, 13 M 491, *Raklen v Magappu dayan*, 16 M 80, *Kader v Apeyan* 21 I A 96=21 C 882 (P C.) see also *balkishen Das v Iegge* 19 A 431, *Holmes v Mathrus* 9 Moo P C 413. *Mutty v Annundo* 5 M I A 72, *Barton v Bank of New South Wales* L R 15 App Cas 379. The question was again considered by a Full Bench of the Calcutta High Court in *Pronath Sha v Madhusudan Bhunya* 2 C W N 362=25 C 603 (T B). There *Banerjee* and *Wilkins JJ*, in their order of reference reviewed all the previous cases on the subject. *Maclagan C J* in delivering the judgment of the Full Bench observed. In regard to the question of law, which was the main ground for this reference namely whether oral evidence as to acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out and out sale, the learned J who appeared for the Appellant stated that having regard to the authorities he could not successfully contend that such evidence was not admissible. We think the authorities establish that in such a case evidence which is directed to the acts and conduct of the parties would be admissible. This Full Bench decision was followed in subsequent cases, *Inde Shama Charan v Hivas Molla*, 26 C 160, *Khankar v Ali Hafez*, 28 C 256=

S 92 5 C W N 351, *Abdul Ghafur v. Abdul Kadir*, 111 P. L. R. 1901=72 P. R. 1901, *Mahomed v. Ali* 117 28 C 289=5 C W N 426, *Ham Sarup v. Allah Bhatta* 107 P. L. R. 1901, *Abdul Khoda Bhatta*, 26 Ind. Cas. 717.

In 1899 the case of *Balkishen Das v. Legge* 1 C W N 133 (P. C.)=22 A 119 was decided by the Privy Council. In that case the question was whether certain deeds executed by the respondent in favour of the appellants constituted a mortgage transaction or an out and out sale with a contract of repurchase. Lord Dargy in holding that oral evidence of intention was not admissible for the purpose of construing the deeds or ascertaining the intention of the parties said: "By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to such instrument or their representatives in interest for the purpose of varying or adding to or subtracting from, its terms, subject to the exceptions contained in several provisions. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in the Acts of the Indian Legislature. The cases therefore be divided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." The question arose whether previous decisions were not affected by the above Privy Council case. There is a direct conflict as regards the effect of *Balkishen v. Legge* on the rule stated above. In *Ahomed Ali v. Ali Hafeez*, 28 C 256=5 C W N 351 the Court observed: "Upon the first question this is how the matter stands. The extrinsic evidence that was admitted was evidence of the acts and conduct of the parties; that is evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, and not evidence of any oral agreements or statements by the parties. If that was so the evidence would be admissible, as section 92 of the Evidence Act does not exclude the evidence of acts and conduct of the parties. The view we take is supported by a Full Bench decision of this Court in the case of *Pero Noth v. Madhu Sudan* 2 C W N 562=25 C 603. It was contended by the learned J. for the appellant that the decision must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen v. Legge* 271 A 58=4 C W N 153. We do not consider the argument sound. The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention which had been admitted in the Courts below and the ground upon which their decision is based is that such evidence is excluded by section 92 of the Evidence Act. Their Lordships do not lay down any rule of exclusion of evidence over and above that contained in section 92 and section 92 of the Evidence Act as we have already observed whilst it excludes evidence of any oral agreement or statement, does not exclude evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement. See also *Mahomed Ali v. Mir Nawaz Ali* 5 C W N 326=23 C 389, *Ali Sheikh v. Imam Ali* 35 Ind. Cas. 102, *Miriam v. Ibrahim* 28 C. L. J. 306=48 Ind. Cas. 561, *Kamala v. Nandan* 11 C. L. J. 39, *Ramachandrar v. Tulsu* 16 C W N 137, *Sharada v. Jamal*, 17 C W N 1033. In the last named case B executed in favour of A a deed of out and out sale with a condition of repurchase of a house but no date was fixed for the repurchase. On the same date B executed a *tabuqiyat* in favour of A by which he accepted a lease of the house sold. The Court took into consideration how the language of the document was related to the existing facts such as that the vendor continued in possession and rent at the usual rate of interest etc. and further that the value of the property was much more than the consideration paid. In delivering the judgment *Jenkins C. J.* said: "The argument before us has been that it was not open to the Appellate Court to regard the transaction as a mortgage. I designedly use the word transaction because that with which we have to deal is not contained in one document but in two and what we have to consider, in the circumstances is whether there is anything in section 92 of the Evidence Act or in *Balkishen v. Legge*"

22 A 119—which is in opposition to that section—that would compel us to hold that the decision of *Mr Justice Chatterjee* is erroneous. We would certainly not willingly infringe the provisions of section 92 or fail to follow what was laid down by *Lord Davey* in *Billishen Dass* case, and in order to be sure as to this we have listened with all possible attention to the argument that has been addressed to us. A great deal of that argument has been directed to showing that *Billishen Dass* case has been differently regarded in different Courts, and while there is a strong tendency in one direction in the Courts of Bombay and Madras, there is a current, perhaps a sluggish one in the other direction in Calcutta. But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived. He took the transaction as it is expressed in the documents. He also took into consideration those facts which may legitimately be proved with a view to showing in what manner the language of the documents was related to the existing facts and on a consideration of all those facts he has come to the conclusion as did the two lower Courts, that the transaction really was a mortgage. It has been urged against this that the transaction on the face of it was an out and out sale. This is not so on the face of it, what I would call the principal document is expressed in qualified terms and it is only open to the suggestion that it is an out and out sale, if and so far as it can be said that the express terms of the deed must be disregarded in obedience to the rule against perpetuities. See also *Kamala Sahai v. Babu Nandan Mani*, 11 C L J 39 (42). But in a later Calcutta case, a Full Bench of the same High Court has held that evidence of conduct subsequent is admissible when the terms of a contract are ambiguous, and it is not admissible where there is no uncertainty or ambiguity. *Secretary of State for India v. Kumar Narendra* 32 C L J 102, see also *Karanvashu v. Ananda* 32 C L J 15. *Nirod Chandra v. Harihar*, 32 C L J 19. *Bhupendra v. Harihar* 21 C W N 874, *Umesh v. Surendra*, 29 C L J 6, *Dejee v. Daya moji* A I R 1928 Pat 225. *Uday v. Jagat A I R 1928 Pat 66=6 Pat 630*. *Brouche v. Chatter Singh* 86 Ind Cas 597=6 P L T 331. *Kumar v. Secretary of State*, 29 C W N 166. *Juggernath v. Ramdayal* 26 C 150.

In *Narendra Lal v. Bhola Nath* 27 C W N, 337=77 Ind Cas 154, the cases of *Pronath Shaha v. Madhu Sudan* 25 C 603=2 C W N 562, *Khanlar Abdul v. Ali Hafi*, 23 C 276 and *Mahomed Ali v. Najar Ali* 28 C 289=5 C W N 306 were followed, see also *Kailash Chandra v. Dabbara*, 20 C W N 347. *Manindra v. Durga Sundari*, 20 C W N 680, *Ajwad Ali v. Sherkh*, 50 Ind Cas 12, *Mudhab Charan v. Rajam Mohan* 64 Ind Cas 583, *Dipin v. Punjabara*, 26 C W N 36=34 C L J 256. Where a gift has been effected by an instrument, only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. *Krishna Lal Singh v. Sri Ray Kuar* 104 Ind Cas 299=1 Luck C 97=A I R 1927 Oudh, 278, *Uriam Bibi v. Ibrahim* 28 C L J 306=49 Ind Cas 561. The rule that the conduct of the parties in respect to an instrument may be looked to in construing a document is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. *Dejee Indrayee v. Dayamoy* 108 Ind Cas 418=A I R 1923 Pat 25. Subsequent conduct of the parties can be admitted to show alteration of original tenancy. *Lal Ghose v. Nulanta Das* A I R 1925 Cal 340. Though evidence to vary the terms of a written agreement is not admissible yet evidence to show that there is not an agreement at all is admissible under this section, and it is open to the Court to examine the surrounding circumstances with a view to enable it to decide if the parties intended to arrive at any agreement. *Ramdhani v. Keval Mani*, 90 Ind Cas 929. Evidence of the subsequent acts and conduct of the parties to the written contract is admissible in evidence to show that certain terms of the contract were never in the deed to be acted upon from the very beginning. *Narendra v. Bhola Nath* 77 Ind Cas 154=27 C W N 336 see also *Ali Sheik h v. Imam Ali* 35 Ind Cas 102.

A different view has been taken by the Bombay High Court in *Dattoo v. Ramchandra*, 30 B 119=7 Bom L R 669, where *Jenkins C J* said: "Too

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plaintiffs sue to recover possession of land alleging that the document passed by his father, though in form an absolute conveyance, was intended to operate as a mortgage. The grounds, on which their contention is based, are that the consideration was a debt and not money paid at the time that the plaintiff's father notwithstanding the execution of the deed remained in possession until his death, and that after his death his widow remained in possession for three years that there was no transfer of the land into the *khata* of the transferee, and that the consideration was inadequate. We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the several circumstances. But it has been pointed out by the Privy Council in *Ballishen Das v W I Legge* 22 A 119=2 Bom L R 523 that in questions of this kind the Courts in India must be guided by section 92 of the Evidence Act, and that we cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in the cases of which *Hudson v White*, 2 D & J 98 or *Lincoln v Wright* 4 D & J 16 furnishes us with examples. We think that the contention urged by the appellant obviously comes within the ruling of the Privy Council and if we were to give effect to it then we should not observe the limitation which their Lordships declare to be binding on us. So oral evidence to prove variations in the terms of a sale deed is inadmissible, unless such evidence comes within any of the provisos to section 92 of the Evidence Act. *Bai Adhar v Lalbhai*, 66 Ind Cas 865=21 Bom L R 239. Ordinarily oral evidence is not admissible for the purpose of ascertaining the intention of the parties in interpreting languages used in a written document which is clear and unambiguous. Unless the Court is able to assume some oral agreement it would be impossible to regard the contemporaneous or subsequent conduct of the parties as in itself evidence to establish the intention of the parties at the time of the execution of the document. Such extraneous intrinsic evidence would necessarily be of value only as a ground for inferring an oral agreement when of evidence is excluded by section 92 of the Evidence Act. *Keshavrao v Raja Pandu* 8 Bom L R 287. But where the contention in a case is that there was no agreement enforceable by law to sell the property but that there was a mortgage agreement it should be specifically determined whether the transaction between the parties as shown by evidence is a mortgage or a sale. *Krishnabai v Rama Bala* 8 Bom L R 764. The plaintiff sued to redeem his lands alleging that his lands were mortgaged with the defendants under a nominal sale deed. The lower appellate Court treating the contract as embodied in the deed as one of its rejected the suit. Held that the question involved was not whether the document was one of sale or mortgage, but whether the real agreement between the parties was embodied in the document. *Ansa v Kemchappa*, 8 Bom L R 669. But where parties enter into a sale deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud misrepresentation or failure of consideration or the like reason rendering the sale void. *Sangra v Ramappa* 34 B 59 see also *Daqdu v Nana* 35 B 93. *Somana v Galigaya* 35 B 231=13 Bom L R 113. *Ganee v Bhau* 42 B 512=20 Bom L R 64. *Baraya v Sundondas* 1 B 333. The plaintiff sued to redeem a mortgage dated 1899. The mortgage having been expressed in the form of a sale deed he relied on s 10 A of the Dekkhan Agriculturists Relief Act to show its real nature. The provisions of the Act were extended to the district in 1905. The lower Court held that the section was of no avail to the plaintiff, as he could not be said to have been an agriculturist within the meaning of the Act at the time of the transaction. Held that the plaintiff could only be allowed according to the provisions of s 10 A of the Act to enjoy the special benefit of the favoured class in disregarding the provisions of Section 92 of the Evidence Act if he belonged to the favoured class as defined by the statute at the date of the transaction. *Sauanbhai v Gurappa* 15 Bom L R 778=21 Ind C 4 (F B). The phrase any other law for the time being in force in section 10 A of the Dekkhan Agriculturists Relief Act must be read as *eiusdem generis* with the preceding words which refer to s 12 of the Evidence Act and does not point to any other Act for instance the Registration Act. *Gopal v Morar*, 15 Bom L R

555=20 Ind Cas 249, see also *Bisappa v Tajaua* 31 Bom L R 1266, *Gopal v Rajaram*, 14 Bom L R 14=13 Ind Cas 851. The object of s 10 A of the Dekhan Agriculturists' Relief Act, namely the decision as to the real nature of the transaction by admission of the oral evidence which otherwise would be excluded by the ordinary law, whether s 92 or the like of the Evidence Act is to override not merely Evidence Act, s 92 but also where necessary s 91 *Bisappa v Tajaua*, A I R 1930 Bom 79=31 Bom L R 1266

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The effect of the Privy Council decision of the case of *Ballishen Das v Legge* 27 I A 58=22 A 149, came to the consideration of the Madras High Court in *Achutararamayya v Subbaraju* 25 M 7. In that case the Court observed "Before going into the merits of the appeal we required the appellant to show how it was open to him, in the face of section 92 of the Indian Evidence Act to adduce evidence to contradict the terms of the contract of sale, is clearly and unambiguously set forth in exhibit L. We replied principally on the decisions in *Khanikar Abdul v Ali Hafiz*, 28 C 256 and *Mahomed Ali v Azar Ali*, 28 C 289, contending that evidence of the conduct of the parties subsequent to the date of the sale was admissible to establish that an absolute conveyance was intended to operate only as a mortgage. With great respect for the learned Judges who took part in those decisions we are unable to concur either with the conclusion arrived at or with the reasoning on which it rests. Evidence of such conduct could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale deed was to operate only as a mortgage and not as a sale but section 92 of the Evidence Act enacts that no evidence of any oral agreement or statement shall be admitted as between the parties or their representatives for the purpose of contradicting varying adding to or subtracting from the terms of any contract grant or disposition of property which has been reduced to writing and no exception is made in any of the provisos to section 92, or elsewhere in the Act, in favour of evidence which consists of the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant. The question before us is really concluded by the recent decision of the Privy Council in *Ballishen Das v Legge*, 27 I A 58=22 A 149.

In this connection we may also draw attention to the distinction which is drawn by the same tribunal between admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous and evidence to vary the terms of a contract or grant (*Sah Lal Chand v Indrajit*, 27 I A 93=22 A 370) and also to the decision in the House of Lords in *North Eastern Railway v Lord Hastings* (1900) A C 260 in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument, and the effect to be given to it. See also *Venkata v Subramania*, (1917) M W N 671, *Chall Venkata v Desaphakum* 1912 M W N 164. Where the contemporaneous agreement though in writing is not registered it is not open to the party to show that what is apparently a sale was really a mortgage. *Meenal sheendaram v Chenchu*, 109 Ind Cas 18=A I R 1923 Mad 459. Evidence of subsequent conduct to prove contemporaneous agreement is not admitted. *Lutz Holmes v The Bank of Upper India*, 77 Ind Cas 523=5 Lah L J 439. In delivering the judgment the Court observed "on the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned senior Subordinate Judge has summarised the authorities very clearly and we find ourselves in complete agreement with the conclusion to which he comes that this question which was formerly debatable, and one on which the High Courts differed has been finally decided by *Maung Kyin v Ma Shue* 14 I A 236 (P C)=45 C 320=12 Ind Cas 642=22 C W N 25 (P C). It was contended before the senior Subordinate Judge, that the Privy Council has not definitely set aside *Abdul Ghafur v Abdul Kadir* 72 P R 1901=111 P L R 1901. As explained by the learned senior Subordinate Judge that ruling followed *Preonath Shaha v Madhu Sudan Bhuiya*, 25 C 603=2 C W N 562 and *Khanikar Abdul v Ali*



**S 92** *Hafiz*, 28 C 256=5 C W N 351, and the distinction made by the Calcutta High Court between evidence of previous and contemporaneous conduct as offered to evidence subsequent conduct was drawn in exactly the same way in *Abdul Ghafur v Abdul Kadir*, *supra*. See also *Fat-holms v The Bank of Upper India Ltd* 4 Lah 258=1923 Lah 518, *Ghanam v Kanhya Mal*, 15 P W R 1915=126 P L R 1915=25 Ind Cas 126, *Maung Bin v Ma Haining*, 3 L B R 100 (I B), *Maung Lu Gyi v Maung Hla Pym*, U B R (1902 1903) Vol II, I evidence 1, *Ajodhya Prasad v Jagadish Singh*, 11 O C 321, *Ramesh v Nga Saung*, 2 L B R 1 *Mi Gyue v Keshan Ram*, U B R 1903, 3rd Qr I evidence 15, *Dagde v Aama* 12 Bom L R 972=8 Ind Cas 614 *Sookna v Gundhoo* 12 W R 261 *Malul Chand v Karbi Chendra B L R Sup Vol* 399=5 W R 76, *Jugobundhoo v Bulce*, W R (1869) 388, *Mahomed v Raesooddeen* 6 W R 117 *Radha v Ram*, 9 W R 251, *Bulal v Ilad*, 27 P R 1911=118 P W R 1911=10 Ind Cas 1001

In *Maung Kynn v Ma Shue* 15 C W N 953=38 I A 146 P C=91 M L J 1105 the appellants who according to their case were mortgagees of certain properties under a deed which was in form a conveyance purported to execute an absolute conveyance of them in favour of the respondents. The appellants subsequently purported to purchase the equity of redemption from their mortgagor. In this suit the respondents to recover the properties on the basis of the conveyance sought *inter alia* to give evidence of the acts and conduct of the parties (as distinguished from evidence of oral statements and conversations constituting in themselves an agreement to contradict or vary the written instrument) to prove that the transaction was really intended to operate and was always treated as a transfer of their mortgage, it being further alleged that the respondents had taken the absolute conveyance with notice that the properties in fact belonged to a third person. Lord Robson in delivering the judgment of the Judicial Committee of the Privy Council said 'This evidence (i.e. evidence of the acts and conduct of the parties) was excluded by the Courts below under section 92 of the Indian Evidence Act, 1872, and the principal question arising on this appeal is whether or not that evidence was properly rejected. Its object was to show that whatever the terms of the document may have been none of the parties had acted on them as effecting an absolute sale but that through a long course of mutual dealings materially affecting their respective positions they had always treated the business between them as one of loan secured by mortgage. This may give rise to important and difficult questions under section 92 of the Indian Evidence Act. The case has been argued before their Lordships as though the questions in dispute turned entirely on the construction of this section as applied to the deeds of the 4th March, 1903 under which the respondents claim. Their Lordships however are of opinion that the case for the Appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds on which much of the evidence tendered would certainly be material.' So their Lordships in that case did not express my opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March 1903. That case again went up to the Privy Council (*Inde Maung Kynn v Ma Shue La*, 22 C W N 257 P C). The appeal raised the question of the admissibility of oral evidence under section 92 of the Indian Evidence Act. In delivering the judgment Lord Shaw said 'When the matter in dispute was before this Board upon a former occasion it was decided that evidence upon the topics above mentioned could be received but no final judgment was given as to the effect to be given to such evidence after its reception. The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of them upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. Founding upon this section the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the Appellant maintain that, notwithstanding the terms of the section they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction

having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being, *Bakshu Lakshman v Gorinda Kanj* 4 B 594, *Hem Chunder v Kally Charan*, 9 C 528, *Rallen v Algapudayan* 16 M 80, *Pionath v Madhusudan* 25 C 603=2 C W N 562, *Khankar v Ali Hafe*, 28 C 256 and *Mahomed Ali v Na ar Ali*, 28 C 289=5 C W N 326. The judgment of Mr Justice Mellville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln v Wright* 4 Deg & J 16 by Lord Justice Turner thus 'The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.' In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Dary in the case of *Balkishen Das v Legge*, 27 I A 58=4 C W N 153. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties to written documents. Lord Dary cites section 92 of the Indian Evidence Act and adds—'The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to the existing facts.' Notwithstanding the decision of this Board, however a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achuta Ramaraju v Subbaraju* 25 M 7, *Maung Bin v Ma Hlaung* 3 L B R 100 and *Dattoo Valod v Ram Chandra* 30 B 119 and in particular to the judgment of Jenkins C J in the last case. In these the judgment of the Board, as pronounced by Lord Dary has been rightly followed and applied.' See also *Kamala Kanta v Annada Chandra*, 71 Ind Cis 1038, but see *Narendia v Bhola*, 27 C W N 346=77 Ind Cis 154. In *Narasimhan v Panuganti*, 29 C W N 246=47 M 729 (P C) the question was whether documents executed between the parties constituted a mortgage by conditional sale or an absolute sale with an agreement to reconvey. In holding that the transaction though phrased ostensibly as a sale with a right of repurchase in the vendor was in reality a mortgage, Lord Blanesburgh said 'In accordance with that arrangement the vital questions whether the transaction in question did or did not amount to a mortgage has been fully argued before their Lordships and with that problem alone we now propose to deal. It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than the surrounding circumstances such as in Lord Dary's words in *Balkishen Das v Legge* 27 I A 58=22 A 149=4 C W N 153, are clearly required to show in what manner the language of the documents was related to the existing facts.'

In *Baynath Singh v Hajeo Vally* 30 C W N 242=27 Bom L R 787 the suits were instituted by *Baynath Singh* for the redemption of shares in the *Natu Singh Oil Co* on the footing that certain transactions entered into between the plaintiff and defendant *Hajeo Mahomed Jamal* were mortgages. The defendant contended that the transactions were as they purported to be absolute sale to the original defendant followed by contracts for the resale of the shares to the plaintiff, that time was of the essence of the contract and that the right to repurchase had been extinguished. In admitting the oral evidence of the circumstances of the transactions *Sir Lawrence Jenkins* said 'It is true as was laid down in *Balkishen Das v Legge* 27 I A 58=22 A 149=4 C W N 153, that under section 92 of the Indian Evidence Act is between the parties to an instrument oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no appli

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cation to it. The preamble to the Evidence Act recites that it is expedient to consolidate, define and amend the law of Evidence, and section 92 merely prescribes a rule of evidence; it does not better the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. So extrinsic evidence is not admissible for the purpose of showing that a document which purports to be, and is on the face of it a deed of sale, is in reality a deed of gift. *Tarunmussa v Humfunmussa*, A W N 1905 129 = A L J 360 = 27 A 612.

### PROVISO (1)

**Scope of the provisos.** The admissibility of extrinsic parol testimony to affect written instruments is perhaps the most difficult branch of the law of evidence. *Taylor* § 807. The general rule can, indeed, be laid down in clear and definite terms—parol evidence is not admissible to add to, vary, or contradict a written transaction—but the application of the rule is beset with difficulties. It is frequently said that there are several exceptions to the rule, but it is submitted that there is *no real exception at all*, no case in which parol evidence is admissible either to add to, vary, or contradict a written transaction. The cases given below show that parol evidence can be used for the several purposes indicated, but it can scarcely be said that there is in such cases either addition to, or variation or contradiction of a written transaction.

Parol evidence may be given to prove or explain —

(1) The terms of any verbal transaction, although a writing exists concerning it, if such writing be not the transaction itself but a mere note, memorandum, receipt or the like.

(2) Fraud, mistake, illegality, incapacity, failure of consideration, or other matter showing that the writing is not the valid transaction it purports to be.

(3) Any collateral verbal agreement on the same subject matter, consistent with the written transaction.

(4) Any collateral verbal agreement suspending the operation of the written transaction or being a condition precedent thereto so that the writing is not a presently operative transaction.

(5) Any subsequent verbal agreement rescinding or modifying the written transaction so that the writing has ceased to be operative.

(6) Any local or trade custom or usage applicable to such written transaction, and not excluded thereby.

(7) The meaning of words having a special or unusual meaning, or generally, the translation of a written transaction. — *Cockle Cas. Ex.* pp 337–338. The statement of law in *Amir Ali's Evidence* that though evidence to vary the terms of an agreement in writing is not admissible yet evidence that there is not an agreement at all is admissible is too wide and must be qualified by the express provisos 1 to 3 to section 92 of the Evidence Act. *Lachmi in Das v Ram Prasad*, 49 A 680 = 100 Ind. Cas. 1029 = 25 A L J 319 = A I R 1927 All 422.

**Scope of Proviso (1).** Parol evidence is admissible to show that a writing is not really the valid transaction which it purports to be. Such evidence may therefore be given to prove fraud, mistake, illegality, incapacity, failure of consideration, or other matter affecting the validity of a writing as a document. *Cockle Cas.* 341. In *Henkle v Royal Ex. Ass. Co.* 1 Ves. 317, Lord Hardwicke said: 'No doubt, but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against fraud in contracts, so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified.' When the parties have recorded their contract in writing the rule, that they are not at liberty to alter or vary it, comes into effect. That which they put down is final as to what they mean: it is the binding record of the agreement. But they are always at liberty to show whether it is the binding record of the agreement. Suppose that the signature were made in the course of a dramatic representation, or suppose a printed form of agreement were used and the witness, by mistake, signed his name in the space meant for the principal and *vice versa* would not the parties be at liberty to show the real state of the case? *See Baron Bramwell in Hale v Harrop*, 7 Jur. 719.

*Conen v Truefitt* (1899) 2 Ch 309, *May v Platt*, (1900) 1 Ch 616, *Dobell v Stephens* 3 L J K B 89, *Cockle Cas* 341. So the first proviso in no way trenches on the rule laid down in the section. *Mart* Lx 73. So the rule is not infringed by the admission of parol evidence under the proper pleading showing that the instrument is altogether void or that it never had any legal existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject matter, or for want of due execution and delivery. *Collins v Blanton* 2 Wells 341, *Parton v Popham* 9 East 421, 422, *Taylor* § 1135. The instances mentioned in the proviso are not exhaustive. *Benmodhab v Sadasul* 12 C 437=9 C W N 305=1 C L J 155 (I B). In delivering his judgment *Woodroffe J* said 'The rule of evidence which is embodied in the first paragraph of section 92 of the Indian Evidence Act presupposes the validity of the transactions evidenced by the documents to which that rule has to be applied. If therefore, that validity is impeached it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases the Court is not bound by what has been described as a mere paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any document. To prove that a contract is void as by showing that it is an agreement by way of wager is to invalidate it. It has been suggested however, that the only cases in which oral evidence may be given to invalidate a document are those specifically mentioned in proviso (1), namely, fraud, intimidation, illegality, want of due execution or capacity, want or failure of consideration or mistake. But, in my opinion, this is not so, as the instance given are not exhaustive but, as appears from the use of the words 'such as' are set out by way of illustration only. Assuming then that as has been argued the present case does not come within the term 'illegality' (which it is necessary to consider) it is still within the words of the proviso. The admissibility, therefore, of such evidence as that which the defendant seeks to give in this case is not only not excluded by the general rule which is embodied in section 92 but is expressly recognized by the first proviso to that section'. Under proviso (1) of section 92 the facts which may be proved must be such as to show either that the legal requisites for a valid agreement did not exist in the case at all, or that one of the parties did not give his free consent to it or that the document does not express what was really intended to be embodied in it. It has no application to a case where the instrument represents what the parties intended to put down in writing though it might not be in accordance with what they intended to do, and with the legal result that they secretly wanted to bring about but which for some reason they did not wish to put in writing. *Mottayabhan v Palani* (1913) M W N 650=25 M L J 290=20 Ind Cas 924. When several persons have signed a promissory note jointly and severally it is not permissible for one of them to let in evidence that he signed only as a surety but if the possessor himself new at the time of taking his signature that he signed only as a surety, then proviso 1 would operate to let in the evidence. *Maung Sein v Ma Sau* 3 Bur L J 112=82 Ind Cas 816. When a document can be shown to come within proviso (1) evidence of contemporaneous and oral agreement contradicting the document is admissible, *Mahomed v Abdul*, 63 Ind Cas 368. It is open to the defendant in a redemption suit to plead that the mortgage is a fictitious document intended to cover a previously complete transaction of sale between the parties and under the first proviso to section 92 of the Evidence Act to prove any facts which would invalidate the deed. *Sahab Baksh v Muhammad*, 58 Ind Cas 115. An instrument purporting to be a contract in writing, which is executed on the avowed understanding of both parties that it is not to be treated as the real contract between them is not an agreement enforceable by law and there is not a contract at all and does not acquire greater legal force because it is an instrument in writing. *Ma anal v Cassim Ali* L B L (1893-1900) 154. Where the plaintiff sold the property in suit to defendant No 2 in the name of his wife, defendant No 1 by

**S 92** a conveyance in consideration of services rendered or to be rendered by defendant No 2 in inducing his master L to sell certain property to the plaintiff. Held that the defendant No 2 was entitled to prove the real transaction by oral evidence. *Aabu Khan v Mussamat Sena*, 9 Ind Cis 161=15 C W N 108. Where a party deliberately and with eyes open executes a deed of sale he can not be allowed to set up against it on oral agreement that the sale was a mortgage. He may prove that a mortgage was intended but that by fraud, misfile or otherwise a deed of sale was executed, but he cannot when he intended to execute a sale deed or executed it, be allowed to prove an oral agreement that the sale was to be held to be a mortgage. *Iithoba v Hoonum Chand* 2 C P L R 125.

Under this proviso oral evidence will be admissible for the purpose of invalidating a written agreement. *Dholan Das v Rajya Singh* 85 P R 1998. Under this proviso any fact may be proved which would invalidate any document, such as fraud illegality, etc. Therefore in a suit on a bond, a defendant pleading that it was invalid by reason of its having been given to secure money lent to promote an immoral purpose will be allowed to prove the same. *Musamat v Ounlar Tal*, 61 P R 1882, *Haji v Larman*, 30 B 426. Where at the time of executing a document a representation is made that the document though in form a sale deed will not be enforced as against the executant as a sale deed as where on the faith of that representation the executant executes the document the sale deed cannot be upheld as a sale deed as against him. *Narathu v Surubai* 8 Bom L R 761 see also *Pettap v Mohendra* 17 C 297. Where the words of a conveyance in an apparent sale deed formed only part of the real agreement between the parties, and the oral agreement to re-convey to the vendors which gave them a claim to equitable relief formed another part of the same transaction it is in the eye of law a fraud to insist on the conveyance as being absolute and parol evidence should therefore be admitted as for proving the fraud. Nor does s 92 of the Evidence Act render evidence of the oral agreement inadmissible for, if the real agreement were proved it would invalidate the document as a deed of absolute sale within the meaning of the first proviso to the section, and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage. *Rakken v Alagappudayam*, 16 M 80. This proviso seems to apply to cases where evidence is admitted to show that a contract is void or voidable or subject to reformation upon the ground of fraud duress illegality etc upon its inception and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other. *Cutts v Brown*, 6 C 328=7 C L R 171, see also *Naoroji v Kazi* 20 B 636.

**Fraud.** This section cannot stand in the way of oral proof of fraud when it is charged. It has been said to be "absurd that a statute made to prevent frauds shall be made a hindle to support it". *Peachey's case* Roll E T 1759. *Burr Jones* § 431. The correct view appears to be that equity will at all times lend its aid to defeat a fraud notwithstanding the Statute of Frauds. *Burr Jones* § 431. For example parol evidence may be received to prove that a conveyance or other contract has been obtained by fraud. *Thompson v Mason*, 4 Bibb 195. It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the most solemn formalities. Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case to show that which appears to be a contract is not and never was a contract. *Wadell v Glasel*, 18 Alr 561. *Gunn v Mc Carthey*, 13 L R 1r 304. *Collins v Blanton*, 7 Wills 341. *Larson v Popham* 9 Cr 421. *Taylor* § 1135, *Mart* Ex 73. *Phip* 1, 4th Ed pp 537, 538. If the fraud is clearly proved, one of the essential elements of contract—consent—is wanting. Thus it may be proved by parol evidence that any material part of the contract was fraudulently omitted or inserted by the other party. (*Heter v Glasgow*, 79 Pa 79) or that it was fraudulently misread to one not able to read and that he was thus induced to give his signature, (*Mc Kesson v Sherman*, 51 Wis 303) or that a part of the contract was not reduced to writing.

because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence *Phyfe v Wardell* 2 Edw Ch (N Y) 47. In brief, if one person fraudulently imposes on another and procures the latter's signature to an instrument he had not agreed to sign, did not know he was signing, and did not intend to execute, this amounts to fraud in the execution of the instrument, which may be proved by parol or if satisfactorily established will justify a finding against the validity of the instrument and would not be obligatory on the person so signing *St Louis & S F R Co v Dearburn*, 60 Fed 880, *Marnell v Blake*, 3 B & B 35=3 Eng Rep 1153. For the purpose of proving the fraud, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement may be proved. In such cases the rule that prior negotiations are merged in the written agreement does not apply *Prentiss v Russ*, 16 Me 30 (Am). No rule is better settled up on this—where fraud is alleged a very wide range is given to the testimony. Parol evidence is admissible in such cases to show the circumstances surrounding the transaction and the motives and intentions that prompted the parties to execute the same. Such evidence is permissible to show fraud in a transaction, which, if shown, annuls the contract, and prevents its enforcement. It is not admitted for the purpose of varying the terms of a contract but merely to ascertain whether it is a *bonafide* transaction or sham. If there is no fraud the contract will stand conversely if there is fraud the purpose of the admission of parol testimony is served *Tairbanks v Simpson* 28 S W 128 (Am). In such cases any secret agreement or trust may be shown by them although directly contravening the face of the conveyances. The consideration may be enquired into (*Gray v Hanson*, [By (S C) 278]) the purpose and object of mortgages or assignments may be shown (*Wimmer v Hoyt*, 66 Wis 227=57 Am Rep 257), and generally the entire transaction may be investigated. Again in actions upon a written contract brought by one of the contracting parties against the other the rule under discussion is constantly invoked, and parties are allowed to prove fraudulent representations or conduct which formed an inducement to the contract *Abaji v Luxman*, 30 B 426=8 Bom L R 553, *Navalbai v Sruubhai* 8 Bom L R 761, *Nadia v Brendra*, 20 C W N 1067. But in such cases the evidence should be strong and clear, and the written contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived. Without enumerating them then the rule applies practically to all classes of private writings *Burr Jones* § 435. But where fraud is not alleged by the party in his pleadings fraud cannot be pleaded in answer *Somana v Gadigeya* 35 B 231, see also *Dagdu v Aama* 35 B 93, *Sangra v Ramappa* 31 B 59, *Balishen v Legge* 22 A 149. But mere allegation of the fraud in the pleadings is not of course, sufficient to warrant the introduction of such parol evidence as would vary the writing. The foundation is the evidence of fraud and upon it is built the evidence of the actual agreement (if any) between the parties. There must be evidence of fraud other than that which may be derived from the mere difference in the parol and written terms. It is not enough that there are parol stipulations contradictory to the written agreement *Tausant v Runyon* 19 Ky Law Rep 1931. The rule which prefers written to unwritten evidence does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained and thereby to avoid the contract evidenced by it or to secure indemnity to the party injured *Burr Jones* § 435. A *kabuliyat* for a period of one year provided that on default of payment of rent the arrears would carry interest at 75 per cent per annum. The tenant held over after one year. On a suit for rent on the basis of the *kabuliyat*, the tenant pleaded that, before the *kabuliyat* was executed by him the landlord agreed him that the covenant for payment of interest at 75 per cent would not be enforced. This allegation was found to be true. Held that under the circumstances the *kabuliyat* was not the final agreement between the parties, having been induced by fraudulent misrepresentation and the tenant was not liable to pay interest claimed on the basis of the *kabuliyat* *Nadia v Brendra*, 20 C W N 1067.

The fraud which under proviso 1 of section 92 may be proved must be fraud which would invalidate the document and therefore subsequent fraud

**S 92.** in respect of the document not such as to invalidate it, could not be a ground for admitting extraneous oral evidence under proviso 1 of section 9? *Keshavrao v Raya*, 8 Bom L R 287. When there is a duly signed receipt for the payment of rent oral evidence could not be admitted in supersession of the recitals in the receipts. But if the case is that false entries were made in the receipts there is a question of fraud and oral evidence is admissible under this proviso. *Kumari Behari v Kalla*, 1923 Oudh 45.

Where the transaction beginning with a sale deed amounted to a mortgage between the plaintiffs and defendants. Held it s 92 be applied the proviso, to that section would admit the evidence because it would be found to insist upon a claim made by the appellants to property arising out of such transactions, when the appellants must have known that the plaintiffs were the true owner. *Mahadeo v Tularam* A I R 1922 Bom 256.

Where an assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, the provisions of section 92 of the Evidence Act are no bar to the production of oral evidence by such third parties. *Paramal v Mahomed Ali* 6 S L R 107. In a suit to recover rent under a *kabuliyat* held that evidence of an oral agreement set up by the defendant, while admitting execution of the *kabuliyat* was admissible for the purpose of proving the fraudulent character of the transaction between the parties. *Kashinath v Bhindabun*, 10 C 649. *Kasim v Noor Pebee* 1 W R 76.

**Coercion or intimidation.** Coercion is defined by section 15 of the Indian Contract Act. When consent to an agreement is caused by coercion the agreement is a contract voidable at the option of the party whose consent was so caused. (Vide section 19 of the Contract Act). An instrument obtained by illegal duress is an instrument, obtained by intimidation. This may be by threats as well as actual violence, actual imprisonment, privation of food or rest or the like torture. *Smith v Monteith* 13 M & W 13. Threats may affect loss of life loss of member corporal imprisonment. But the duress or threat must be sufficient to overcome a firm and constant man and not a meretricious *homo*. 11 M I A 250. *Nort Li* 274, see also *Guthrie v Abdul* 14 M I A 53, *Tincori v Krishna* 20 C 15. *Ranganayaka v Alura* 13 M 214. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the most solemn formalities. An excellent illustration of duress sufficient to avoid a contract is contained in a recent Maryland case. *Moore v Putts* 110 Md 490. (Am). A lessee had possession of the fire policies on certain leased property, and a fire having occurred and the lessor being unable to collect the amount covered by the policies without having such policies in his possession the lessee threatened to destroy the policies except the lessee agreed to pay him a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the Court said it would be difficult to imagine a clearer case of fraud and duress in exacting such an agreement of the lessee before he could obtain possession of the policies which belonged to him, and that it would be reflection upon the administration of justice to permit a plaintiff to recover on an agreement obtained as above shown. *Burr Jones* § 435.

**Undue influence.** Undue influence is defined by s 16 of the Contract Act. "Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will must be an influence exercised either by coercion or by fraud." *Per Cranworth L C in Bony v Rosborough* 7 H L C at p 15. Similarly *Earle B in Barry v Dutton* (1838) 2 Moo P C at p 491 observed. "Undue influence and the importunity which is to defeat a Will must be of the nature of fraud or duress exercised on a mind in a state of debility." "The influence to vitiate an act" said Sir John Nicholl in *William v Gould* 1 Hogg at p 751. "It must amount to force or coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another." See also *Siti Mahomed v Dame Juber* 22 B 17. *Hyer v Mullen* 15 C W N 231. *Siti Mahomed v Kinnay* 43 M 546-47. *I A 1*. *Bijoy Singh v Kinnay* 23 C W N 100. *Mahomed v Sumanj* 49 Ind C 761-60. *L J* 572.

**Illegality** The consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law or is fraudulent, or involves or implies injury to the person or property of another or the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void (Rule 23 of the Contract Act). If the consideration on either side consists of a promise and the thing promised is unlawful, the consideration is unlawful and the agreement is void. The agreement is also void if the object or purpose of the parties (including the manner in which it is intended to be carried into effect) is unlawful (*Jaffer Meher v. Budget Budget Mill* 33 C 702 *Cum Contract Act* p 102). The legality of a contract has to be determined by the law of the place of performance or if no particular place is designated by the law of the place where the contract is made. But the *lex fori* determines how far the law of a foreign country is to be recognised. Although therefore an agreement may be lawful according to the law applicable to it, it will not be enforced by the Courts of a state whose laws expressly prohibit such an agreement. Nor will the *lex fori* suffer the foreign law to be applied if the agreement is contrary to the interests of the state or to common principles of justice and morality (*Santos v. Illidge* 23 I 1 C P 317). Accordingly the Court will not enforce an agreement obtained by threats of a criminal prosecution although the agreement is valid according to the law of the country where it was made and where the parties to it were domiciled (*Kaufman v. Gerson* (1904) 1 K B 591 *Cum Contract Act* p 106). Illegality covers instruments or transactions against public policy such as a bond, in restraint of trade (*Mitchell v. Reynolds*, 1 Sm I C 341), bond given for an immoral consideration, *Utrurpi causa non est in actio e.g.* a promise the obligee to live with the obligor in a state of fornication (*Haller v. Perkins* 3 Burr 1568). In *Damun Das Banerjee v. Hurro Lal Shaha* 10 W R C E 140 a contract to carry on litigation against a third party out of spite is void aside *Vol II* 271. Section 127 of the Indian Succession Act 1925 provides: 'A bequest upon a condition, the fulfilment of which would be contrary to law or to morality is void'.

Parol evidence may under the proper pleading, be offered to show that the contract was made for the furtherance of objects forbidden by law or is void by common law (*Collins v. Blanton* 2 Wills 347 = 1 Sm I C 341). In *Benyon v. Nettlesfold*, 3 M & G 94 *Biggs v. Lawrence*, 2 I 2 5 = 1 Sm I C 341 *v. Read* 5 T R 600 *Doe v. Ford*, 3 A & E 129 *Smith v. Jones*, 1 C & P 582 *Norman v. Cole* 3 Esp 251 *Syde v. Smith* 1 Sm I C 341. Evidence is always admissible to prove that the consideration or object of an agreement in writing is unlawful and that the agreement is void (*Ka. In Nath v. Brindaban* 10 C 619 *Anup Chandra v. Banerjee* 10 C 619). In *Mudhal v. Sadasook* 32 C 437. Moreover, where a contract is made in violation of a law, it is thus unlawful it is the right and duty of the Court to take cognizance of the fact although it may not be stated in the pleadings (*Kamala Nair v. S. M. I. A.* 187, *Scott v. L. R. S. M. I. A.* 187, *Fraser v. Clarke* 27 A 267, *Cum Contract Act* p 102). It is also the duty of the Court to show that an agreement in writing is void if it is contrary to law or morality. In *Dass v. Venkata Subba Pam*, 17 M 43.



**S. 92.** himself written the body of the document or not, if he has signed it. It is even immaterial whether he has signed it, if he has otherwise acknowledged, or adopted it. Hence proof of signature is sufficient to charge him. *Wigmore* § 2131. When it is required that a transaction, to have legal effect, must be in writing, the requirement is one of form or solemnity. Stamp, Registration Seal, Attestation, writing—all these are different varieties of formality. These formalities, so far as required, take their place with the rule for writing in some of the Acts as an inherent element of form in the validity of the transaction. Like all other requirements of form, they are arbitrary, in the sense that the act may be sufficient in its terms (for example to constitute a contract or a release) and may be fully proved by evidence, and yet remains legally effective. Nevertheless, they are not arbitrary to the extent that they rest on a conscious policy of avoiding certain general dangers or abuses and that they enforce a rigid rule for the sake of this policy. *Wigmore* § 2456. The only question was whether the appellant (defendant) was entitled to produce oral evidence to prove that the contract on which the plaintiff sued was void as being illegal. The fact that the contract is not what it purports to be but an agreement for an unlawful object, is a fact which would invalidate the document on which the suit is brought. Evidence to invalidate the document is admissible. *Thurugada v. Maning Nyo* U B R (1897-1901) Vol II 399.

**Want of capacity of the contracting parties.** Parol evidence may also under the proper pleading, be offered to show that the party was incapable of contracting by reason of some legal impediment such as infancy, coverture, idioey, insanity or intoxication. *Bariel v. Burton* 2 Ack 167. Besides the two classes of persons *non compos mentis* viz. idiots and lunatics. *Lord Cole* mentions two more classes viz. those who were of good and sound memory but by the visitation of God has lost it and those who have become *non compos* by their own act, as drunkards. (*Will Per* 25). In the former of these two latter classes must be reckoned those who from sickness, grief, accident or old age have lost their reason, who are not like those classed by *Lord Cole* as lunatics, sometimes having their understanding and sometimes not, but those under standings are defunct, who have survived the period that Providence has assigned to the stability of their minds. *Williams on Executors* 26 citing *Lepante Chancery* 12 Ves 452 by *Lord Eversham*. *Sherwood v. Sanderson* 19 Ves 283. *Rignay v. Darnum* 8 Ves 66.

**Want or failure of consideration.** An agreement made without consideration is void unless it is in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. (*vide section 23 of the Contract Act 1872*). This proviso of the Evidence Act permits a party to a contract reduced into writing to establish among other matters "want or failure of consideration" where in a suit on a promissory note the defence raised the plea of want of consideration. *Held* that there was nothing in the law preventing the defendant from establishing the plea. *Chaman Lal v. Hiralal*, 108 Ind Cas 158 = 26 A L J 183. If one party to a deed alleges and proves that the whole of the consideration, the receipt of which was acknowledged in the deed, did not pass, the case falls within the first proviso of section 92 of the Evidence Act and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the consideration. *Chaman v. Basanti* 36 A 37 = 24 Ind Cas 661 = 12 A L J 969, see also *Kailash v. Harish* 5 C W N 178. Where it can be shown that the consideration for a promissory note was losses in gaming this is a want or failure of consideration within the meaning of proviso (1) to section 92 of the Evidence Act and oral evidence can be given to prove that the consideration represented gambling losses. *Balghobind v. Bhaggy Mal* 11 A L J 874 = 35 A 758. Notwithstanding an admission in a sale deed that the consideration had been received it is open to the vendor to prove that no consideration had been actually paid. *Henry v. Flaherty* U B R (1897-1901) Vol II, 400. See also *Shadat v. Dulopur* A W N 1854 52. Pre-emptor can show that transaction which is ostensible

a mortgage is really a sale 157 P W R 1909 Under this proviso a party to a contract may prove a fact such as want or failure of consideration, but then, if a party to a contract under that proviso be allowed to prove want or failure of consideration his opponent would not be bound by the recital in the contract, but would be competent in answer to the case made by the other side, to adduce evidence in order to prove that the consideration was different from that recited in the contract *Lala Hummat v Lderchellen*, 11 C 486 Notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid The provisions of the Evidence Act do not render inadmissible evidence that will contradict the statements of fact in a written document When a contract of sale mentions that the amount of consideration specified in it has been received by the vendor it is competent to the vendor, under the provisions of the Evidence Act to prove a collateral agreement that the purchase money should remain in the hands of the vendee for the purposes and subject to the conditions alleged by him *Sahpal v Indrajit*, 22 A 370 P C = 1 C W N 485 = 27 I A 93 = 2 Bom L R 353 The want or failure of consideration contemplated by this proviso is a complete want or failure of consideration *Keshabrao v Laya S* Bom L R 287 Where the consideration for an assignment of a mortgage decree is stated in the registered deed of assignment to be Rs. 2,50,000 the amount of price is an essential term of the contract and oral evidence is inadmissible to prove that the price agreed to be paid was in fact something less than the amount recited in the deed *Lodd v Muthuli A I R 1925 Mad 660* = 48 M L J 721 When there is a recital in a document of the payment of a certain sum of money as consideration oral evidence is admissible to prove that the recital is incorrect as a matter of fact Such a recital being only an averment of facts S. 92 of the Evidence Act does not bar oral evidence being let in to prove it to be wrong In such a case the other party may also be allowed to let in oral evidence to prove that the recital is not incorrect but was deliberately put in and for the purpose of proving it he must be allowed to prove what the real consideration was Section 92 does not in any way bar such proof for the proof is adduced not for the purpose of varying or altering any term of the written contract but only to show that the recital in the deed is correct *Ramaswami v Lodi Govindoss* 22 L W 818 = A I R 1926 M 35 = 19 M L J 111 Though want of consideration or failure of consideration or difference in the kind of consideration may be proved evidence to vary the consideration in a registered sale-deed is inadmissible *Anualla v Haryoband*, 27 C W N 196 = 37 C L J 502 = 75 Ind C 157 = 1923 Cal 370 In the case of a deed of sale it is open to the vendors to prove that no consideration was actually paid and oral evidence is admissible to prove that fact though contrary to the recitals in the deed *Motiram v Radhabai* 55 Ind C 13 see also *Singara Charlu v Upenbanga*, 10 M L J 69 *Faiyaz-issa v Hanjunnissa*, 27 A 612 = A W N 1905 129 = 2 A L J 360

**Considerations different from that contained in recital** Although this section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, it does not prevent one of the parties to the contract from showing either that there was no consideration or that the consideration was different from that stated in a conveyance *Gopal Singh v Laloo Lal*, 10 C L J 27 = 2 Ind Cas 93 Evidence is admissible to show that consideration, mentioned in a deed as having been paid, never passed, and also to show that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself *Muhammad v Muhammad* 4 A L J 441 = A W N 1907, 181

**Mistake of fact** "Here again" says *Mr Norton*, "the Indian Court sits as a Court of Equity, and will reform a document on the principles which prevail in equity vide illustration (e) In equity, parol evidence is often admitted to vary or even contradict a writing whereby some mistake surprise or the like, it does not represent the party's true intention, but it requires a very clear case to induce the Court to interfere The mistake must be most satisfactorily

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made out, and the error be shown to be one which ought to be corrected this be done by the plaintiff, the Court will reform the instrument so as to make it in conformity with the true intent. A defendant against whom specific performance is sought may insist on the mistake in his defence, and establish by parol evidence. *Not Et* 275. Section 20 of the Contract Act enacts "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Section 22 of the same Act lays down "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact." This section is not a bar to plead the mistake of a document writer. *Bhallappa Sanjua* 6 Mys L J 103. Where on a renewal of a mortgage an item of property was misdescribed and there was no property satisfying that description belonging to the mortgagor reference to the earlier deed of mortgage is permissible to establish identity of the disputed item. *Abdul v Ram Gopal* 41 A 246-20 A L J 55=L R 5 A 81=64 Ind C 961. A mutual mistake may in describing a piece of land in a registered mortgage deed can be proved by oral evidence. *Kota Chinn v Kanni Kantua*, 31 Ind C 671. Where a deed of mortgage under which possession of the mortgaged property was handed over to the mortgagee provided that there was to be no accounting between the parties at the time of redemption and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor merely by way of guess without any accounting having been really taken at the time. *Held* that the mortgagor should show that there was mistake in the statement of consideration and that the mortgagee was entitled to have an account taken. *Parab v Balwant* 5 O L J 670=48 Ind C 55. Under proviso (1) to this section evidence may be admitted to prove that there was a mutual mistake in the wording in an agreement and to prove what the real intention of the parties was, and such evidence as to the alleged mistake may be given not only in a suit for the rectification of the mistake, brought under section 31 of the Specific Relief Act, but also in a suit based upon the agreement itself. *Narayan Suman v James*, 3 L B R 227 see also *Po Vay v Mann*, *Br Chit* A I R 1929 Rang 262. Oral evidence may be adduced to show that owing to the ignorance of the draftsman a deed of sale did not truly express the real intention of the parties. *Shalur hohuni v Vishwanath* 13 C P I R 33. It is open to the Court, having regard to this proviso to allow oral evidence of mutual mistake of fact to vary the terms of a deed. *Mahendra v Jogendra* 2 C W N 260 see also *Hunt v Rousmanier* 8 Wheat 211 (Am) *Price v Lay* 32 F J Ch 550 *Molmer v Shotall* 2 Dru & W 371, *Hold v Hatchison* 21 F J Ch 28, *Wright v Goff* 24 F J Ch 803.

**Mistake of law.** A contract is not voidable because it was caused by a mistake as to any law in force in British India but a mistake as to law not in force in British India has the same effect as a mistake of fact. (Under section 21 of the Indian Contract Act 1872). This accord with the English common law rule that ignorance of law cannot be pleaded. The Courts say (Chancellor Kent) do not undertake to relieve the parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. Cited in *Stor E J Jur note* to § 126. At the same time Courts of Equity have claimed power to relieve against mistakes in law as well as mistakes in fact in cases where there is some circumstance which makes it inequitable that the party who has received the money of other property should retain it. *Cum Fe* 99, *Partho Chunder v Mohendranath* 17 C 692. The maxim *q. Ignorantia juris neminem excusat* refers to a principle of ordinary law of the land and not to mistake regarding contents of documents. *Deauchamp v Winn* L R 6 H L 225, *Cia* 1 C 99.

**Mistake of fact and section 31 of Specific Relief Act.** When such a mistake is established the document is construed by the Court as if the mistake had been rectified without the instrument having been actually ordered to be rectified in a suit brought for the purpose under section 31 of the Specific Relief Act.

Act subject to the condition that the rights of third persons acquired in good faith and for value should not be prejudiced thereby. *Kota Chuna v Kanti Lantu* 31 Ind Cas 671. Oral evidence is admissible to prove a mutual mistake in the description of a piece of land in a registered mortgage deed and when the mistake is so proved the document can be construed by the Courts as if the mistake had been rectified, and a separate suit for rectification of the instrument under section 31 of the Specific Relief Act is not necessary provided that the rights of third persons acquired in good faith and for consideration are not prejudicially affected thereby. *Kota Chuna v Cannelanti*, 3 L W 551. The combined effect of section 92 of the Evidence Act and section 31 of the Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant to protect his right by proving a mistake in contract, is a mistake in the description of the property sold by wrong survey number of the same. A prior rectification of the deed is not necessary to the advancement of the plea of mistake. *Sarban v Kaur Singh*, 104 Ind Cas 736. Where a mortgage deed stipulates that Re 1 per month shall be paid as interest and the mortgagee contends that the rate of interest agreed upon is Re 1 per cent per month, the words 'per cent' having been omitted from the mortgage deed, through clerical mistake it is a case of mutual mistake of the parties and not one of latent ambiguity is contemplated by s 93. The case is similar to one in which a description of the property intended to be conveyed in a particular deed has been wrongly entered. Therefore the combined effect of section 92(1) of the Evidence Act and section 31 of the Specific Relief Act, is to entitle either party to the contract to protect his rights by proving the mistake in the written contract. *Ham Bhariosay v Janji Prasad*, A I R 1950 Oudh 95. See also *Lungasami v Souri Iyyan* 59 M 792=29 M L J 229=29 Ind Cas 588. *Abul Halim v Ramgopal*, A I R 1922 All 12=44 A 246, see also *Pratap Chandra v Mahomed Ilt*, 41 C 312=19 C L J 66=20 Ind Cas 413=15 C W N 592.

## PROVISO (2)

**Scope of Proviso (2)** Parol evidence is admissible to prove any collateral verbal agreement as to any matter on which a document is silent, which is separate from and not inconsistent with its terms and which might naturally be omitted from the writing. *Cottle* Cas 313. Vide illustration (f). The plaintiff took a lease of land from the defendant reserving to the latter the sporting rights. Evidence was admitted of a collateral verbal agreement by which the defendant promised to destroy the rabbits if the plaintiff would sign the lease although the lease was silent on the point. In admitting the evidence *Kelly C B* said 'I think the verbal agreement was entirely collateral to the lease and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given would not have signed the lease and a Court of Equity would not have compelled him to do so, or only on the terms of the defendant performing his undertaking'. *Morgan v Griffith* L R 6 Ex 70, *Cottle* Cas L 313. In the same case *Piggott B* said 'The verbal agreement in this case, although it does not affect the mode of enjoyment of land demised is I think purely collateral to the lease. It was on the basis of its being performed that the lease was signed by the plaintiff, and it does not appear to me to contain any terms which conflict with the written document'. There is no rule that there shall only be one agreement upon any matter. There may be two (or more) in the above case, if they can consistently stand together and one may be written and the other oral. If proceedings are taken on the written agreement evidence may be given of the oral agreement. This is not ruling on the written agreement, although at first sight, it may look like it. *Cottle* Cas Ex 313. The above case was cited with approval in *De Lavalley v Gaultford*, L R (1901) 2 K B 215=70 L J K B 33 which perhaps may now be taken as the leading case on the matter. There the plaintiff and the defendant entered into a lease of a house by the latter to the former. The terms were arranged but the plaintiff refused to hand over the counterput that he had signed unless he received an assurance that the drains were in order. The

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defendant verbally represented that they were in good order, and the counter part was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order and an action was brought to recover damages for breach of warranty. In holding that the representation made by the defendant as to the drains being in good order was a warranty which was collateral to the lease, and for breach of which an action was admissible *L. Smith v. R.* said "Now what constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain and should then enter into the bargain as part of it. It was laid down by *Buller J.* so long ago as 1789 in *Pasley v. Freeman*, 3 F.R. 51. It was rightly held by *Holt C. J.* in *Croce v. Gardner* Carth. 90 and *Medina v. Stoughton* 2 Ark. 210 = 1 Ed. Raym. 593, and has been uniformly adopted ever since that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended." What is it the defendant asserts? I paraphrase the evidence: you need have no certificate of a sanitary inspector—it is quite unnecessary the drains are in perfect condition. I give you my word on the subject. Will that satisfy you? If so hand me over the counterpart. What more deliberate and emphatic assertion of a fact could well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? The next question is: was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. The lease is entirely silent about the drains, though there is a covenant that the lessee during the term should do the inside repairs and the lessor the outside repairs, which would, I suppose, include the drains which happened to be inside or outside the house. There is nothing in the lease as to the then condition of the drains—i.e. at the time of taking of the lease which was the vital point in hand. Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy and it in no way affected the terms of the tenancy during the three years which was all the lease dealt with. The warranty in no way contradicts the lease and without the warranty the lease never would have been executed. Three cases were cited in which prior collateral agreements outside leases had been allowed in evidence and given effect to by the Court namely *Morgan v. Griffiths*, L.R. 6 Ex. 70; *Eysling v. Ideane* L.R. 8 Ch. 756 in this Court, and *Ingeil v. Dule*, L.R. 10 Q.B. 174. The first two cases relate to prior agreement collateral to leases as to keeping down rabbits, and the last case to a prior collateral agreement to do repairs and to send in additional furniture. In the rabbit cases the agreements were held collateral to the leases, and did not contradict the terms of the leases. It was argued by the learned counsel for the defendant that the collateral agreements in the rabbit cases were agreements that something should be done after the lease was taken and that in the present case the agreement or warranty is that the drains were in good order. This is true, but if in the rabbit cases the agreements were collateral and outside the leases the leases not containing the whole terms and the collateral agreements not contradicting the leases, I cannot see why the agreement in his case is not collateral also. It will be observed that in both these cases the subject matter of the verbal undertaking was temporary and immediate a matter which did not require to be dealt with amongst those permanent or continuous matters which are the subject of the covenants in the lease. Such covenants generally dealt with matters to be periodically attended to during the tenancy and it would doubtless be far more difficult to induce the Court to admit verbal evidence of agreements concerning such matters as it would be by no means natural to leave them to a collateral verbal arrangement where there is formal written transaction between the parties, on the other hand, it is most natural to omit from a lease an arrangement as to the immediate destruction of rabbits, or the condition of drains at the commencement of the tenancy. *Cockle Cas. Et. 344*

But in order that parol evidence may be admissible to prove collateral agreement, it must not conflict with, or be inconsistent with, the written document, the evidence must not amount in effect to adding additional terms to the writing. *Angell v Duke* 32 L T 320=L R 10 Q B 174, *Cocle Cas Li* 346. In that case the defendant let to the plaintiff, by a written agreement a house and furniture therein. The plaintiff offered evidence of a verbal agreement made at the same time to the effect that the defendant would send in additional furniture. It was held that such evidence was inadmissible, it being inconsistent with the written agreement. In that case *Cochran C J* in delivering his judgment said "To allow the plaintiff to recover in this action would be to allow a parol agreement to conflict with a written agreement afterwards entered into. I agree with the cases which have been cited to this extent that there may be instances of collateral parol agreements which would be admissible, but this is not the case here. Something passes between the parties during the course of the negotiations, but afterwards the plaintiff enters into a written agreement to take the house and the furniture in the house, which is specified. Having once executed that, without making the terms of the alleged parol agreement a part of it, he cannot afterwards set up the parol agreement. In the same case *Mellor J* said 'There is one contract, the house is the same, the rent the same and the general terms the same. During the negotiations it appears to have been suggested that some more furniture should be put in, but afterwards a written contract is made affecting the house, affecting the furniture and affecting the rent and to this agreement the plaintiff is attempting to add an additional term. *Blackburn J* added "It is a most important rule that where there is a contract in writing it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties, where there is a collateral contract the written contract does not contain the whole of terms. Here the lease expresses the whole terms, the defendant agrees to let and the plaintiff to take, the house and furniture at a certain rent, there is said to have been an arrangement made beforehand during the negotiation, that the defendant should let the plaintiff have more furniture for the same rent, how is this collateral? I cannot perceive that it is.

But the general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct valid contemporaneous agreement between the parties which was not reduced to writing when the same is not in conflict with the written agreement. *Burr Jones* § 439. Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms may be proved by parol if under the circumstances of the particular case it may be properly inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies, that is it must not be so closely connected with the principal transactions as to form part and parcel of it. And where the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the agreement of the parties, and the extent and manner of their undertaking was reduced to writing. *Seitz v Breuers etc Ma Chme Co* 141 U S 510. But 'where a writing although embodying an agreement is manifestly incomplete and is not intended by the parties to exhibit the whole agreement but only to define some of its terms, the writing is conclusive as far as it goes. But such parts of the actual contract as are not embraced within its scope may be established by parol. *Flood El* § 23. According to the better view the only criterion of the completeness of the written contract is a full expression of the agreement of the parties in the writing itself. If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. *Burr Jones* § 440.

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Where a promissory note is silent as to interest this proviso does not preclude a party from setting up and proving a subsequent oral agreement to pay interest. *Sudhances v Spalding* 12 C L R 163. Where there is a contract with a partnership and a promissory note signed by a partner in his own name and note in the name of the partnership as evidence of such contract all the partners will be liable. The principle that only the maker of the promissory note can be held liable thereunder is not applicable in a case where an independent contract is alleged and therefore the promisee can be allowed to adduce evidence as to the independent contract. *Popula v Popul* A I L R 190 Mad 109.

In considering or not whether this proviso applies etc. The principal rule applies only to formally complete contracts, for in such it is reasonable to suppose that the parties have set down all they intended and omitted nothing. This presumption becomes weaker and weaker as the document is found to be less and less formal. *Beharee Lal v Kammer* 11 W R C R 319. And in the case of memoranda of agreements etc. as we are not bound to presume that every thing has been reduced to writing, parol testimony to prove additional terms etc. is reasonably enough admissible. The rule being confined to formal and complete documents a mere receipt in general may be invalidated by parol evidence of fraud or mistake. So of a loose memorandum which does not profess to embody the whole of the parties' intentions. So, where a person who hired a horse gave the owner his card on which he had written in pencil "six weeks at two guineas". If the owner was allowed to prove by parol an additional term namely that all accidents by shying should be at risk of the hirer. *Jeffrey v Walton* 1 Strange 267. On this ground the section directs the Courts, in considering whether parol testimony is admitted or not to have regard to the formality of the documents. *Rule illustrations (g) and (h) Aot P* 276. Where a suit is based on a negotiable instrument which is a document of a formal character the existence of a separate oral agreement as to any matter on which the instrument is silent cannot be proved under s. 92 of the Evidence Act or proviso 2 to the section would not apply to the case. *A Shahyog Hindu* is an instrument of a formal character and where it is silent as to interest a separate oral agreement for payment of interest cannot be proved by virtue of proviso 2 to section 92 of the Evidence Act. *Kishore Chand v Gindutta* 16 P L R 1911. *Patima v Hanumanth*, 17 M J J 296. *Lalram v Hemendra* 18 C W N 1260. *Jado v Beharilal* 53 Ind Cas 212 but see *Goswami Sri Ghansham Jaji v Ram Nivarn* 11 C W N 1075=29 A 33-17 M L J 37=1 A L J 29=9 Bom L R 1. Defendant mortgaged certain shops and their stock in trade to the plaintiff. The plaintiff alleged in the plaint that it was agreed that the mortgage should include the goods which might be brought into the shop subsequent to the date of the mortgage as well. It was found that the mortgage deed, though registered was drawn up not by a lawyer but by a petition writer. Held that in considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer was of much more importance than the fact that it was registered, and that evidence of the alleged oral agreement was admissible under section 92, proviso (2) of the Evidence Act. *Nochitpa v Chotalungun* 4 L B R 240=14 Bar I T 231.

When the informal and incomplete document is silent. Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant was incomplete and that there was a supplementary oral agreement. Held that it would not be inconsistent with the terms of the document that there should have been an agreement that the consignments should be sent when the plaintiff ordered or requested that they should be sent and that the defendant was not bound to despatch consignments without definite order. *Seth Lalram Chand v Sahabuddin*, 70 Ind Cas 844=A I R 1923 Nag 36. Where a deed of lease does not mention the place fixed for payment of rent it is open to the plaintiff to show that it was subsequently agreed between the parties that rent was to be paid at a particular place. *Onkar Prasad v Bubi Das* 8 N L J 81=89 Ind Cas 273=A I R 1925 Nag 281. Under this proviso the existence of any separate oral agreement as to any matter can

which a document is silent and which is not inconsistent with its terms may be proved. This proviso applies where the document is of an informal character. *Jodhaya v Bapam*, 7 N L J 25=81 Ind Cis 309. Following on a contract for sale of goods, the vendor gave a *Parithanayan* reciting the payment of a sum of money, and the varying terms of the contract and the quantity of good, its price and the term of performance. It was signed only by one of the parties and did not advert to the obligations of one of the contracting parties. On a question arising whether oral evidence was admissible as to whether there was an agreement that the goods were to be supplied only on receipt of the full purchase money, *held* it was admissible under the second proviso to this section. *Indran v Kannappa* 86 Ind Cis 476=A I R 1925 Mad 1029. Where a document does not embody all the terms of a contract between the parties but is merely a written admission of a fact there is nothing in section 92 to exclude evidence of the real meaning of the words used. *Jumma v Abu*, 93 Ind Cis 193=A I R 1926 Nag 701.

**Document is silent—and terms not inconsistent with the terms of the contract.** In a lease the rent was stated to be a certain sum but a deduction on account of rent in suspense was allowed and a lesser sum was actually payable. The plaintiff sued upon the loan and alleged that the deduction was allowed because a quantity of land was not at that time fit for cultivation but that there was an oral agreement to the effect that the rent in suspense would be received as soon as the quality of the land improved. *Held* that under proviso 2 section 92 of the Evidence Act the oral agreement could be proved because the lease omitted to specify the reasons for which the rent was kept in suspense and the period during which it was to continue in abeyance and that the plaintiff might establish that the contingency upon which the rent was agreed to be received had happened. *Satish Chandra v Kamru Mohan*, 7 Ind Cis 721. Where a sale deed was executed for a consideration of Rs 35,000 but in fact settled by oral contract to be Rs 37,000 and the discharge of a mortgage for Rs 1,000 *held* that the oral contract is inadmissible in a suit for cancellation of the mortgage or for damages for breach of the oral contract under proviso 2 or 3 of section 92 of the Evidence Act. *Ramalinga v Adityam Iyer* 14 M L J 335=(1913) M W N 850=21 Ind Cis 163. A partition suit between two brothers was compromised and decree drawn up accordingly. The property was thereby divided between them in certain proportions. The plaintiff alleged that part of the terms of the compromise was that he should receive a certain sum of money from his brother in order to equalize the lots. The compromise was, however, for certain reasons silent as to this. He sued the defendant for that sum of money. *Held* that the plaintiff could not give oral evidence of the agreement, as the document providing for the division of the property between the brothers was one of considerable importance and the alleged oral agreement to pay the money was not a separate agreement but part and parcel of the very contract that was reduced to writing and the case did not fall under proviso (2) of section 92 of the Evidence Act. *Abdul v Abdul* 11 A L J 770=21 Ind Cis 305. Where the defendant admitted the execution (jointly with H) of the promissory note sued upon, but averred that it was verbally agreed that his liability on it should cease by a specified date. *Held* that evidence of such an agreement was admissible under proviso 2 of section 92 of the Act—being a separate agreement on a matter on which the promissory note was silent and not inconsistent with its terms. *Motabhai v Mulvi* 19 C W N 713=25 M L J 589=13 A L J 529=39 B 309. Where an *hathula* on which a suit was brought, was virtually a memorandum of the loan without any mention of the rate of interest section 92 sub section (2) of the Evidence Act did not prevent the parties from letting in evidence showing the rate of interest agreed upon between the parties at the time of the loan. *Aabin Chandra v Debenlia* 36 Ind Cis 612. Evidence relating to an oral agreement entered in a *bahn* to pay interest is admissible under the 2nd proviso to section 92 of the Evidence Act and the existence of such an agreement is a question of fact which cannot be considered in second appeal. *Bhan Singh v Colat* 50 Ind Cis 137. A mortgage bond contained the following stipulation for interest: 'I have borrowed from you Rs 300 I shall pay for the aforesaid sum every year





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### PROVISO (3)

**Scope of the proviso (3)** This proviso is based on the English rule which does not exclude evidence of oral agreement which constitutes a condition on which the performance of written agreement is to depend. *Lindley v. Laley* 17 Com B N S 557. *Taylor L.J.* § 1135. The meaning of this proviso is shown by illustration (1). The defendant agreed in writing to buy of the plaintiff a certain invention. Evidence was tendered by the defendants to the effect that they declined to purchase unless one Abernethy, an engineer approved of the machine and that Abernethy was absent, and one of the defendants could not conveniently return to sign the document after seeing him, it was expressly agreed verbally that the written document was signed conditionally upon Abernethy's approval being obtained and that Abernethy had disapproved of the machine. It was held that such evidence was admissible to show that the written document was not operative. *Pyon v. Campbell*, 6 A & E 370. *Cockle Cas* 318. *Thayer Cas* 17 831. In delivering his judgment, *Erie J.* said: "The point made is that this is a written agreement, absolute on the face of it, and that evidence is admitted to show it was conditional and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of the paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement, and if in fact he did sign the paper *animo contrahendi* the terms contained in it are conclusive, and can not be varied by parol evidence, but in the present case the defence begins one step earlier, the parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it is an agreement until Abernethy was consulted. I grant the risk that such a defence may be set up without ground and I agree that a jury should therefore always look on such a defence with suspicion, but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible but evidence to show that there is not an agreement at all is admissible. In the same case *Crompton J.* said: 'I know of no rule of law to estop parties from showing that a paper purporting to be a signed agreement was in fact signed by mistake or that it was signed on the terms that it should not be an agreement till money paid or something else done. They may show that they never came to an agreement at all and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. Evidence to show that it does not vary an agreement and is admissible. *Lord Campbell C.J.* adds: 'I agree. No addition to or variation from the terms of a written contract can be made by parol but in this case the defence was that there never was any agreement entered into

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Evidence to that effect was admissible, and evidence given in this case was overwhelming' Another useful case is *Wallis v Little*, 11 C B N S 369 in which evidence was allowed of a verbal argument that a written agreement for the sale of a lease should be conditional on the consent of the landlord. The Court said 'It is in analogy with the delivery of a deed as an escrow, it never varies nor contradicts the writing but suspends the commencement of the obligation' Thus even a formal deed fully executed may be suspended in its operation by a verbal agreement as an escrow' *Coelle (as Ex)* 349, *Murray v Lord Stau*, 2 B & C 82. In *Davis v Jones*, 17 C B 625, it was held that parol evidence was admissible to show that a written contract, which was undated, was not intended to operate from its delivery, but from a future uncertain period. In *Jaganmunda v Nerghun Singh*, 6 C 433 435 *Garth C J* said 'That proviso (i.e. proviso 3), as it seems to me, is intended to introduce into the law of evidence the rule which is well established and understood in England and treated of in s 1033 of *Mr Taylor's* book on Evidence. That rule is, that when at the time of written contract being entered into it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed parol evidence of such oral agreement is admissible to show that the condition has not been performed and consequently that the written contract has not become binding. This will be found exemplified and explained in the following cases—*Davis v Jones* 17 C B 625 *Bell v Lord Ingestre* 12 Q B 317, *Pym v Campbell* 6 E & B 370 *Immagirobala v Krishnaswami* 1 M H C R 457. These cases show that until the condition is performed there is in fact no written agreement at all. But this rule could never apply to a case where the written agreement had not only become binding but had actually been performed as to a large portion of its obligations. To admit parol evidence to show that some particular stipulation could not be enforced would be to introduce the mischief which s 92 was intended to prevent, and it seems clear to me that the true meaning of the words 'a y obligation' in proviso 3 is any obligation whatever under the contract, and not as is contended by the defendants some particular obligation which the contracts may contain. So it may be shown by parol evidence that a document signed is an agreement had not been intended by the parties to operate as a present contract but that it was meant to be conditional on the happening of an event which had never occurred. *Pym v Campbell* 25 L J Q B 277 *Wallis v Little* 31 L J C P 100. Wherever therefore, certain conduct or writing is put forward against a party as his purporting act no principle prevents him from showing that there never was a consummation of the act. *Wigmore* § 2408. The truth is that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper binding and of full effect. *Per Wilde P J* in *Guard house v Blackburn* L R 1 P & D 100 *Wigmore* § 2408.

On the one hand says *Prof Wigmore* 'it is well accepted that the handing of the deed to a third person is not necessarily final, the document may still be withdrawn or (less correctly) revoked. On the other hand, the maker retention of the document does not necessarily negative the act's finality, this too may be deemed unquestionable law since *Mr Justice Blackburn* in masterly exposition *Doe v Knight* 5 B & C 671" *Wigmore* § 2408. In *Lenox v Wickham* 2 H I C 296, *Blackburn J* said "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it the mere affixing the seal does not render it a deed but as soon as there are acts or words sufficient to show that it is intended by the party to be executed a his deed presently finding on him it is sufficient". See also *Gudgen v Bessel*, 6 & P B 956. The true construction to be placed on this proviso is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached and if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract evidence of such oral agreement cannot be admitted. On the other hand it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agreed that until the happening of a certain event no obligation whatever under the

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written agreement should attach. *Walter, Mitchell v. Zervant*, 52 C 677=90 Ind C 59=A I R 1925 Cal 1007. Oral evidence is admissible to show that the defendant's liability on a promissory note does not arise until another person to whom the defendant stood surety has paid the amount. *Manelju v. Maung*, 84 Ind C 1012=A I R 1925 Rang 83. But a person is not entitled to adduce oral evidence of a condition by which he says it was agreed to postpone the enforcement of a promissory note. *Subramania v. Narayan Suami*, 90 Ind C 1020=(1925) M W N 601=A I R 1925 Mad 1240. Where in an action on a promissory note the defendant set up an oral contemporaneous contract, whose terms were reduced to writing by him, but the writing was not signed by the plaintiff, held that it was not open to him to raise as plea and the agreement was inadmissible. When a contract was founded on consideration and the party who has received the consideration wrote down and signed the terms on which he received it, it was not open to him to raise the plea that he did not agree to those terms. *Hualal v. Benarasi*, 26 P L R 612=6 Lah 411=90 Ind C 682. This proviso does not intend to permit the terms of a written contract to be varied by a contemporaneous oral agreement, but having regard to illustrations (b) and (j) the proper meaning of that proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event may be proved. Where an oral agreement purports to provide that the promisee to pay on demand in a promissory note though absolute in its terms is not to be enforceable by a suit until the happening of a certain event or, in other words, that the legal obligation to perform the promise is to be postponed, such an agreement does not fall within the proviso 3 of the Indian Evidence Act. *Rambun v. Oghore*, 25 C 401=2 C W N 188.

Where a certain property was sold by the defendant to the plaintiff for Rs. 180 and it appeared that there was a separate arrangement between the parties for the payment of a certain amount to the defendant which would be a condition precedent to the sale taking effect, held that proof of such an agreement was not barred by section 92. *Maung Mon v. Ma Kiu Oh*, 5 Rang 636. See also *Lal Hia v. Bharadwaja*, 4 Bur L J 38=88 Ind C 336=A I R 1925 Rang 256. Failure of condition precedent to written agreement is fixed by oral agreement can be proved but oral agreement as to getting off amount due to the executant of the promissory note on a separate account can not be proved. *Ram Singh v. Ibrahim*, 18 S L R 39=A I R 1925 Sind 136. The admissibility of an oral agreement contemporaneous with a written document will depend to some extent upon the way in which the case is presented. *Anderson v. Walter*, 29 C W N 670=88 Ind C 135=A I R 1925 Cal 860.

**Escrow.** That specific variety of delivery to a third person which consists in naming a condition precedent to be performed, and making the act final except for the happening of the condition—the usual meaning of *escrow*—has long been recognized as leaving the act incomplete, though here it may well be that the document can not be withdrawn since nothing, but the *escrow* remains to complete the act. *Wigmore* § 2403. It is a familiar rule that parol proof will be received to show that a deed was delivered in *escrow* and that an agreement was without consideration and was delivered on *condition* that such conditions may be proved. "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to show any modification of the written agreement but to show that it never became operative as an obligation never commenced." *Wilson v. Powers*, 131 Mass 577. *Elliott Jones* § 471. Where a deed is delivered to the party in *escrow* and is not acted on, evidence is not admissible to show that it was intended to be acted on as an *escrow* only. *Moshum Ali v. Balusoo Koer*, 2 Hal 574.

**Parol proof as to execution and delivery and intention of operation of the principle so often referred to as the "parol evidence rule" is not to show that there never was any actual agreement. If the agreement, however, is shown to have no proper execution or delivery, the agreement is void.**

**S. 92** When the execution of a deed is in issue what was said and done at the time and by whom done are the very vital facts *Burr Jones* § 171 If a deed has never been delivered or if a party to an instrument obtains possession thereof by fraud or in any improper manner, this of necessity must be shown by parol and such evidence is no contradiction of the writing. The act and fact of delivery is independent of the language of the instrument. Delivery consists of an act of the hand joined with a purpose of the mind. It comes after the scrivener has done his work and after signing of the paper. Whether or not a deed was delivered is an issue frequently made in the Courts, and has been since deeds were written. If parol evidence, to establish or to refute delivery, is incompetent, then the issue of delivery would never arise for delivery rests not in words written but in things done or said. It may be shown that the party obtained possession of it by accident and against the will of the other party or that by mistake of both parties a wrong paper was delivered *Burr Jones* § 171 A and B enter into a written agreement for the sale of an interest in a patent and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party in question may show this *Pym v Campbell* 6 El & B 370 A, a farmer agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is verbally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent, and the fact that he does not consent. *Wallis v Littell*, 11 Com B N S 369 = 31 L J C P 100 In a suit on a promissory note the defendant pleaded an oral agreement that plaintiff should discharge a mortgage that was subsisting on the property sold to him by the plaintiff before he could enforce payment of the amount due on the promissory note. Held that the agreement pleaded is not admissible in evidence under s 92 proviso (3). The proviso will apply to the case of a non-attachment of an obligation under the written contract until the event provided for in the oral agreement happens and not to the case of a mere postponement of the performance of the legal obligation until the happening of the event. *Muniamma v Surappa* 4 Mys L J 74 Where in a suit on a promissory note the defendant pleads an oral agreement at the time to set off moneys due to the executant under some other account the agreement is contrary to the nature of the document and is not admissible in evidence. The case of a condition precedent to the performance of a contract in writing is different and evidence to prove such an oral agreement is admissible *Ram Singh v Ibrahim* 78 Ind Cas 418 = 1925 Sind 136 The plaintiff brought a suit on a promissory note executed by P. N. in respect of which P. H. stood surety without mentioning the terms of the contract in the plaint. P. H. contended that he was not a party to the contract and that his liability on the promissory note could only be determined after the settlement of account with the executant which was upheld. Held on appeal (1) that under s 92 (3) of the Evidence Act the oral evidence as to the surety's part in the transaction is admissible to supplement the terms of the contract and that the written and the oral agreements together constituted a condition precedent to the attaching of any liability under the promissory note which was taken as a security and that it is not open to the plaintiff to treat the promissory note as a separate contract and to enforce it without taking the whole contract into account. *Muneejee v Yauing Po Han* 2 Rang 492 = A. I. R. 1925 Rang 83 An attempt to show that the agreement reduced to writing is not what it purported to be but something different is opposed to section 92 (3) of the Evidence Act but oral evidence of an agreement constituting a condition precedent to the attaching of an obligation under the instrument could be proved. *Tata v Savana* 71 Ind Cas 471 = 6 N L J 21 = 1923 Nag 13 It is open to a person who admits the execution of a promissory note to plead want of consideration therefor. *Lallu Lal v Reoti Ram*, 45 A 679 = 21 L J 669 = 74 Ind Cas 353 (1) In a suit on a promissory note the defendant pleaded that the promissory note in the suit was passed to secure the plaintiff mortgagee against any claim that might be made by them—prior mortgagees who had been paid off and from whom the defendant has not obtained a reconveyance. Held that this alleged agreement amounted to a suspension of the obligation attaching under the note until necessity for enforcing the indemnity arises. It was no

an agreement to postpone payment of an existing liability but one by which the note is to have no legal effect until the eventuality to guard against which it was passed, arises. Under the circumstances the alleged agreement may be proved under proviso (3) to section 92 of the Indian Evidence Act. *Ahmed v Ubhaya* 25 Bom L R 867=1924 Bom 44

Proviso 3 is intended to embody the rule that when at the time of a written contract being entered into it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed and consequently that the written contract has not become binding. Until that condition is performed there is in fact no written agreement at all. *Habib Ali v Lala Ram Narayan* 9 O L J 273=1 U P L R (O C) 69=68 Ind Cas 520=1922 Oudh 270. The proviso cannot help a defendant who wishes to prove a separate oral agreement, as to the rate of interest between him and the plaintiff when the document provides for interest at a specific rate. *Habib Ali v Lala Ram Narayan* 9 O L J 273=1 U P L R (O C) 69=68 Ind Cas 520=1922 Oudh 270. A person is not permitted to vary the terms of a written contract by proof of a contemporaneous oral agreement under this proviso a contemporaneous oral agreement to the effect that a written contract was to be of no force at all and that it was to impose no obligation at all until the happening of a certain event may be proved. It may be shown that the instrument was not meant to operate until the happening of a given condition but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event. *Ali Jawad v Kulayan* 44 A 421=20 A L J 247=66 Ind Cas 131

Under this proviso a party is entitled to prove the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract and consequently, to show that the contract is to be considered as binding only when confirmed by the principals themselves. *Dmanath v Metharam*, 33 C L J 577. In a suit on a promissory note payable on demand it is not open to the defendant to plead by way of defence a contemporaneous oral agreement where the plaintiff has agreed that he will not present the note, although it is payable on demand until he has discharged certain incumbrances on the property he has sold to a stranger. *Tishnu v Ganesh*, 45 B 1155=23 Bom L R 488=63 Ind Cas 673

It is open to the Court to decide under proviso (3) that the *vara patta* granted by a landlord was intended to be operative only in the event of the lessee being able to obtain possession of the lease hold property and that such possession was a condition precedent to the attaching of any obligation under the lease upon which a suit could be based. *Kabuluddin v Sabdar Ali* 29 C L J 478=50 Ind Cas 918

In a suit on two promissory notes which contained the words 'I promise to pay you hereafter' the defendant pleaded that there existed a separate oral agreement constituting a condition precedent to the attaching of the obligation and that the word 'hereafter' in the two notes referred to that agreement. *Held* that the alleged oral agreement was admissible in evidence under proviso 3 of section 92. *Kinloch v Isa Ram* 31 P R 1877. Where the plaintiff purported to sell certain land to the defendants under a deed of sale and there was an arrangement that the deed should take effect only if the defendants succeeded in getting possession of the property in a suit *held* that oral evidence of the arrangement was admissible in evidence under s 92, proviso 3 Evidence Act. *Mahalinga v Hyder* 9 M L T 450. It is open to a defendant to sue on a promissory note executed by him as a subscriber to a *chit fund* to prove that the promissory note was executed and delivered only as security for the payment of future instalments to the *chit fund*. *Panchapala v Ayyaswami*, 107 Ind Cas 510. Where in a suit for recovering of money based on an instrument which recited that the borrower had taken in money and brought it into his own use the defendant tendered evidence to prove that he had executed such instrument upon the understanding that it should not be binding upon him unless a condition precedent was performed by the plaintiff *held* that the evidence was admissible. *Kishen v Chandi*, A W N 1882 93

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## PROVISO (1)

**Scope of the proviso (4)** Parol evidence is admissible to prove any subsequent verbal agreement rescinding or altering the terms of a written document, unless writing is required by law to render the transaction in question enforceable, in which case such evidence cannot be given to alter the terms of such written document. *Goss v Lord Nugent*, 5 B & Ad 8=21 L J K B 127=Cockle Cas 350=Hayes Cas 1 v 87; *Denman C J* (in delivering the judgment of the Court which consisted of *Taunton Littledale, Parle and Patteson JJ*) said "By the general rule of common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time that it was in a state of preparation so as to add to or subtract from, or in any manner to vary or qualify the written contract, but after the agreement has been reduced into writing, it is competent to the parties at any time before breach of it by a new contract not in writing either altogether to waive dissolve or annul the former agreement or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement and partly by the subsequent verbal terms engrifted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any Act of Parliament we think that it would have been competent for the parties by word of mouth to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. But the Statute of Frauds has made certain regulations as to contracts for the sale of lands. (So) we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts of the sale of lands, and that any contract which is sought to be enforced must be proved by the writing only." This proviso deals with two points. In the first place it lays down that if a transaction has been reduced into writing not because the law requires but because the parties find it convenient then since there is nothing in general law, which prevents them from subsequently modifying it or rescinding it altogether by oral agreement, so there is nothing in the rules of evidence, which prevents them from proving the alteration or rescission. But a matter which the law requires to be in writing can no more be altered by a subsequent than by a contemporaneous oral agreement because the rule of law prohibits it. *Mankby Et* 73. It was contended in a case that the word 'or should be interpreted as 'and' and as such oral evidence should be admissible in cases of documents which are not compulsorily registrable but which have been registered. This contention however was negatived. *Vooroor v Ashutosh*, 9 C W N ccxiv. Under this proviso evidence of a subsequent oral agreement rescinding or modifying a contract, etc in writing is not admissible but the proviso does not exclude a distinct subsequent new oral agreement super-eding the old contract *in toto*. *Lal hon Ram v Amir Khan* 14 P R 1889. The exception at the end of proviso 4 to section 92 of the Evidence Act applies to any agreement whether executed or executory. *Goseli Subba Rao v Varigonda Narasimham* 27 M 368. The provision of this proviso do not preclude the admissibility of oral evidence to prove the discharge and satisfaction of a mortgage bond. *Rumal v Gobinda* 4 L W N 301.

**Parol proof of subsequent agreement.** The general rule under discussion however does not prevent the proof of 'the existence of any distinct, subsequent oral agreement to rescind or modify any such contract grant or disposition of property, provided that such agreement is not invalid under the Statute of Frauds or otherwise'. *Steph Et* Art 90. *Goss v Nugent* 5 Barn & Ad 8. The general rule does not purport to exclude negotiations respecting written contracts unless they are prior to or contemporaneous with the making of the written instrument and in a great variety of cases it has been held admissible to prove by parol a subsequent change, modification addition or even discharge. For example it is admissible to show by parol that the written contract has been abandoned except in so far as it has been modified by a new parol agreement.

that the time or place of payment or of performance of the contract has been changed that performance has been prevented or waived by the other party, that the mode of payment for services has been changed or that the contract has been wholly discharged. It is not necessary to the admission of this kind of testimony that any new consideration be proved. 'The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it.' *Lord Denman in Stead v Druber*, 10 Ad & L 57. Where it was sought to be proved that the plaintiff had relinquished his right to a portion of the rent renewed under a *Kabuliat* by means of an agreement subsequent to the date of the instrument. *Held* that the acts and conduct of the parties were not admissible in evidence to prove that the terms of the agreement have been varied. *Talshim v Nabatulp* 116 Ind Cas 733=56 C 201=A I R 1929 Cil 437. The expression 'oral agreement' as used in this proviso is wide enough to include all written agreements whether they are oral or they are implied from acts and conduct of the parties. *Kuman v Jadhuka*, 10 Pat. L J 669=A I R 1929 Pat 717, *Mayandi v Oliver*, 22 M 261, *Rudra Ramulu v Lhabani*, 12 C L J 439=6 C W N 60. *Talhatulla v Bishambhar* 12 C L J 646, see also *Morell v Studd* (1913) 2 Ch 618, *Burner v Moore* (1904) 1 Ch 305 (312), *Hughes v Metro Ry* 2 App Cas 439, *Manindia v Durga Sundari*, 20 C W N 650=32 Ind Cas 185. The word 'oral' in this proviso is used in the sense of "not committed to writing," and includes all unwritten agreements whether come to by word of mouth or inferred from the acts and conduct of the parties. *Mayandi v Oliver* 22 M 261=8 M L J 196. As regards the alternative defence set up by the defendant in his case not only claiming the property as a preferable lien but also setting up an oral agreement whereby she alleged she had acquired it by transfer to her of the rights of the plaintiffs under their sale deed. *Held* that proviso 1 of section 92 of the Evidence Act was no bar to an enquiry into the merits of the latter defence based on the agreement, for the object of the alleged oral agreement was not to rescind the original transaction as affected between the plaintiffs and their vendor, but to transfer any right acquired by the plaintiffs to the defendant. *Rahmabai v Tularam*, 11 B 17.

Parol proof of subsequent agreement, in case where the document has been reduced into writing. The exclusion of evidence by section 92 is itself excluded by proviso 4 and a notification of a written agreement to submit matters in dispute to arbitration can be proved by oral evidence. *Pyyalal v Ghanaram*, 83 Ind Cas 22=A I R 1925 Nag 203. In a written lease for a period of 5 years there was a condition that if the lessee desired a renewal he should give a written notice three months before the expiration of the term of the lease. The lessee alleged that one of the lessors had told his wife that there was no need to give a written notice as provided for by the lease and hence no written notice for renewal had been given. *Held* that the alleged statement of the lessor regarding the written notice for renewal was not admissible in evidence under section 92 proviso 4 of the Evidence Act. Such a statement, on being assented to by the lessee, amounted either to modification or rescission of the contract of lease within s 92 proviso 4 of the Evidence Act. *Mars D'Cruz v Jitendra Nath*, 46 C 1079=30 C L J 94=53 Ind Cas 684. Under proviso 4 a party is entitled to prove the existence of any distinct subsequent oral agreement which modifies the written contract where the contract is neither required by law to be in writing nor has been registered according to the law in force for the time being as to the registration of documents. Where parties, who have bound themselves by a written agreement depart from what has been so agreed on in writing and adopt some other line of conduct it is incumbent on the party insisting on and endeavouring to enforce a substituted verbal agreement, to show not merely what he understood to be the new terms on which the parties were proceeding but also that the other party had the same understanding that both parties were proceeding on a new agreement the terms of which they both understood. *Parl of Dundley v London Chatham Rail Co* 2 H L J 13 (60). *Dina Nath v Mutha Ram* 33 C L J 577. An agreement when confirmed, becomes operative with effect from the date when originally made. *Dina Nath v Mutha Ram*, 33 C L J 577. A partnership



**S 92** which has been constituted by a registered deed can be dissolved by an oral agreement *Abdul Rahaman v Asgar Ali* U B R (1902 1903) Vol II Evidence 5 Prior to the due date of a registered hypothecation bond securing Rs 750 with interest, the obligor, the obligee, and a creditor of the latter, made an oral agreement whereby Rs 600 due by the obligee to his creditor was appropriated towards the discharge of the bond debt In a suit by obligor to recover the whole amount secured by the bond by enforcement of lien held that there was nothing in section 92 proviso (4) of the Evidence Act or in any provision of law to debar the obligor from proving by oral testimony that he satisfied and discharged the bond in whole or in part before due date *Phakar Rai v Gulari Ram*, A W N 1890, 193 The first defendant (mortgagee) sold the mortgaged property to the second defendant under the power of sale contained in the mortgage deed The plaintiff mortgagor sued for a declaration that the sale was void and for redemption, contending that, on the day before the sale took place, the first defendant orally agreed to give him four days time within which to pay off his mortgage debt and to postpone the sale and that the second defendant had notice of his agreement prior to his purchase Held that oral evidence of this agreement was admissible because it did not fall within proviso 4 of section 92 of the Evidence Act (I of 1872), as being an agreement to modify any of the terms of the mortgage *Punjab v Bhanu Das*, 23 B 348 Oral evidence of an agreement subsequent to the execution of a promissory note payable on demand varying its terms as regards its exigibility on demand is precluded under this section *Sheikh Jamu v Muhammad* 90 Ind Cas 378

Parol proof of subsequent agreement in cases of transaction which is required by law to be in writing and registered Where the parties enter into a contract, they can substitute another in its place and the substituted contract is the one to be looked to, not the one which was first entered into If the law requires that the substituted contract shall be made only in a certain way and in compliance with certain formalities such as writing and registration then unless it is so made it cannot take effect and the old contract subsists *Ukyo v My Pan Yo*, 74 Ind Cas 154=1923 Rang 102 So when an agreement modifying the terms of a prior document requires to be registered, but is not so registered the document is inadmissible in evidence and oral evidence is precluded under section 92 (4) to prove its terms *Kastur Chand v Singhai Latam Chand* 93 Ind Cas 95=A I R 1926 Nag 321 But this proviso does not exclude oral evidence of the discharge of the mortgage bond when it is pleaded that it was made partly by payment of money and partly by the release of the debt *Moham Chandra v Ramdayal*, 30 C W N 371=9 Ind Cas 757=A I R 1926 Cal 170 Where the agreement of lease on which plaintiff's suit is based is in writing and registered it is not open to the defendant to prove by oral evidence that the lease was surrendered under a later oral agreement of the parties *Doda v Muttappa* 2 Mys L J 124 An oral agreement to receive lesser amount than was due on a registered mortgage deed in full discharge of it cannot be proved under s 92 (4) of the Evidence Act and section 17 (b) of the Registration Act In such a case the actual discharge cannot also be proved *Lugnarayan v Supham* 100 Ind Cas 54=52 M L J 224 This proviso excludes oral evidence of an agreement to sell following upon a registered mortgage deed *Mauing Wai v Mauing Lau* 3 Rang 243=89 Ind Cas 825=8 A I R 1925 Rang 32 Even though a tenancy has been created by a registered instrument the termination of the tenancy can be proved otherwise than by a registered instrument There is no question of varying or modifying the terms of the lease in such a case *Uthay Kumar v Ebadulla*, 64 Ind Cas 893 Oral evidence regarding the existence of a subsequent oral agreement is excluded not only in cases in which the original contract grant or disposition of property is by law required to be in writing but also in cases where such contract grant or disposition of property has been registered *Chandha Has v Albar*, 110 Ind Cas 261 But there is nothing to prevent oral evidence being adduced in order to prove satisfaction of a claim *Mauing Lau v Mauing Po Thant* 6 Rang 191=110 Ind Cas 612=A I R 1928 Rang 114 Subsequent oral agreement to take less than what is due under a registered mortgage deed is an agreement modifying the term of a written contract and oral

evidence is inadmissible to prove it under s 92 proviso 4, of the Evidence Act *Gnananya v Ratha*, 9 Lih 597=110 Ind Cis 421=A I R 1928 Lih 873 Where the subsequent oral agreement relates to the mode of payment of mortgage money, evidence with respect to it is admissible. But if it is not merely an agreement as regards the mode of payment but an alteration of the character of mortgage itself such as changing the original mortgage which was without possession into a usufructuary mortgage it is not admissible *Chandra v Hori* 110 Ind Cis 261 One of several mortgagors can enter into an oral agreement with the mortgagee for the redemption of his share only of the mortgage and proof of the oral agreement under which money is paid for redemption is not precluded by section 92, proviso 4 of the Evidence Act. The proof of oral agreement and payment does not amount to a re-cession of the contract of mortgage but only shows that as between the parties the contract is discharged to that extent *Kandaswami v Palaniswami*, (1928) M W N 537=A I R 1928 Mad 1050 When the plea is to alter the terms of the mortgage oral evidence is inadmissible *Sukhlal v Jetha*, 30 Bom L R 1455=A I R 1928 Bom 522, *Mahomed v Nanhe Mal*, 27 A L J 924=119 Ind Cis 107=A I R 1929 A 615 An oral agreement between the mortgigor and the mortgagee whereby the latter agreed to forego interest in consideration of the payment of the principal sum in a lump within a certain date is inadmissible in evidence *Maung Shue v The Chetty Firm of J M* 43 Ind Cas 913 So also a subsequent agreement by the mortgagee to take less than is due under a registered mortgage is an agreement modifying the terms of a written contract and if it has to be proved, oral evidence is inadmissible under proviso (4) to section 92 of the Evidence Act *Malappa v Nagachetty*, 42 M 41=35 M L J 555=48 Ind Cis 158 In a suit to recover money due on a registered mortgage-deed, defendants led oral evidence to show that the mortgagees were discharged by a payment of a lesser sum. A question having arisen whether the evidence was admissible. Held that the evidence was inadmissible under section 92 proviso 1 of the Evidence Act the defendant's case being that the plaintiff agreed to receive a lesser sum given in full satisfaction to the much greater amount which was due on the mortgage *Jagannath v Shankor*, 44 B 55=22 Bom L R 39=51 Ind Cis 699 Even where the original lease is a registered one, a riyat can orally surrender his holding under section 86 of the Bengal Tenancy Act if it was not for a fixed period and its possession is given up *Poran Mahal v Indra Sen* 47 C 129 When an under riyati interest of the value of less than Rs 100 is created by a registered instrument it will not preclude the admission in evidence of an unregistered instrument to show that the interest has been relinquished. A relinquishment for consideration may be recorded as a conveyance and in the view of a document by which an interest in immoveable property of the value of less than Rs 100 is relinquished does not require registration *Soman v Molla*, 57 Ind Cas 949

Under this proviso any variation of rent reserved by a registered lease must be made by a registered instrument, and oral evidence is inadmissible to prove such variation and an agreement is none the less oral because it is inferred from the conduct of the parties *Manindra v Durga* 20 C W N 680=32 Ind Cis 185 Evidence that since the execution of the *Kabuliyat* the tenant paid rent at a lower rate than that stated in the *Kabuliyat* is admissible to show that the intention of the parties was that the *Kabuliyat* from the first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease *Manindra v Durga Sundari*, 20 C W N 680=32 Ind Cas 185 This proviso is not applicable to cases of mortgage or sale deeds executed prior to the passing of Act IV of 1882 because at that time there was no law which required a sale-deed of immoveable property to be in writing *Jangi Ram v Sheoray Singh*, 30 Ind Cas 231 This proviso precludes evidence of an oral agreement to renew a registered contract *Namagiri v Srimasa*, 27 Ind Cas 269 Although a mortgage deed has been duly executed and attested and no obligation attaches thereunder till certain conditions have been fulfilled, upon fulfilment of the conditions, the obligation attaches from the date of its execution and not from the date of registration or delivery of the deed *Jalunandan v Kalyan Singh*, 15 C L J 61=16

**S 92** C W N 612=13 Ind C is 613. Section 92 (1) does not exclude evidence of oral agreement substituting a new contract for a previous one in writing and registered. That clause refers only to an oral agreement to amend or modify such contract. *Jagat Singh v. Deo Datta Mall*, 169 P R 1953. In a suit for redemption of the mortgage, the defendant pleaded a sale of the mortgaged property. Held that section 92 clause (1) does not exclude evidence of sale for the new contract does not amend or modify the former one which is merely merged in the new one. *Bulboul v. Hira*, 39 P R 1984. Evidence of conduct of parties oral or documentary, for showing cancellation of a registered mortgage is shut out by s 92 (1) Evidence Act. *Srinivas Swami v. Alimram* 5 M I T, 1=19 M I J 280=2 Ind C is 612.

A parol agreement between a mortgagee and the assignee of his interest, whereby the latter was to pay the consideration for the sale to a third party to the credit of the mortgagee is an attempted rescission of a contract, required by law to be in writing, by a subsequent oral agreement which is forbidden by s 92 (1) of the Evidence Act, and is inadmissible in evidence. *Iyataly v. Aalamuli* 9 Ind C is 310. See also *Kattika v. Kistnamma*, 17 M L J 30=30 M 231. A subsequent oral agreement by which the plaintiff would get the money for cost and *uasalat* and would make deduction from the rent corresponding to the amount received, is not admissible in evidence under proviso (4) of section 92 of the Evidence Act to prove modification of terms of a registered *Kabuliyat*. *Banku Bihari Sanyal v. Shama Charan* 12 C L J 142=8 Ind C is 792. In a suit on a registered lease deed for rent due for two years the defendant alleged that as he was not realising proper income the plaintiff orally agreed to receive rent at a reduced rate. In support of this contention the defendant produced a receipt acknowledging receipt of a less amount in full discharge for one or two years. Held that under proviso 4 to section 92 of the Evidence Act, no evidence of such agreement was admissible and the defendant was not bound to pay at the rate stipulated in the lease. *Karampalli v. Theklu*, 26 M 195. Where the evidence of the alleged exchange involves rescission or modification of the terms of the registered deed of 1892 it is inadmissible. *Bhagwan v. Narain*, 129 P W R 1908. Where a subsequent arrangement does not in any way affect the mortgagee or where it does not modify or vary the terms of the mortgage, it is not inadmissible under this proviso. *Kedar Singh v. Sumer Singh* 10 Ind C is 196. An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible under section 92(4) of the Evidence Act. But a discharge extinguishing a debt though in receipt of a smaller sum than that due is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself, and is consequently not hit by s 92(4). *Balasundara v. Ranganathu*, 30 L W 293=A I R 1929 Mad 794. It is not open to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed that in spite of a certain property, belonging to the vendor being entered in the sale deed title to it would not pass to the vendee. *Kummar Ram v. Ananda Krishna* 118 Ind C is 789=A I R 1929 A 578, *Umedmal v. Davu*, 2 B 517. *Duarka v. Bhogaban* 7 C L R 577.

### PROVISO (5)

**Scope of proviso (5)** Parol evidence of usage or custom is always admissible where the object is to render intelligible to the Court the meaning in which parties have used language. *Voor Pt* 277. So parol evidence may be given to prove any local custom of general application, in order that it may be applied to the subject matter and bind the parties to a written transaction, unless it is inconsistent with the writing. *Wigglesworth v. Dallison*, 1 Sm L C 520=Doug 201=Cockle C is Fv 351. In that case which was a case of an agricultural lease evidence was allowed of a custom whereby, contrary to the general law the tenant on leaving at the end of his term, was allowed to take away his way going crop that is to say all the corn growing upon the said land which hath before the expiration of such term been sown by such tenant upon

any part of such lands," although the lease was in writing and no mention was therein made of such custom. In delivering the judgment of the Court Lord Mansfield C J said: "The custom is good. The custom does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." Another important case is *Dashwood v. Muggie*, (1891) 3 Ch 506 in which evidence of local usage is to waste and cutting of timber was held admissible on the construction of a Will, the testator being taken to have framed his Will with reference to such local usage. *Cockle Cas 352*. So it is always admissible to "annex incidents" as it is termed e.g., to show that things are by usage or custom in particular cases treated as incidental and accessory to the principal thing. *Nort Es 277*. Thus, it may be shown that days of grace are allowable for payment of a bill or note, that a contract of hiring is terminable by either party on a month's notice that the outgoing tenants shall have the emblements. *Ibid*. So parol evidence is always admissible to prove any trade or mercantile custom or usage, either as to the obligations of the parties in such transactions as that in question or as to the meaning of words or terms used, in order that it may be applied to the subject matter and bind the parties to a written transaction, unless it is inconsistent with the writing. *Cooley Cas 70 353*. In *Brown v. Byrne*, 3 E & B 70, — 23 L J Q B 313 = *Cockle Cas 352* = *Hayer Cas 15 911* a bill of lading specified a certain amount as payable for freight. Parol evidence was offered of a custom whereby three months' credit of discount was allowed for freight. The evidence was held admissible. In delivering the judgment of the Court, Coleridge J said: "The principles on which this case is to be decided are perfectly clear, the difficulty lies in the application of them to the facts. Mercantile contracts are very commonly framed in a language peculiar to merchants, the intention of the parties though perfectly well known to themselves would often be defeated if this language were strictly construed according to its ordinary import in the world at large, evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts is to the subject matter of which known usages prevail parties are found to proceed with the tacit assumption of these usages they commonly reduce into writing the special particulars of their agreement but omit to specify these known usages which are included however as of course by mutual understanding, evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But in these cases, a restriction is established on the soundest principle that the evidence received must not be of a particular which is repugnant to, or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither, in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded because the words are in their ordinary meaning unambiguous, for the principle of admission, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than a thousand? 'a week' 'a day'? Yet the cases are familiar in which a thousand has been held to mean twelve hundred 'a week' only during the theatrical season 'a day' a working day. In such cases the evidence neither adds to, nor qualifies nor contradicts the written contract, it only ascertains it by expounding the language. Here the contract is, to pay freight on delivery at a certain rate per pound, it is inconsistent with this to allege that by the custom the ship owner, on payment is bound to allow three months' discount? We think not. *Nebb v. Plummer*, 2 B & Ald 746 and *Hulton v. Warren*, 1 M & W 466 are cases which illustrate this principle. In the first of the cases, by the custom of the country the outgoing tenant was bound to do certain acts and entitled to receive certain compensation, but the lease which formed the written contract bound him to do the same acts in substance and specially provided for his payment as to some of them, omitting the others and the Court held that the expression as to some excluded the

**S 92** implication as to the remainder, and the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and no more. The custom therefore would have been repugnant to the contract. But in the latter case in which the former was expressly recognized the Court held that a specific provision, as to a matter *de hors* the custom, left the custom untouched and in full force. This latter case appears to us like the present the contract settles the rate of freight. Whether or not discount is to be allowed on the payment, it leaves open, and to that the custom applies.

The cases in which the evidence of custom or usage is receivable have been well summarized by an eminent author, thus—(1) To annex incidents to contracts and Wills (2) To explain the meaning of peculiar or technical terms (3) To furnish standard of comparisons on questions of negligence etc (4) To fix a party with knowledge or notice of this subject matter of the usage (5) To rebut a fraudulent intent. *Cockle Cas* 354

**To annex incidents to written instruments** Extrinsic evidence is admissible to annex incidents to a written instrument where the inclusion of such incidents is consistent with the writing and carries out the intention of the parties. In such cases the notoriety of the usage makes it probable and reasonable that the parties intended it to be a term of their contract. Thus where a written contract contained a stipulation that a party should 'lose no time on his own account and do his work well and behave himself in all respects as a good servant,' extrinsic evidence was received to show that by the custom of his trade such a party was entitled to certain holidays. *R v Stole Upon Trent* 5 Q. B. 303, *Pouell Et* 190. In *Hatton Warren* 1 M & W 475 *Parke B* said 'It has long been well settled that in commercial transactions extrinsic evidence of custom or usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usage have been established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to those known usages.' So in the case of mercantile contracts the evidence is not confined to the explanation of the written terms. Provided they are not inconsistent with the contract it is allowed to supply terms of known usage in control of the contract, and which is known by the expression of *annexing incidents*. This is upon the principle that the contract was itself framed with reference to the usage and so as to incorporate the usage in and as part of itself. *Goodale Et* 378. Accordingly where a ship was to depart with convoy but without any definition of the spot at which the convoy was to start evidence was allowed to fix this is from the place of rendezvous. *Lathulan's Case*, 2 Salkeld 443. In *Humphrey v Dale* W R (Eng) 1856—57, p 467 when there had been a contract for purchase by brokers, not disclosing their principal, and evidence was admitted to show a usage of trade holding the brokers liable. *Lord Campbell C J* thus laid down the rule *in extenso* 'Now, neither collateral evidence, nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract, but subject to this condition both may be received for certain purposes. To use the language of *W Phillips*, (in Vol II, p 415 10th Ed) 'Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade farming or other business for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure or to ascertain what was equivocal, or to annex particular incidents which although not mentioned in the contracts, were connected with them or with relations growing out of them, and the evidence in such cases is admitted with the view of giving effect, as far as can be done to the present intention of the parties. Now here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports namely that this was a contract which the defendants made as brokers. The evidence is based on the usage can have no operation except on the assumption of their having acted as brokers and of there having been a contract made with their principal. But the plaintiff by the evidence seeks to show that according to the usages of the trade and as those concerned in the trade understand the words used there

imported something more, namely, that if the buying broker did not disclose the name of his principal, it might become a contract with the broker as principal, if the seller pleased. Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed is not material. In either point of view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with, the tenor of the written instrument, and, upon consideration of the sense in which that objection must be understood with reference to this question we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with, the added incident the two would seem to import different obligations, and be different contracts. Take a familiar instance by way of illustration. On the face of a bill of exchange, at three months after date the acceptor will be taken to bind himself to the payment precisely as the end of three months; but by custom he is only bound to do so at the end of the days of grace which vary according to the country in which the same is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which in uniform usage would annex and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore of repugnancy, the incident must be such as if expressed on the written contract, would make it insensible or inconsistent. Thus to warrant upon to be *prime* signed adding 'that is to say slightly tainted, as in *Lates v Pym*, 6 Taunt 446, or to insure all the boats of a ship and add 'that is to say, all not along on the quarter, and in *Blackett v The Royal Exchange Assurance Company* 2 C & J 244 and other cases of the same sort scattered through the books would be instances of contracts in which both the two parts could not have full effect given to them if written down. Therefore when one part only is expressed it would be unreasonable to suppose that the parties intended to exclude the other also. Without repeating ourselves, it will be found that the same reasoning applies where the evidence is used to explain a latent ambiguity of language.

'Merchants and traders with a multiplicity of transactions pressing on them and moving in a narrow circle, and meeting each other daily desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges they still continue to do so and, in a vast majority of cases of which Courts of law hear nothing they do so without loss or inconvenience, and upon the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present cases that in fact this contract was made with the usage understood to be a term in it, to exclude the usage is to exclude a material term of the contract and must lead to an unjust decision.' The case was affirmed on appeal. As has been well observed in reference to these cases of mercantile contracts "The witnesses for this purpose may be considered to be the sworn interpreters of the mercantile language in which the contract is written." Indeed the observation applies to all usage evidence. *Goodere* 11 p 378-381.

So the true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intention of the parties and to ascertain the nature and extent of their contracts, arising not from express stipulations but from mere implications and presumptions and acts of a doubtful or equivocal character. *Burr Jones* § 457. Hence it is that in respect to contracts, parol evidence is often received on the ground that the parties have not stated the contract in all its

**S 92.** details, but only those which were necessary to be stated by specific agreement, and that there has been left to implication those incidents which a uniform usage would annex and according to which the parties must be understood to contract unless they expressly exclude them. It is on this principle that in a great number and variety of cases in England and in this country parol evidence has been admitted of local or general usages of trade and commerce to ascertain the true meaning of written contracts. *Southwell v Lord* 11 C P Div 371, *Fleet v Martin* L R 7 Q B 126, *Humphreys v Dale* 7 Ed & B 268, *Imperial Bank v London Dock Co* 5 Ch D 195, *Smith v Wood* 11 B & Ald 724, *Thorn v Byrne* 311 & B 702, *Berch v Depeyster*, Stark 210, *Thores v Shand*, 2 App Cas 168, *Joy Lal v Manmatha*, 20 C W N 365, *K M P R Iyer v Somasundaram*, 18 M 27=85 Ind Cas 991, *Patel v Hbbetson* 26 L J C P 296, *Hutton v Warren* 5 L J 15 931, *Gibson v Small* 1 H L C 396. In a *doult labuliyat* creating a tenancy for a term of years there was an express statement that the tenant had no right of sale gift or transfer without the landlord's consent and the only right known was an option in the tenant to take a renewal of the lease within one year after the expiry of the term at the rate of rent prevalent in the *pergannah* failing which the tenancy would pass into the landlord's possession. Held that the tenancy created by it was neither heritable nor transferable and that no evidence of custom was admissible on those heads. *Mahomed v Prodyot* 48 C 359=25 C W N 13=61 Ind Cas 503. Where a *hundi* is silent as to the payment of interest, but in accordance with prevailing custom interest is payable if the *hundi* is not sent within a certain time the drawer of the *hundi* is liable for the payment of interest. *Maving Po v Vellayappa* 62 Ind Cas 315. *Hundis* upon which a suit was brought were silent as to interest. But it was proved that in accordance with the custom of the district the parties had entered into a collateral agreement, embodied in written documents that the *hundis* should bear interest at 30 per cent per annum. Held that section 80 of the Negotiable Instruments Act being an enabling section was no bar to the recovery of interest at the above rate. *Goswami v Ram Narain* 11 C W N 105 (P C)=29 A 33=17 M L J 35=4 A L J 29=9 Bom L R 1.

To explain the meaning of Peculiar or technical terms Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless by the express terms of contract, such usage is excluded or is inconsistent with the contract. *Burr Jones* § 457. Proof of usage, say *Dr Greenleaf* is admitted either to interpret the meaning of the language of the contracts or to ascertain the nature and extent of the contract in the absence of express stipulations and where the meaning is equivocal or obscure. *Greent L v* § 292. Evidence has been held admissible to show that by the usage in the trade the phrase "crop of flax" included the amount of the current year's production which the party had on hand whether purchased or produced by him. *Goodrich v Stevens*, 5 Linn (N Y). Evidence is admissible to show that the term *san* did not signify the Bengali year but a different period specially applicable to *jalkor* tenancies. *Jote Kumar v Jadunath* 26 C W N 1023 see also *Giant v Mador*, 15 M & W 737, *Repton*, 3 Dyer 345(1) *R v Newcastle* Burr 669, *R v Sayer* 10 B & C 156, *Mayer v Sarl*, 3 D & E 306. Where in a mortgage deed it was stipulated that the mortgage should not be redeemed from 1287 to 1298 *Iash*, for 10 years alluded to was not the *Fashi* year as commonly understood but agricultural year. *Sheeboran v Bisheshwar*, A W N 1892, 236. The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters and of informing the Court of relevant surrounding circumstances. *Canadian General Electric Co v Puda Radio*, A I R 1930 P C 1.

The usage must be known. Closely allied to the requisite of long establishment of a usage that of its being known is of equal and far reaching importance. Judicial notice is taken of the general custom of the country, and

there are certain commercial customs and usages of which every person in the community is deemed to be cognizant such for example, as those belonging to the law merchant. But the usages of special trades and those local usages which may be limited to certain communities cannot, of course, be presumed to be known to all. *Sleight v Hartshorn*, 2 Johns (N Y) 531. These have been called usages as contradistinguished from the generally recognized customs of business. *Clair v Baker*, 52 Mass 186. In respect to these usages there should be either proof of actual knowledge on the part of the person to be affected or proof of circumstances from which such knowledge may be fairly implied. *Burd v Brall* 150 Ala 122 124. If a usage is special and confined to a particular business or has reference to a particular place only, there is no such presumption, and it is manifest that it would be unjust to admit it in order to restrict the natural meaning of a written contract except upon proof that both parties were aware of the particular usage and intended to be governed by it. Even if, as respects a special custom in a particular trade or between particular places there is a presumption that parties who are engaged in that trade contract in reference to the particular custom this presumption is at best but a *prima facie* one liable to be rebutted by proof that it was unknown to the party against whom it is set up, and on that being proved no weight ought to be given to it. *Isalson v Williams* 26 Fed 642. The customs of an individual in his private business are not binding upon others, unless known. *Burr Jones* § 164. See also *Mana Vilasam v Pattai*, 2 M 275. The evidence of usages of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent. In the matter of *Jay Lall & Co* 20 C W N 365=35 Ind Cas 3.

**Custom or usage must be consistent with the contract.** Since evidence of usage is received for the very purpose of ascertaining the true meaning of the contract on the theory that the parties entered into their contract with reference to such usage it is clear that proof of the usage should not be received if it contradicts expressly or by implication the language of the contract. As was said by Lord Lyndhurst 'Usage may be admissible to explain what is doubtful it is never admissible to contradict what is plain.' *Blackett v Royal Exch Assn Co* 2 Cramp & J 249=2 Tyr 266. See also *Indas Chandan v Lachmi Bibi* 7 B L R 682=15 W R 501. *Andalal v Gunupada* 51 C 588. *Goreldhan v Rouji* 76 Ind Cas 62. *Boues v Shand* 16 L J Q B 561. *Haji Mahomed v Spinner* 21 B 519. *Jago Mahon v Karsri* 9 M I A 260. *Holmes v Butalishna* 54 C 549=104 Ind Cas 268. *Macfarlane v Curri*, 8 B L R 459. *Hari Mohan v Krishna* 9 B L R App 1. *Morris v Panhananda* 7 M H C R 135. Where a delivery order is expressed to be subject to conditions no evidence can be given of any usage or custom which is repugnant or inconsistent with the express conditions of the documents. *Ahoo v Nanygram* 10 Bar L 1 92.

**Proof of custom or usage.** Lord Holt Chief Justice said 'The way and manner of trading is to be taken notice of.' *Ford v Hopkins* 1 Salk 283. In another English Case the Judge took notice of the law of the road to turn to the near hand and that it applied to riding as well as to driving. *Turley v Thomas* 8 Cu & P 103. The law merchant forms a branch of the law in England and those customs which have been universally and notoriously prevalent amongst merchants and have been found by experience to be of public use have been adopted as a part of it upon a principle of convenience and for the benefit of trade and commerce and when so adopted it is unnecessary to plead or prove them. *Barnett v Brandho* 6 M & F 630. But the usages of special trades and the local usages which may be limited to certain communities cannot of course be presumed to be known to all. Such customs or usages must be proved either (a) by direct evidence of witness (which must be positive and not amount to mere opinion) (b) by a series of particular instances in which it has been acted upon (c) by proof of similar customs in the same or analogous trades in other localities. *Coyle Cas* 1 L 351.



## PROVISO (6)

**Scope of proviso (6)** Upto a certain point and apart from any question of ambiguity extrinsic evidence would be necessary to point the operation of the simple instrument. Thus were it the case of a deed conveying all the land at A in the grantor's occupation, until it was defined by proof what lands were in his occupation the operation of the deed could not be known. So were it a case of a Will and a bequest to the children, of a party or even to the testator's own children to give effect to the bequest it would be necessary to define who the children were. *Gooder v F* p 385. Same evidence says J C Wood in *the matter of Feltham* 1 Kay & John 528 'is necessary in any case of a Will that is to say evidence to show the subject and objects of the gift. *Ide ibi* section 7 of the *Indian Succession Act* (XXXIX of 1925) 'The law says J C Wood has become so settled by numerous decisions, as to how far extrinsic evidence is admissible, and what that species of evidence must be that I need only sum up what appears to be the result of the authorities. Of course in interpreting any instrument which purports to deal with property some extrinsic information is necessary in order to make the words which are but signs fit the external things to which those signs are appropriate. In reality external information is requisite in construing every instrument but when any subject is thus discovered which not only is within the words of the instrument according to their natural construction but exhausts the whole of those words then the investigation must stop, you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator and are not permitted to go any further. To that extent the Court is always at liberty to go in interpreting a Will in other words I am to place myself in the position of the testator with the knowledge of all the facts with which he was acquainted, but I am not in the course of interpretation to introduce any evidence whatever of what were the intentions of the testator, as contrasted with, or extending or contracting the language which he has used. *Webb v Byng* (1855) 1 K & J 80 (185) So in construing a written statement the situation of the parties must be looked at and the deed must be construed with reference to the situation of the parties and their rights at the time the deeds were executed. *Rabuttu Dass v Shubchunder Mithel* 6 M I A 117. The above observations are only cited as illustrative of the principle. Practically it is upon some imperfection of the instrument as applied to the facts that the difficulty as to determining its meaning usually arises and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing their light on its interpretation. It is indeed by these as by a lamp that the Court read the document. *Gooder v F* 386. This proviso applies whether a writing is required by law or not. It proceeds upon a principle which has been stated thus—that a person who is to interpret a document, ought to be put into the same position as the person whose language is being interpreted. *Marby v F* p 74. 'It manifestly relates to the admissibility of evidence necessary to make the words which are used fit the external things to which the words are appropriate. For example if lands at a certain place in the grantor's occupation are conveyed by a document extrinsic evidence is admissible to show what lands were in his occupation. So also if a gift be made to a man's children extrinsic evidence would be admissible to define who the children were. Other instances might be multiplied. *Jurumissa v Hanfurnissa* 27 A 612 (617)=2 A L J 360 (36)=A W N (1905) 129 see also *Haji Mahomed v Spinner* 24 B 510 515 525. 'As it is a leading rule says *Dr Greenleaf* 'in regard to written instruments, that they are to be interpreted according to their subject, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence or verbal communications respecting it. Whatever therefore indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when construed.

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relatively different from that which it would receive if considered in the abstract. Thus, when certain premises were leased, including a yard, described by metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease, verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease (*Doe d. Fiecland v. Burt*, 11 R 701). So where a house or a mill, or a factory is conveyed, *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed, parol evidence to this point is admitted' *Greenl. Et* § 286.

So it is clear that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject matter of the instrument, or in other words to identify the persons and things to which the instrument refers must of necessity be received, *Doe v. Hiscocks* 5 M & W 367, 368 *Shore v. Wilson* 9 Cl & F 556 *Doe v. Martin* 4 B & Ad 771, *R v. Wooddale* 6 Q B 549 565 *Macdonald v. Longbottom*, 1 E & E 977, *Mumford v. Gelling* 29 L J C P 105 *Chambers v. Kelly* 1 R 7 C L 231, *M. Collin v. Gilpin* L R 6 Q B D 516 *Bank of New Zealand v. Simpson*, (1900) A C 182. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used, and in order to do this the Judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject matter *Shore v. Wilson*, 9 Cl & Fin 553 *Doe v. Martin* 1 N & M 524, *Grey v. Sharpe* 1 Myl & K 602. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument. *Skeet v. Lee*, 3 M & Gr 466, per *Faulstich J.* *Ill. Gen. v. Drummond* 1 Dru & War 567, *Drummond v. Ill. Gen.* 2 H of L Cts 862. In the simplest case that can be put namely that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject matter to satisfy the description. If an estate be conveyed by the designation of Black Acre parol evidence must be admitted to show what property is known by that name (*Ricketts v. Furquard*, 1 H L Cts 472) *Faylor* § 1191. "But it is well settled that the terms of an unambiguous document cannot be controlled by the conduct of the parties. As *Lord Halsbury* said in *North Eastern Railway v. Hastings* (1900) A C 290 no amount of acting by the parties can alter or qualify words which are plain and unambiguous, that it is otherwise when we have to determine the true construction of an obscurely framed document. *Herbert v. Purches* L R 3 P C 305. Per *Moorrees J.* in *Kanashu v. Inanda*, 32 C L J (18) *Nool Chandra v. Harhar*, 32 C L J 19 (F B) - 24 C W N 874-58 Ind Cts 867, *Secretary of State v. Narendra*, 32 C L J 402 (F B). *Hement v. Madnapur Zamindary Co.*, 35 C L J 493 *Ibnash v. Hyub* 36 C L J 176 *Madnapore Zamindary v. Jogendra* 62 Ind Cts 491 *Blupendra v. Madnapore Zamindary Co.* 68 Ind Cts 937 *Pranatha v. Dinanath*, 31 C L J 129 *Idams v. Gray*, 90 Ind Cts 5-48 M L J 707, *Mankam v. Venkatera* 99 Ind Cts 705=1927 M L J 191, *Must Jio v. Mt. Kulu* 101 S Lrh 219=100 Ind Cts 51. The language of the proviso is rather vague. It is true that evidence of the circumstances surrounding a document is admissible but it is admissible only for the purpose of throwing light on its meaning. It would not be permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale deed was intended to operate as a mortgage. There must be some limit to the suggestion that surrounding circumstances can always be scrutinized so as to enable the Court to alter or change the nature of the document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. *Montland v. Imrit Rio* 49 B 662=27 Bom L R 951=A I R 1925 Bom 501 *secal o Maung Shue v. Maung Tam* 6 Bar L J 195=105 Ind Cts 297=5 Rrh 644 *Kaliwam v. Gayassa*, 107 Ind Cts 201=A I R 1928 Na 182 *Contra, Benham v. Dett*, 117 Ind Cts 907 (2)=A I R 1929 Lrh 875 (2). Where the terms are unambiguous and clear, there can be no question that the evidence to prove that the terms of the contract were used in

**S. 92** a different sense must be excluded under section 92 nor is the Court in such case entitled to speculate as to the meaning of words in the contract. But where the wording of the contract is capable of different interpretations the Court is justified to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. *Juran v Ram Mandal* 55 C 808 = A 11 1928 Cld 157

**Application of the rule in Will cases** The question has more often arisen upon Will than upon other documents and it is from cases on these, accordingly, that the law has mainly to be taken. The law on the subjects as regards Wills contained in section 75 of the Indian Succession Act (XXXIX of 1925). That section is based upon the first paragraph of *Justice Wigram's* proposition V which is as follows:—For the purpose of determining the objects of testator's bounty or subject of disposition, or the quantity of interest intended to be given by the Will, a Court may enquire into every material fact relating to the person who claims to be interested under the Will, and the property which is claimed as the subject of disposition and to the circumstances of the testator and of his family and affairs for the purpose of enabling the Court to identify the person or the thing intended by the testator, or to determine the quantity of interest he has given by his Will. See also *Gien v Shah* 1 Mvl & K 60. *Wigram* § 76. *Dhanapala v Ananta* 24 M L J 418. *Sher Bahadur v Gangai* 36 A 101. *Kulasani v Khembai* 13 L W 657 (P C). *Bhagobutty v Gooroo* 25 C 112. *Indubala v Manmatha* 41C L J 258. In considering questions of this nature it must always be remembered that the words of a testator like those of every other person tacitly refer to the circumstances by which at the time of expressing himself, he is surrounded. If therefore when the circumstances under which the testator made his Will are known the words of the Will do sufficiently express the intention ascribed to him, the strict limit of exposition cannot be transgressed because the Court in aid of the construction of the Will refers to those extrinsic collateral circumstances to which it is certain that the language of Will refers. It may be true that without such evidence the precise meaning of the words could not be determined but it is still the Will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one however would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading because in order to make that page intelligible he required to be informed to what country the writer belonged or to be furnished with a map of the country about which he is reading. *Wigram* P. § 76. But there is a clear distinction between the application of evidence to explain a testator's words as embodied in his Will and the introduction of extrinsic evidence to prove the intention of the testator is independent fact. The former kind of evidence is auxiliary only to a right understanding of the words used by the testator in his Will and as such it is explanatory only of the words themselves. But the evidence which is introduced to prove the intention of the testator is quite a different sort of evidence. In this section we are concerned with the former kind of evidence. It does not *per se* approach the question of intention. It is wholly collateral to it. It explains the words only by removing the cause of apparent ambiguity whether in truth there is no real ambiguity. It places the Court which expands the Will in the situation of the testator who made it and the words of the Will are then left to their natural operation. The propriety and indeed the necessity of their referring to extrinsic circumstances is strongly enforced by the consideration that the same words properly interpreted mean different things under different circumstances. *Wigram* pp 70-71. See also *Dead Israel v Israel* 5 M & W 363. *Sharp v Maddison* (1909) 2 Ch 190. *Charington v Wooder* (1911) A C 71-72. *King v Winn* (1909) 2 Ch 111. *Lawell v Wall* 101 I T 85. *Great Eastern Ry Co v Bristol Corporation* 87 I T Ch (H L) 117. 121 125. *Samuel v Omer*, (1909) 1 Ch 61. *Shore v Wilson*, 3 Ves 206. The general rule is that in construing a Will the Court is entitled to put himself in the position of the testator and to consider all

material facts and circumstances known to the testator with reference to which he is to be taken to have used now in the Will and then to declare what is the intention evidenced by the words used with reference to 'those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words' *Per Blackburn J* in *Allgood v Blake*, L R 8 Ex 160 *Re Stullen*, (1916) 1 Ch 518, *Ruer Wear Commissioners v Adamson*, 47 L J Q B 193, *Harrison v Higson* (1894) 1 Ch 561. In *Boyes v Cool* 14 Ch D 53 (56), *James L J* used the following expression "You may place yourself, so to speak, in his (testator's) arm chair *Charles v Charles* L R 7 H L 364 (377) 'The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his Will as he has written it and collect his intention from his words. But as the words refer to facts and circumstances respecting his property and his family and others whom he names or describes in his Will it is evident that the meaning and application of his words cannot be ascertained without all those facts and circumstances' *Per Lord Alinger* in *Doe d Hiscocks v Hiscocks* 5 M & W 363 (367) see also *Benasconi v Atkinson* (1873) 10 Hare 345, *Bhuggobutty v Gooiroo*, 25 C 112 (124) *Paton v Omerod* 66 I R R 351 *In re Glasington*, (1902) 2 Ch 314 *Bhagabutty v Bholanath* 2 I A 256=1 C 104 *Mohomed v Sheraliam* 11 B L R 226=2 I A 7, *Rulhi Prasad v Rimmam* 35 C 896 (P C) *Sher Bahadur v Ganga Bhusle* 18 C W N 401=36 A 101 P C, *Phannidra v Hemangum* 36 C 1 *Mathura v Lilhan* 19 A 19 *Beti v Collector of Elua* 7 A 198 *Sularam v Kalidus* 18 B 631 *Dhanabala v Inantha*, 18 Ind Cas 973=21 M L J 418 *Mela v Sri Raja*, 17 C W N 121, P C. The state of a testator's knowledge or acquaintance is also important. In the words of *Lord Cairns L C* in *Craigh v Prington*, 3 L L 1 338 (339) "In construing the Will of the testator we should put ourselves as far as we can in the position of the testator and interpret his expressions as to persons and things with reference to that degree of knowledge of the persons and things which so far as we can discover, the testator possessed". See also *In re Vaughan* (1901) 17 I L R 278 *Marten v Harding*, (1907) 1 Ch 465. But this proposition must be accepted with several reservations. What has to be done is first to construe the Will. The meaning placed upon the language used as the result of this process cannot be altered by reference to the surrounding circumstances when the Will was executed. The procedure is not, first ascertain the surrounding circumstances and with that knowledge approach the construction of the Will but first construe the Will if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon the meaning, or to give the Will a different meaning. *Higgins v Dawson* (1902) A C 1 cited in *Theobald 7th Ed* 12 *In All Gen v Drummond* 1 D & W R 67 *Sydney C* observed "When the Court has possession of all the facts, which it is entitled to know they will only enable the Court to put a construction on his instrument consistent with the words, and the Judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear". Such evidence is admissible only to explain what is ambiguous and not to contradict what is clear. The general principle is that if the words of the Will are definite and free from doubts parol evidence is not admissible to show that they meant something different, (*Jarman* Vol 1 p 506) see also *Hensman v Fryer*, L R 3 Ch 120, *Lage v Leaping Hill*, 18 Ves 166. This section empowers Courts to avail themselves of extrinsic evidence for the purpose of determining questions as to what persons or what property are denoted by any words used in a Will, etc. but where a testator has left no uncertainty as to the person to be benefited or the property by which the benefit is to be conferred then the Courts are precluded from going outside the actual words used by the testator. Judges should not, where the language of a Will presents no ambiguity, imagine ambiguity in its application to different sets of existing facts and so initiate an enquiry into those facts. *Pestonjy v Framji* 12 Bom L R 303=4 Ind C 150 *Lakshmbai v Gupat* 4 B H C R 170 *Gangabai v Thapar* 1 B H C R 71 *Kulsambai v Khensabai* 13 I W 67 (P C) but see *Pran'risto v Lemaunlari* 12 M J A 41, *Shamsul v*

- S 92.** *Schaliyam* 2 I A 7, *Sulochana v Jagattanum*, 30 C L J 51 In construing a Hindu's Will the ordinary notions and wishes of Hindus can be taken into consideration in giving effect to testator's intention. *Mahomed v Shewakram* 14 B L R 26, *Rudha v Rani*, 35 C 896, *Chunilal v Bai Samrath* 19 C L J 563 (P C)

**Application of the rule in cases of other documents** Courts in the construction of contracts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed and in that view, they are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the thing described. *Addison Contract* 846 *Merriman v United States*, 107 U S 437 (Am), *Burr Jones* § 453. The rule is thus laid down by *Lindal, C J* in *Att Gen v Shore* 11 Sim 592 615, 'The general rule I take it to be, is that where word of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates such instrument is always to be construed according to the strict plain common meaning of the words themselves and that, in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise no lawyer would be safe in advising upon the construction of a written instrument nor any party in taking under it for the ablest advice might be controlled and the clear title undermined if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself. The true interpretation however of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made it has always been considered as an exception, or perhaps to speak more precisely, not so much as exception from, as a corollary to the general rule above stated that where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in foreign languages, in the case of ancient instruments where by the lapse of time and change of manners the words have acquired in the present age a different meaning from that which they bore when originally employed in cases where terms of art or science occur, in mercantile contracts which, in many instances use a peculiar language employed by the only who are conversant in trade and commerce and in other instances in which the words besides their general common meaning, have acquired by custom or otherwise, a well known, peculiar idiomatic meaning in the particular country in which the party using them was dwelling or in the particular society of which he formed a member, and in which he passed his life. But I conceive the exception to be strictly limited to cases of the description above given and to evidence of the nature above detailed. *Wignote* § 2461. So in order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove that peculiar sense in which the parties understood the word but it is not admissible to contradict or vary what is plain. *Per Lord Chelmsford*, in *Law v L C J* 14 C L J 1001 *Moore* P C 73 98.

It is frequently necessary in order to construe written instrument to take into evidence of other accompanying facts than those which serve to apply the instrument to the subject matter or the person intended. Under some circumstances not only the situation and relation of the parties but their negotiations and statements may be proved as part of the surrounding facts.

which throw light on the transaction. It would be impossible to prescribe by general rule the precise limits within which under the ever varying facts such testimony may be admitted. The circumstances under which such testimony is admissible will be best understood from instances of adjudicated cases. Thus in construing a memorandum of sale the *Massachusetts* Court held that, although parol evidence is not admissible to prove that other terms than those are to be inferred from it, yet that it is competent to prove not only the relations of the parties and the nature and conditions of the property but also the acts of the parties at and subsequent to the date of the contract as a means of showing their own understanding of its terms. *Knight v New England Worsted Co* 2 Cush (Mass) 271 *Burr Jones* § 453. Where a question arose under a lease as to whether a building erected thereon belonged to the lessor or lessee parol evidence of the subsequent dealings of the parties was competent. The purpose for which such evidence is received must always be borne in mind—to elucidate the meaning of the words used and not to import into the writing an unexpressed intention, and in its admission, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument, must be kept steadily in view,—the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to be written. *Burr Jones* § 453, 2 *Phill Fr* 277 *Greenl Fr* § 277. So oral evidence of intention is not admissible for the purpose of construing the deeds or ascertaining the intention of the parties. *Balkishen Das v H F Teague* 22 A 149 (158). But it does not follow from this section that subsequent conduct and surrounding circumstances may not be given in evidence, for the purpose of showing that an apparent conveyance is still a mortgage. *Kashi Nath v Harihar* 9 C 898 = 13 C L R 1. Though this section excludes in particular instances any real agreement or statement yet evidence of conduct *e.g.*, return of a *labuliyat* is admissible for proving that such return was due to an intention to make the *labuliyat* inoperative. *Shayama Charan v Huas Mollah*, 26 C 160. But the parties to a written contract are precluded by s 92 of the Evidence Act (with which the provisions of the Registration Act might be considered) from relying upon the evidence furnished by their conduct which would be only of an oral contemporaneous agreement for the purpose of varying adding to or subtracting from its terms *e.g.*, to show that an out and out sale was in reality intended to be only a mortgage. *Dramodhi v Kaim Pasidan* 5 C 300 = 4 C L R 413. *Abdul v Abdul* 72 P R 1901. Parol evidence is admissible to explain a deed. *Babu Dhanpat v Sheel Louchar* 8 W R 152. If a note of hand promises repayment with interest at a given rate, without stating either per mense or per annum it must be construed with reference to previous transactions between the parties. *Mahomed Sumsoodeen v Moonshee Abdool W R* 1864 379. It is competent to a party to show that a bond executed in favour of A was really in favour of B and that A was a party to it merely in the capacity of *gomastah* of B. *Subodha v Ram Puttan Maish* 3 = 1 H W 24. see also *Tentata Subba v Gobinda* 31 M 45 = 18 M L J 1. Parol evidence is admissible to prove circumstances connected with a transaction between the parties to a written contract. *Pheloo v Greesh*, 8 W R 51. An obscure *potlak* can be elucidated by oral testimony. *Mohamed v Unoopoorra* 9 W R 466. But this provision cannot be used for the purpose of importing into a letter an acknowledgment of a personal liability for a debt which is not contained in it even by implication. *Smila Banl v Ball* 2 P R 1884.

A suit was instituted on a mortgage bond executed by the 1st defendant in favour of the plaintiff. The loan has been secured by the mortgage of a *taluk* belonging to the 1st defendant. Subsequent to the plaintiff's mortgage, the *Sarabalan* rights of the 1st defendant in two *garhs* of the *taluk* were mortgaged to defendants Nos 2 & 3. The question for decision was whether *Sarabalan* rights of defendant No 1 in the two *garhs* were also mortgaged to the plaintiffs. Held that evidence was admissible under section 92(b) and section 93 of the Evidence Act, because it showed how the plaintiff document was related to existing facts and because the nature of the land tenures was a special matter which could not be tried off hand.

**S. 92** required to be elucidated by a reference to the particular facts *Raja Gunt Chandra v Rajah Mudunda Deb* 9 C W N 710 Where a mortgage-bond does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged *Ramlal v Harrison*, 2 A 83<sup>d</sup> Where there is an acknowledgment in writing of a debt due, parol evidence is admissible in order to show to what debt the acknowledgment related *Uma Chandra v Sigeman*, 5 B L R 633 Note=12 W R O C 2, see also *Adam pudu Jerru v Chaulalaren* 5 M H C R 320 In cases where the question is whether a lease to a person named in it is perpetual or not, whether it is to him and his heirs evidence as to the surrounding circumstances is admissible because it explains—what standing alone is capable of explanation—whether a grant to a person is a grant to him alone or to him and his heirs *Sambhal v Sitaram* 3 Bom L R 768

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Courts in possession places the Judge in the position of the donor settlor, or other party to the instrument and it is upon the survey which that position affords him, that he exercises the office of an Expositor *Goodere* Lr 389 But contemporaneous exposition is a guide to the interpretation of documents is often accompanied with danger and great care must be taken in its application *Raghobhai v Lal Shumrao*, 16 C W N 1058 (P C)=23 M L J 383=12 M L F 172=17 C I J 17=36 B 639 (P C) In *Macdonald v Longbottom* 7 W R 40 (Eng) the question arose on a contract for purchase of wool and the quantity the subject of purchase was not otherwise defined than by the expression 'Your wool' The contract was on the one hand, a letter containing an offer to purchase—Your wool 16 per stone and on the other in acceptance by another letter of the offer and evidence was received to fix the quantity the subject of the bargain I am quite clear said Lord Campbell C J from the letters which were put in at the trial that there was a contract between the parties An offer was made, and was accepted and the only question as to the subject matter of the contract I am clearly of opinion that when a specific thing is the subject of a contract and it is doubtful upon the contract what the specific thing is, that any fact may be given in evidence, in order to identify it which is within the knowledge of both parties—meaning by that expression the knowledge upon the strength of which both parties dealt In the same case *Earle J* said The defendant says 'I will buy your wool' Now it is the universal practice to admit parol evidence to identify the subject matter of a contract as no Judge can have judicial knowledge of it It is not contended that this contract is on the face of it void for uncertainty parol evidence must therefore be admissible to explain to what it refers In *Mumford v Geethum*, 9 W R 187 (Eng) the defendant had been employed by the plaintiffs who were tradesmen, as a traveller to solicit custom for them over certain districts in which their commercial connection lay and he having afterwards left their service and travelled for other parties contrary to his agreement with them they sued him on his agreement which was in writing to recover damages The agreement, however was imperfect on its face, and it becoming necessary to explain the meaning of its expressions 'your employ' and the ground that defendant was to travel parol evidence in explanation the parol evidence is admissible in order to apply the contract to the matter in question It is not to alter or vary it The parol evidence is admissible to show the circumstances under which the words were used In the same case *Byles J* said 'It does not appear from the face of the document what the employment was It does not appear what the ground was The subject therefore requires to be identified The contract is to be applied to some object matter and that is just the case where parol evidence is admissible It is the case of every day occurrence in the construction of Will

Where there were conflicting statements of the parties as to the circumstances leading up to the execution of an agreement for sale and it was difficult to reconcile them *Hell* that the Court was justified in admitting extrinsic evidence to explain the facts *Hussain v Lubham*, 25 C W N 35 (P C)

61 Ind Cas 395 But under this section, evidence of surrounding circumstances is not admissible for the purpose of contradicting the terms of a document, but they may be referred to only for the purpose of ascertaining and giving effect to the full intention of the parties as expressed in the document itself *Varangeji v Panaganti*, (1921) M W N 519 see also *Sulhan Rai v Chalcour Singh*, 66 Ind Cas 752 Where a document is a perfectly plain straightforward document no extrinsic evidence is required to show in what manner the language of the document related to existing facts There may be cases where such extrinsic evidence is required and it will therefore be admitted But it can only be in such cases where the terms of the documents themselves require explanation and then evidence can be led within the restrictions laid down by proviso 6 to section 92 of the Evidence Act Where a document has stood more than fifty years it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it *Ganpatrao v Tularam*, 44 B 710=23 Bom L R 831=38 Ind Cas 776 Where a vendor agrees to sell land to several named persons and in drawing up the agreement of sale the name of one person is mentioned and without naming the rest the word "others" is used there is nothing in the Evidence Act to prevent the evidence from being let in as to the persons in whose favour the conveyance is to be executed *Pela Marthi v Jutapuram* 47 M L J 177=(1922) M W N 185=(1922) Mad 100 Where there is a dispute as regards the identity and extent of the land leased the Court cannot look at the correspondence that preceded the lease *Sital Prasad v Badi Prasad*, 20 A L J 907=L R 3 A 623 Where a promissory note recited that interest at the rate of 1½ p c m is payable but it was not mentioned therein as to whether the rate of interest aforesaid will be per mensem or per annum Held the document was therefore ambiguous and under this proviso no evidence could be given to clear up that ambiguity *Sayju v Sukhi*, 1 Pat L J 577 In an action for a declaration that certain alluvial accretions formed part of settled land antecedent documents are admissible under this proviso for the purpose of identifying the property demised but not for contracting the terms of the settlement *Talakdhar v Kesho* 83 Ind Cas 103=27 Bom L R 919=48 M L J 61 (P C)=41 C L J 386 (P C) If in a deed of mortgage the boundaries of the land mortgaged are described and such boundaries can also be identified they should generally be accepted as defining the area of the land affected by the deed *Nya Cho v Jhi So U B R* (1916) 2nd Qr 110=36 Ind Cas 7 A contract reduced to writing must be construed on a consideration of the document itself with only such extrinsic evidence of the circumstances as may be required to show the relation of the written language to existing facts *Abraham Goolam v A M Chetty* 26 Ind Cas 531 Where the question is whether certain properties are indeed in the trust deed, the conduct of the parties can be looked into in construing the meanings of the expressions used therein *Subramania v Rajeswar* 40 M 1016=38 Ind Cas 627 Where a deed of transfer raises an ambiguity as to the nature of interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken in construing the deed *Dwabhandu v Mannulal* 52 Ind Cas 443 *Mauq Saung v Mauq So Hla*, U B R (1992 1896) Vol II 359 Oral evidence of intention of parties is inadmissible But evidence under this proviso regarding the attendant circumstances is admissible *Venkata v Venkata A I R* 1929 Mad 807 A I R 1921 P C 226 and A I R 1925 P C 75 followed Extrinsic oral evidence of surrounding circumstances which will show in what manner the language of the document is related to existing facts is inadmissible in evidence *Subaji v Naul Singh* 104 Ind Cas 736 In the case of a registered mortgage deed oral evidence cannot be let in that the property really meant as security is other than what appears in the deed *Musli Kazim v Haji Mutasaddi*, 90 Ind Cas 811 Where at the time of the sale by the Government of a certain estate some portions of it were submerged under water and where in the sale notification the area of the estate was specified as certain number of bighas Held that the latter fact did not preclude the purchaser or his successor in interest from claiming any accretion



**S 93** to the estate *Santer Ray v Secretary of State* 29 C W N 166=81 Ind Ca 178=40 C L J 322 Extrinsic evidence is admissible to identify the thing referred to in a written agreement, as for instance, in a contract to deliver a quantity of grain (*galla*) at a particular time parol evidence is admissible under certain restrictions to show what kind of grain the contracting parties had in their view at the time the contract was made. *Talla v Sidoji* 5 B H A C 87 Where a mortgage deed does not indicate by name the property mortgaged evidence may be adduced to prove what property was mortgaged. *Ram Lal v Harrison* 2 A 832

**Illustrations** *Illustration (a)*—This illustration is based on *Hester v Pines* 1 Taunt 115

*Illustration (b)*—This illustration relates to proviso (3), vide also *Ramplan v Oghun Nath*, 2 C W N 188

*Illustration (c)*—‘So where a deed conveyed the messuage and land called Gotton farm consisting of particulars specified in a schedule, and delineated in a map drawn thereon evidence that a close not included in the map and schedule had always been occupied and treated as part of Gotton farm was rejected

*Taylor* § 1152 citing *Buton v Daves* 10 Com B 261 *Llenellyn v Ld Jersey* 11 M & W 183

*Illustration (d)*—Vide proviso (1)

*Illustration (e)*—Vide proviso (1)

*Illustration (f)*—Vide proviso (2)

*Illustration (g)*—Vide proviso (2)

*Illustration (h)*—Vide proviso (2)

*Illustration (i)*—Vide proviso (3)

*Illustration (j)*—Vide proviso (3)

**93** When the language used in a document is on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Exclusion of evidence to explain or amend ambiguous document

*Illustrations*

(a) A agrees, in writing, to sell a horse to B for Rs 1 000 or Rs 1 500

Evidence cannot be given to show which price was to be given

(b) A deed contains blanks Evidence cannot be given of facts which would show how they were meant to be filled

Two sorts of ambiguities according to Lord Bacon There be two sorts of ambiguities of words the one is *ambiguities patens* and the other is *ambiguities latens*, *patens* is that which appears to be ambiguous upon the deed or instrument *latens* is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument but there is some collateral matter out of the deed that breedeth the ambiguity *Ambiguities patens* is never holpen by averment and the reason is because the law will not couple and mingle matter of specialty which is of the higher account with matter of agreement which is of inferior account in law, for that were to make all deeds hollow and subject to averment and so, in effect that to pass without deed which the law appointeth shall not pass but by deed Therefore if a man give land to *I D et I S heredibus* and do not limit to whether of then heirs it shall not be supplied by averment to whether of them the intention was the inheritance should be limited But if it be *ambiguities latens* then otherwise it is As I grant my manor of S to I F and his heirs here appeareth no ambiguity at all upon the deed but if the truth be that I have the manor both of South S and North S this ambiguity is matter in fact and therefore it shall be holpen by averment whether of them it was that the parties intended should pass Another sort of *ambiguities latens* is corrective into this for this ambiguity spoken of before is, when one name and appellation doth denominate diverse things and the second is, when the same thing

is called by diverse name. As, if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford* this shall be holden by averment, because there appears no ambiguity in the words for the variance is matter in fact. But the averment shall not be of the intention, because it does not stand with the words. For in the case of equivocation the general intent includes both the special and therefore stands with the words but so it is not in variance and therefore the averment must be a matter that doth induce a certainty and not of intention, as to say that the precinct of Oxford and of the University of Oxford is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford. Sir Francis Bacon's *Maxim* rule XXV (Works Spalding's edition, 1861 Vol XIV p 273) 'Much has been said says *Di Schouler* of latent and patent ambiguities in this connection, an expression borrowed from Lord Bacon whose oft quoted canon, though *Wigram* and *Jarman* has disputed it (*Wigram Wills* p 196 1 *Jar Wills* 429, 430) the Courts do not seem quite ready to discard. This canon regards ambiguities of words as of two sorts—patent and latent, the one where the instrument appears ambiguous, the other where collateral matter out of the instruments breed the ambiguity, since the instrument on its face appears certain enough. In a patent ambiguity the written instrument or higher proof, cannot be mingled in proof with the lower or oral and must be construed by its own terms but a latent ambiguity (which in truth grows out of the application of the language of facts and circumstances) is raised by matters parol, and hence may be fully removed by the same means. But, by applying this rule to a Will, we shall presently find that writings of that character which would be ambiguous (or rather uncertain) on their face without oral explanation admit often of such explanatory proof to make their meaning obvious while on the other hand as we have just seen, the latent ambiguity may indeed be aided but whether alike by merely explanatory proof, or by direct proof of intention is another matter. And, again, by ambiguity the idea is conveyed that words are capable of more senses than one but the use of extrinsic evidence must be taken in a broader sense and applied where the instrument points out no certain intention at all where it is inensible so to speak, unless this borrowed light is thrown upon it. The argument, moreover derived from mingling proof of the higher and lower or equal quality is rather fanciful and misleading for employment in our age antedating as it does, the legislation of the last two centuries which inspires our modern policy of written, signed and attested Wills. Lord Bacon's illustrations were good, but practice carried the force of his rule beyond his own examples, and his distinction of patent and latent though convenient in some respects can hardly serve as a criterion. For in every case, as Mr *Jarman* has truly observed, the Judge by whom a Will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, in nearly as possible in the situation of the testator when he wrote it (1 *Jam Wills* 430). Our Courts to day are still using this language and it is said that ambiguities are patent where the uncertainty arises upon the words of the Will before any attempt is made to apply them to the object which they describe and parol evidence is not admissible to explain such ambiguities but is admissible in case of a latent ambiguity whereon supplying the Will to the subject matter it is uncertain what is its meaning. So extrinsic evidence may be admissible to determine the existence of latent ambiguities in the Will. *Schouler's Law of Wills* § 925.

**Difference between patent and latent ambiguities.** A good test of the difference is to put the instrument in the hands of an ordinary intelligent educated person. If on perusal he sees no ambiguity, but there is nevertheless an uncertainty as to its application, the ambiguity is latent, but if he detects the ambiguity from merely reading the instrument it is patent. Thus in illustration (b) the blanks would be patent ambiguities, and they could not be filled by parol testimony as to the intention of the parties, etc. In the illustration to section 95 no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic evidence. *Fort Et* 270.

**S 93.** Similar law Vide s 81 of the Indian Succession Act, (XXXIX of 1879)

**Principle** The province of the Court is to interpret—not to make. It is to construe the expression the parties have themselves furnished, not to supply others. In cases as these, extrinsic evidence of mere surrounding facts would from the nature of things afford no remedy. Where the Court, by the process of construction, to insert in the blank the property or thing omitted, which of the sons was meant by the gift to one, or who was the Lady—this would be to supply, not to interpret and though the law admits evidence to explain it excludes that which would only be to add to. Hence it is laid down that in case of patent ambiguity, parol evidence is inadmissible. *Goodere &c* 397

**Scope of the section** When the express words are employed, they must be in themselves definitely intelligible, so that the act may be capable of enforcement. The general rule is that the act must be definite as to its terms. This excludes all acts whose terms are so uncertain or unintelligible that they are incapable of enforcement. It is common learning, that a deed or a Will is often held void for uncertainty. Lord Baron, giving his classical instance of a grant to 'J D et J S et heredibus' calls this patent ambiguity by matter within the deed, such as shall make the deed for uncertainty. So, too *M Elphinstones* example 'I give my dog Ringer to my nephew John or Thomas,' (Judicial Sec Papers III 266) illustrate the same kind of uncertainty. A blank an illegible word, an unknown language—these various instances show how an act which is impossible to comprehend and therefore to enforce cannot be deemed a legal act. Wigmore § 2407. But even the above proposition sometimes too broadly advanced must be understood with a certain qualification. So far as extrinsic evidence may be required to affix a meaning to expressions or to bring out the contemporaneous circumstances under which the document was framed, there is no doubt that this evidence would be receivable whether the ambiguity is called patent or latent for according to the authority of Lord Abinger, in *Doed His coel's v Hiscocks* 5 M & W 363 'to understand the meaning of any writer we must first be apprised of the persons and circumstances which are subject of his allusions, and what would apply to persons would apply to things. To understand therefore the real meaning of the rule of exclusion as applied to patent ambiguity and thus advanced, one must bear in mind its two classifications—that in which the ambiguity is the result of inartistic composition, and that in which it is one of omission of subject matter. In the former case the language may be not only inartistic composition and that in which it is one of omission of subject matter. In the former case the language may be not only inartistic, but confused, contradictory and generally incomprehensible or it may exhibit a complexity of double meaning, with no adequate solution as to which meaning was intended or it may use terms of art, or terms otherwise not intelligible without explanation. If with the aid of such extrinsic evidence as may be necessary to clear up unintelligible or equivocal expressions, the Court cannot struggle through the maze the instrument itself must fail for want of adequate expression and in attempting to solve the meaning, the Court is not at liberty to indulge in mere conjectural surmise it must be governed by the ordinary rules of legal construction. In a medium of total darkness the eye could not exercise its powers of vision and the mind would not be allowed to speculate on what it could not see. In the latter case the instrument may omit the very essence of its intended operation. Thus a blank may have been left for the subject or person to be dealt with or to take say—in a deed the property intended to be passed—in a Will the legatee—in a contract the thing bought or if not a total blank, what is tantamount to it is in a devise to one of the sons of J S without specifying which or a gift to a Lady—without saying what Lady. Here the blank cannot be supplied. So parol evidence is inadmissible in case of patent ambiguity to one or other of these two classifications indeed as regards the former to something beyond that of individual expressions admitting interpretation. On the first beyond as ignoring a meaning to expression extrinsic evidence could have no bearing and it is unnecessary to discuss its admissibility. From the second it would be excluded. *Goodere &c* 391—392. This section can apply where a writing is required by law. If no

writing is required by law and if the writing is so incomplete that its meaning cannot be ascertained—which is probably the case contemplated—it may be disregarded or used as an admission, and oral evidence given. *Manby v Le p 747*. A mortgage document was very artistically drawn up. It was ungrammatical and could not be read literally so as to give any clear meaning. In order to give the construction contended for by one party or the other some words had either to be supplied or removed. *Held* that there was patent ambiguity in the document and no evidence could be given to supply the defect. *Ram Ganesk v Rup Narain*, 89 Ind Cas 944 = L R 5 A 542. S 93

**Rule as laid down in Colpoys v Colpoys** *In Colpoys v Colpoys* Jacob 165 *Sir William Grant* says. In the case of a patent ambiguity, that is one appearing on the face of the instrument as a general rule a reference to matters *dehors* the instrument is forbidden. It must, if possible, be removed by construction and not by averment. But in many cases this is impracticable, where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed. If in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz., the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities, both in Law and Equity. Where the person and the thing are designated, on the face of the instrument, by terms imperfect and equivocal admitting either of no meaning at all by themselves, or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meanings, to extrinsic circumstances it has never been considered an objection to the reception of the evidence of those circumstances that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his surname and the Christian name is not mentioned, is not that a patent ambiguity? Yet it is decided that evidence is admissible. So where there is a gift of the testator's stock that is ambiguous: it has different meanings when used by a farmer and a merchant. So, with a bequest of jewels, if by a nobleman it would pass all but it by a jeweller, it would not pass those that he had in his shop. Thus the same expressions may vary in meaning according to the circumstances of the testator.

**Mr Starkie's classification of patent ambiguities** 'By patent ambiguity must be understood an ambiguity inherent in the words and incapable of being dispelled, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is that the intention of the parties should be construed not by vague evidence of their intentions independently of the expressions which they have thought fit to use but by the expressions themselves. Now those expressions which are incapable of any legal construction and interpretation by the rules of art are either so because they are in themselves unintelligible or because being unintelligible, they exhibit a plain and obvious uncertainty. In the first instance the case admits of two varieties, the terms though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used which amongst mercantile men bear a distinct and definite meaning although others do not comprehend them: the term used may on the other hand be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument the terms of which, though apparently ambiguous are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning, and that on the other hand, where either the terms used are incapable of any certain and definite meaning, or being in

- S 93.** themselves intelligible, exhibit a plain and obvious uncertainty and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party would be to make the supposed intention operate independently of any definite expression or such intention. By patent ambiguity therefore must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning. *Start on Evidence* p. 653

**Blanks and ambiguities** A document may be void for intrinsic indefiniteness of terms, or it may be, though definite, impossible to enforce extrinsically, because there are no objects existing upon which its terms can operate. These are simple principles well established in their sphere, but in concrete application both of them require discrimination from the foregoing principle concerning equivocations. Is a blank space an equivocation? It certainly hits two or more objects equally, and where it represents merely an insufficient term in an attempted description it may be treated as an equivocation, because the writer has fixed upon an object but his words do not carry the description far enough. On the other hand where a blank space represents a failure to make a final expression of will, the act is incomplete to supply declaration of intention would be to set up a rival Will, there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular document whether a blank space is an equivocation, *Wigmore* § 2473. In *Buyls v. Ill Gen* 2 Atk 239, a bequest was made in the following terms 'to the ward of Bread Street according to Mr—his will. In that case parol evidence of the intention of the testator where there was a blank was excluded. See also *Re Waduff* (1895) 2 Ch 451. Similarly in *Hunt v. Hunt* 3 Prec Ch 511 where the bequest was to the effect 'my other pictures to become the property of Lady—', Lord Threlow L.C. declined to supply the blank by parol evidence, see also illustration (b). In the above cases the blank cannot be supplied. So also where a bill of sale to secure £70 and interest at 1s in the pound per month agreed to repay principal and interest, by monthly instalments of sum— extrinsic evidence to fill up the blank was held to be inadmissible (but 'pound was supplied by construction) *Mourmand v. Le Clay* 88 L 1 735, *Phip Ev 4th Ed* p 580. But where a bequest was to 'Price the son of—' Price's declarations of intent to give to a particular Price admitted this is only that the testator did not know the Christian name. *Price v. Page* 4 Ves Jr 679, see also per Sir J. Haulen in *In the goods of De Rosa*, L R 2 P D 66 (69) where an executor named is 'Perceval of Brighton Esq the father, applied to *William Perceval Boxall* who answered the description. *Wigmore* § 2473. Therefore where blank is left in the Will for the name of a legatee or devisee no parol evidence however strong is competent to fill it up, and the principle appears to be the same where the blank relates to the subject or thing bequeathed or devised. To give to—£1,000 leases therefore, no one who can claim the legacy and to give 'to A B—' leaves nothing to be claimed as a legacy, and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object. *Miller v. Frazer* 2 Atk 239. *Taylor Richardson* 2 Drew 16. *Jarm Wills* 441. But partial blanks may in a suitable case be supplied in construction not perhaps by direct parol evidence of what the testator intended, but at all events, where the context with or without the aid of extrinsic circumstances supplies a definite thing or person, and renders the Will sensible. Thus, a legacy to 'Mr B., or to John or to 'Brown might be identified, and so too where one legacy of £500 was given to A and other £700 to B a third legacy of £100 to C might well be supposed to mean six hundred pounds. Upon partial blanks, on the other hand which leave the sense defective no valid gift can be based. *Mason v. Bateson* 26 Beav 104. And if besides a blank, there is an uncertain description, the Will becomes doubly inoperative. *Gill v. Gill* (1909) P 157. *Hubbuck's Estate* (1905) P 129. Moreover a devise or bequest, wholly omitted by mistake, not to be inserted in a Will (*Newboogh's case*, 5 Madd 364), yet some partial



**S 94** parties *Mr Justice Moolerjee* said "In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by the parties, the intention must be gathered from the language used by them in the instrument. The case of *Mamatha Nath v Nabin Chandra*, (*supra*), is really of no assistance. The learned Judges who decided the case did not specify the evidence which could be admissible to interpret the instrument, they relied merely upon the decision in *Muhammed Samsooddeen v Moonshee Abdool* (1861) W R Gap No 379, which was decided before the Indian Evidence Act was placed in the Statute book. It may be pointed out, however, that evidence of previous transactions between the parties or of the custom of the country may be admissible for a limited purpose. Thus to take one illustration—it has been held that evidence may be allowed to be given in anticipation of some obvious defence for instance evidence of prior transactions between the parties, to construe a term in a contract in rebuttal of a possible customary meaning. *Richard v Samuel*, 11 Cl & Fin 45. In the case before us no such consideration arises, because the only evidence upon which the plaintiff relies is direct oral evidence to the effect that at the time the parties entered into this contract of tenancy they agreed that the interest would be payable at the rate of 1 anna per rupee per month. In our opinion evidence of this description is clearly not admissible under the provisions of the Indian Evidence Act. This view is fortified by illustration (b) to section 93 of the Indian Evidence Act which is to the following effect—A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled. See also *Ram Ganesh v Jupp Narain* A I R 1925 All 34=80 Ind Cas 944, *Sorju v Sull*, 4 P L T 577.

Where a lease is ambiguous evidence of user under it may be given in order to show the sense in which the parties used the language and their intention in executing the instrument whether the ambiguity is latent or patent. *Guru Prasanna v Madhusudan*, 26 C W N 901=35 C L J 87=64 Ind Cas 924, *Watham v Att Gen* (1919) A C 533.

**Extrinsic Evidence when not admissible.** A district Judge held that, a contract compensation for breach of which was sued for, was ambiguous on the face of it. But he held that evidence was admissible to show the intention of the parties and he acted upon such evidence. Held this was in contravention of section 93 of the Evidence Act and illegal within the meaning of s 622 of the Civil Procedure Code. *Joman v Ah Yu* 14 Bur L R 55. Under section 29 of the Contract Act an agreement is void if its meaning is not certain or capable of being made certain, and under section 93 of the Evidence Act where the language of a deed is on its face, ambiguous or defective no evidence can be given to make it certain. *Deoquil v Pitamber* 1 A 270. Where the terms of a document are ambiguous on the face of it oral evidence is inadmissible to prove the intention of the executant. A Court cannot undertake to supply defects or ambiguities according to its own notions of what is reasonable for this would be not to enforce a contract made by the parties but to make a new contract for them. *Berket Ram v Ananta Ram* 31 Ind Cas 632. See also *Maharashtra v Bijnulal* 71 Ind Cas 436. *Collector of Ftwah v Beti Maharani* 14 A 162. *Narsingji v Penanganti* (1921) M N W 819.

**Exclusion of evidence against application of document to existing facts.**

to apply to such facts

**94** When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant

#### Illustration

A sells to B by deed "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

**Scope of the section** "The words of a written instrument must be construed according to their natural meaning and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware no principle has ever been more universally or rigorously insisted upon than that written instruments if they are plain and unambiguous must be construed according to the plain and unambiguous language of the instrument itself. *Per Earl Halsbury L C in North Western Railway v Hastings*, (1900) A C 260 (263). So where there is no ambiguity of any sort in an instrument the instrument must have effect according to the plain meaning of the language the parties have deliberately chosen to employ. *Per Lord Macnaghten in ibid*. So it is a rule of law that extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what it imports. *Ram Lochun v Unno Poorna* 7 W R 144. This section embodies the rule of law laid down by *Tindal C J in Shore v Wilson* 9 Cl & F 555, where he said "The general rule I take it to be, is that where the words of any instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to proper application of these words to claimants under the instrument or as to the subject matter to which the instrument relates such instrument is always to be construed according to the strict plain, common meaning of the words themselves and that in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise no lawyer would be safe in advising upon the construction of a written instrument nor any party taking under it for the ablest advice might be controlled and the clearest title undermined, if at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contravert or vary the plain language of the instrument itself." See also *Cun Fer* 281.

In *Webb v Byng* 1 Kay & John 580 *Jice Chancellor Wood* said "The law has become so settled by numerous decisions, as to how far external evidence is admissible and what that species of evidence must be, that I need only sum up what appears to be the result of the authorities. Of course in interpreting any instrument which purports to deal with property some extrinsic information is necessary, in order to make the words which are but signs fit the external things to which those signs are appropriate. In reality external information is requisite in construing every instrument but when any subject is thus discovered which not only is within the words of the instrument according to their natural construction but exhausts the whole of those words then the investigation must stop you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further. So where the language of a document is clear and applies without difficulty to the existing fact extrinsic evidence is not to be admitted to affect its interpretation. *Higgins v Dawson*, (1902) A C 1, *Clyde Navigation v Laird*, 8 App Cas 678. In the above case *Earl of Halsbury L C* said, "Those are the words which your Lordships have to construe, and I confess that it is to my mind absolutely amazing that any one can entertain the smallest doubt as to what those words mean. I have read the words by themselves because in my view of the meaning of this instrument they are to be read by themselves. One does not doubt that where you are construing either a Will or any other instrument it is perfectly legitimate to look at the whole instrument,—and indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding. The true construction of the agreement depends upon the ordinary meaning of the words used and if those words are plain and unambiguous, it is quite clear that they must not be explained away by extrinsic evidence and still less by mere reasoning for probabilities. *Alagappa v Subramaniam* 1 M H C R 261, *Baboo Rambhadrans v Banne Koonwar* W R 1111, Act X Rul 22(24). In *North Western Railway v Hastings* (Lord) (1900)



**S. 94.** at p 270, *Lord Bampton* said, 'The whole question turns upon the construction of that short clause contained in the agreement of May 18 1851, which I need only refer to. As it stands it seems to me to be clear and free from ambiguity and incapable of any other construction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessors or for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of this construction one of which supports and the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity however exists and it seems therefore to me that in the absence of any proof to the contrary it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite. So a Court must construe a deed according to the plain ordinary meaning of its terms and must not import words into it from any conjectural view of its intention which would have the effect of materially changing the nature of the estate thereby created. *Mussamat Bhagubai v Choudhry Bhoirath* 2 I A 266 = 1 C 104 *Millard v Bailey* 1 Eq 378 *Gibson v Umet* 1 H Bl 61. In cases contemplated by this section there is evidently no patent ambiguity for by the terms of the section the document is 'plain in itself' and there is evidently no latent ambiguity for it 'applies accurately to existing facts.' It follows therefore, that there is no room for parol evidence. *Aort* 1 L 281. So when the language used in a document is plain and applies accurately to existing facts evidence is not admissible for the purpose of showing that it was not meant to apply to those facts. *Telapha v Palani* 29 Ind Cis 201 = 1915 M W N 325. In the same case *Couts Trotter J* said though the object of the Court must always ultimately be to ascertain the intention of the makers of instrument which must be gathered from the words they have used where those words are definite and unambiguous and the Court must not travel outside the words used to found or confirm speculations as to their having in fact intended something other than what they have said. See also *Sambhuset v Sitaram* 3 Bom L R 768 *Rahim Bakhsh v Shayad* 19 C W N 1311, *Madnapore Zamindary v Jogendra* 33 C L J 186. Evidence of the conduct of parties to a document subsequent to its execution is not admissible for the purpose of explaining its meaning. *Chandra v Sevadat*, A W N 1882, 54.

In cases of misdescription oral evidence is admissible. *Mahabu v Muhom mad* 38 A 103 = 14 A L J 15 = 32 Ind Cis 174, see also *Sabji v Nauab* 104 Ind Cis 756. Evidence to prove plaintiff's adoption by the deceased is not in admissible in evidence under this section on the ground that the language of a document on which the plaintiff has partly relied but to which he is no party is plain and unambiguous and does not make mention of the fact of such adoption. *Gopi Kishen v Gopi Kishen* 27 P W R 1915 = 57 P L R 1915 = 1 Ind C 701. When a Court is executing an award it is only in cases where the words are ambiguous or capable of more than one interpretation that oral evidence can be given as to their meaning. *Kesho Ram v Thalun Das* 78 Ind C 90. Explanatory evidence may be given under s 92 proviso (6) where the language is not plain in itself, nor applies accurately to existing facts. *Ghallabhai v Nandubhai*, 21 B 335 see also *Mahabu v Marsiatulla*, 38 A 103.

**Document is plain in itself.** A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. *Higman Fr L* p 189. It 'must be borne in mind' said *Rugby L J* in *Re Grainger*, (1900) 2 Ch 764 'that a Will

is not ambiguous by reason only that it is difficult of construction. If it is finally held to be in a particular construction, that must be given its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it. This dictum was quoted with approval by Lord Dary in *Higgins v Dixon*, (1902) A C 1 at p 10.

**Intention** "It is not the duty of a Court of Justice to search for the testator's meaning, otherwise than by fairly interpreting the words he has used." *Per Lord Cranworth in Abbot v Middleton* 7 H L C 64. In *Doe d Brodbeck v Thomson*, 12 Moo P C 116 *Turner L J* observed. It is upon intention either expressly declared or collected by just reasoning, upon the terms of the instrument or evidenced by surrounding circumstances where surrounding circumstances can be called in aid and not upon conjecture merely that their Lordships feel bound to proceed. The object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to intention. *Per Coleridge J in Shore v Wilson*, 9 Cl & F 25. 'The question in this and other cases of construction of written instruments is not what was the intention of the parties but what is the meaning of the words they have used.' *Per Lord Denham in Reiman v Cartlairs*, 5 B & Ald 663 see also *Doe d Templeman v Marten*, 4 B & Ald 783 *Grant v Grant* L R 5 C P 751 *Grey v Pearson* 6 H L C 106, *Smith v Lucas*, 18 Ch D 31 *Ingham v Raynor* (1894) 2 Ch 83 *Savath v Jogut* 8 M I A, 66 *Scale v Rautins* (1892) A C 312, *Srinivash v Monmohun* 3 C L J 221 *Ighore v Kamini*, 11 C L J 461 *Mary Wilson v George Pales* 31 M 283 *Dinbai v Nusservanji* 22 C W N 199=49 I A 323=49 C 1005 (P C), *Oloymonce v Vilmony*, 15 C 282. *Idiote General of Bombay v Hornusji*, 29 B 375, *Babu v Sitaram* 3 Bom L R 768. *President v Chulakaman* (1911) 2 M W N 238, *Velappa v Palani* (1915) M W N 325=29 Ind Cas 201 *Manmatha v Probodh*, 37 C L J 52. As regards our duty when Wills come before us for construction it is obvious to say that it is in each case to consider the words of the Will. I say that, for the purpose of calling attention to the agreement that in the absence of any rule laid down or established by cases, we are at liberty to construe Wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts and subject to what we are bound to construe the Will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. This is conjecture only, and conjecture on the imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind as regards the attention to the point to be claims of different parties dependent upon him, may not have been constituted as their minds are constituted so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the Will as we should construe any other document subject to this that in Wills, if the intention is shown it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it. *Per Cotton L J in Ralph v Carrut* 11 C L D 873 (878)=18 L J Ch 801.

**Meaning to be ascertained from the whole document** In *Boston v Fitzgerald* (1815) 15 East 530, Lord Ellenborough said. 'It is a true rule of construction that the sense and meaning of the parties in any part of an instrument may be collected *ex antecedentibus et consequentibus* every part of it may be brought into act on in order to collect from the whole an uniform and consistent sense if that may be done.' See also *Damodar Das v Dayabhai* 23 B 833=2, I A 126=2 C W N 117 *Gray v Minnetrope* 3 Ves 107, *Re Fern* (1901) 2 Ch 52 *Kandarpa v Jogendra* 12 C L J 391, *Shah Ialshuman v Parangini*, 8 C L J 20 *Tagore v Pagore*, 9 B L R 377=18 W R 359 *Kalidas v Kanhaya Lal* 11 C 121 (129)=11 I A 218 *Amrithayyan v Atharamayyan* 14 M 67 (69), *Shookmany v Monohari*, 11 C 681=12 I A 103, *Lalitmohan v Chalkan*

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*Lal*, 24 C 834=24 I A 76, *Mahomed v. Sheuakram* 14 B L R 226, *Varry v. George*, 31 W 283 *Indravel v. Sathell*, (1903) A C 122, *O'Brien in re* (1906) 1 Ir R 649, *Brocklebank v. Johnson*, 20 Beav 213, *Key v. Key* 4 De J M & G 73, *Pande v. Surja* 25 C W N 961 (P C), *Grey v. Pearson*, 6 H L C 61

Evidence as to document unmeaning in reference to existing facts

95 When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense

#### Illustration

A sells to B by deed 'my house in Calcutta'

A had no house in Calcutta, but it appears that he had a house at Howrah of which B had been in possession since the execution of the deed

These facts may be proved to show that the deed related to the house at Howrah

**Latent ambiguity** Sections 95, 96 and 97 deal with latent ambiguity. These sections correspond to section 80 of the Indian Succession Act (XXXIX of 1925). In interpreting a Will where there is a latent ambiguity the law is thus laid down by *Wigram*: 'Where object of a testator's bounty, or the subject of his disposition (i.e. the person or thing intended) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator'. Latent ambiguity, in the more ordinary application of the term arises from the existence of facts external to the instrument, and the creation by those facts of a question not solved by the document itself. In strictness of definition such cases as those in which peculiar usage may afford a construction to a term different from its natural one would be instances of latent ambiguity, since the double use of the term would leave it open to the doubt in which of its two senses it were to be taken. It is not however to this class of cases we now advert, but to those in which the ambiguity is rather that of description, either equivocal itself from the existence of two subject matters or two persons both falling within its terms or imperfect when brought to bear on any person or thing. Thus a man having two estates called Blackacre may devise generally his estate Blackacre (not saying which) or having two sons John may give to his son John. Here upon the face of the Will all would be apparently plain. It would be external facts alone which create doubt (*vide* illustrations to sections 95, 96 and 97). Nothing on its face could be more simple or less ambiguous than a gift of 'my estate Blackacre or a gift to my son John'. The embarrassment is raised when it is sought to apply to the gift, and then the discovery is made which did not occur to the testator, namely, that there are two estates Blackacre, or two sons John. In either case accordingly to give effect to the gift, the subject must be ascertained and defined. Again there may be enough description in the instrument to have indicated some specific thing as the object of its operation or some given individual as the object of its provisions, but it might turn out, on seeking to apply the instrument to its supposed subject matter or object, that, from an imperfection of description there was matter subject or object in exact correspondence with it so that it would be uncertain on what, or in whose favour the instrument was designed to operate. Thus in the case of a devise of *Frogues Farm* in the occupation of M the testator had a farm called *Frogues* but a portion of it only was in M's occupation (*Good title v. Southern* 1 M & S 299). In a gift to A and B legitimate children of C D—C D had children A and B but they were illegitimate. Yet the farm was allowed to pass, and the children to take. It was the extrinsic circumstances in both cases which created the uncertainty and the question which extrinsic circumstances created, extrinsic evidence was admitted to clear up. The distinction will be

obviously between clearing up an ambiguity and creating a subject *Goodere Ev* S 95  
pp 395 96

**Principle** The process of interpretation is a part of the procedure of realising a person's act in the external world. It is in a sense the completion of the act, for without it the utterance, whether written or oral must remain an unword. Deeds, contracts and Wills, if they are not to remain empty manifestations must be enforced. They must be applied to external objects. Somewhere possession must be yielded, or goods delivered, or money transferred, and in order that the law may enforce these changes in external objects the relation between the terms of the jurial act and certain external objects must be determined as an indispensable part of the process. In short, the interpretation of the term of a jurial act is an essential part of the act considered as capable of legal realization and enforcement. The only difference is that the actor alone creates the terms of his act while the interpretation of it, being a part of the enforcement comes into the hands of the law. *Wigmore* § 2458. Every agreement must receive its construction from its own terms, without the introduction of any evidence *dehors* the instrument unless there be some latent ambiguity. *Per Rowlc J in Cole v Guy* 2 B & P 565 569, see also the remarks of Lord Eldon in *Smith v Doe* 2 B & B 473 (602). But "where the words stand in *equilibrio*, and are so doubtful that they may be taken one way or the other there it is proper to have evidence read to explain them. *Per Lord Couper in Shole v Russell* 3 Ch Rep 169, *Lord Chesney's Case*, 5 Co Rep 68 (a) "If you go to a prol evidence to raise the ambiguity, you can not well refuse it to explain such ambiguity." *Per Lord Thurlton in Shelburne v Inchaquiri* 1 Bro C C 338 341. This section has its origin in the maxim '*falsa demonstratio non nocet cum de corpore causalit*'. The meaning of the maxim is that where description is made up of more than one part and one part is true but the other false then if the part which is true describe the subject with sufficient legal certainty the untrue part will be rejected and will not vitiate the devise. *Jarman on Wills 6th Ed* pp 1265-66.

**Origin of the rule of extrinsic evidence in cases of latent ambiguity** The construction of Wills' says *Lord Cole* ought to be collected from the words of the Will in writing and not by any averment (i.e. circumstances) of evidence out of it. *Lord Chesney's Case*, 5 Co Rep 68 (a). In *Cole v Raulinsons* 1 Salk 234, *Lord Holt* said "If we once travel into the affairs of the testator, and leave the Will we shall not know the mind of the testator by his words, but by his circumstances, so if you go to a lawyer he shall not know how to expound it. Men's right will be very precarious upon such construction. We must not depart from the Will to find the meaning of it in things out of it. But in *Goodings v Goodings* 1 Ves St 231, *Lord Hardwicke*, said "That rule is laid down much too large by *Holt*, for in several cases it is admitted it must be allowed—namely, where the description or thing is uncertain it must be admitted to show the testator knew such a person and used to call her by a nick name. See also *Shole v Russell* 3 Ch Rep 169. So *Lord Couper* and *Lord Hardwick* were breakers of new ground in this respect. Their work was continued by *Lord Thurlton* whose ruling in *Foncean v Poynt* 1 Bro C C 492 was considered a dangerous innovation. As late as the beginning of the 1800's there were Judges who still thought that the only proper exception was an equivocation. In *Doe v Chichester* 1 Dow 65 93, *Gibbs C J* said "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator, and I know of only one case in which it is permitted that is where an ambiguity is introduced by extrinsic circumstances." *Wigmore* § 2470.

**Application of the section** "The admission of extrinsic circumstances," says *Plumer V R* "to govern the construction of a written statement is in all cases an exception to the general rule of law which exclude everything *dehors* the instrument. It must be the case of an ambiguity which cannot otherwise be removed and which may by these means be clearly and satisfactorily explained. In the same case *Plumer V R* also declared that "where there is a latent ambiguity raised by extrinsic circumstances it may be got rid of in the same manner. The general rule laid down in section 91 of the Act is that

S 95 where the terms of a contract have been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself, or, in certain cases, secondary evidence of its contents. But this rule is subject to the important exceptions contained in ss 95 and 97. *Koruppa Gounden, v Peria Phambi Gounden*, 2 M L J 736=30 M 397. Parol evidence is admissible to show the subject matter to which, or a person to whom, a written instrument applies or refers, and for such purpose to explain the latent ambiguities. Such parol evidence may be of the surrounding circumstances or apparently of statements of intention made by parties to a document. *Doe v Aceds* 6 L J Ex 59=Cockle Cas 355. In *Doe v Martin*, 4 B & Ad 770 785 *Parke J* said: "It may be laid down as a general rule that all facts relating to the subject matter and object of the deed are admissible to aid in ascertaining what is meant by the words used in the Will. So the Court is at liberty to enquire into all the surrounding circumstances which have acted upon the mind of the persons by whom the deed or Will (it matters not whether it was one or the other) was executed. The Court therefore has not merely a right, but it is its duty to inquire into the surrounding circumstances before it can approach the construction of the instrument itself." *Sugden L C* in *All Gen v Drummond*, 1 Dr & W 356. Where a release is silent as to the nature of the claim released, evidence is admissible, under this section, to prove what the claim referred to in the release is valid and operative as a release under section 63 of the Contract Act, even though it is conditional and is not supported by consideration. *Mathew v Lodge*, (1910) M W N 191=20 M L J 383. A compromise decree provided for interests at 2 per cent and the question arose whether the interest was payable at the rate monthly or annually. *Held*, that it was open to that Court by virtue of s 95 of the Evidence Act to hear evidence as to the ordinary meaning of such expressions in documents of that nature. *Mahamud v Zafur*, 62 Ind Cas 702. The content and subject matter of a contract have to be taken into account in determining whether the word "upto" is to be taken as exclusive or inclusive of the day to which it is applied. *Metropolitan Engineering v Walter Engine*, 22 C W N 46=45 C 481=45 Ind Cas 305. Where the plaintiff sued for a declaration that he was a mortgagee in possession of certain plots and alleged that the numbers entered in the mortgage deed were incorrect, *held*, that oral evidence was admissible under ss 95 and 96 of the Evidence Act to prove how the description given in the mortgage deed was relevant to the existing facts. *Radha Lal v Augue* 16 P C 213=21 Ind Cas 429. Where the description of property is such that one portion of it applies to the whole of the house but the boundaries given below apply only to a portion of the same and both read together do not apply correctly either to the whole house or to a portion of it a case of latent ambiguity arises. Extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken is a whole the intention was to convey the whole house or only a portion of it. *Abdul Ghani v Ashiq Hussain* (1922) Oudh 162=66 Ind Cas 412. But where a description is partly correct and partly incorrect and the former part is sufficient to identify the subject matter intended while the latter does not apply to any subject the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself. *Narain Das v Teck Chand* 1923 Sind 42. Where a mortgage deed by a mistake described the mortgaged property as being Fauzi No 6607 but it was found that the mortgagor owned Fauzi No 9907 *held* that it was open to the mortgagee to prove by evidence what the property actually mortgaged was and that the mortgagor could not claim any exoneration on the ground of misdescription of the property. *Hajibunnisa v Talomki Sahay* 1 Pat L R 80=71 Ind Cas 589. Latent ambiguity is removable by extrinsic evidence. *Narain Das v Teckchand* 81 Ind Cas 131. Where a mortgagee transferred the mortgaged property and there was no mention in the deed that only the mortgage right was intended to be transferred the mere fact that it is mentioned in the deed that the property stood in the *khata* of the mortgagor and that there is an indemnity clause cannot justify the contention that only mortgage rights were intended and if the absence of any mention in the deed of absolute ownership on the part of the vendor mortgagor

makes it possible to hold that mortgagee's rights were sold, there is a latent ambiguity to remove which evidence can be given. *Davlat v. Balnam* 118 Ind. Cas. 682 = A I R 1929 Nag 267. Suit was brought by plaintiff as Receiver appointed under an order of Court with authority to sue defendant for money due to a third party. The money was due under an agreement dated 26th August but by mistake the order referred to the money as being due under an agreement of the 25th October. Held that the intention of the parties is immaterial in construing the order and section 95 of the Evidence Act does not apply. *Binode Behary v. Ray Varan* 30 C 699 = 7 C W N 651. Where land with certain boundaries is sold and is wrongly described as containing a certain area the error is regarded as a mere mis-description and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies. Where in a sale deed the land sold is sufficiently identified by the descriptions of its extent and assignment and the name of the registered *pattadar* the addition of a wrong survey number may be disregarded and does not render it useless as a document of title. *Karuppa Gounden v. Pina Phambi* 2 M L J 336 = 30 M 197.

**General principle and scope of the section.** It is not necessary and it is not humanly possible for the symbols of description which we call words to describe in every detail the objects designated by the symbols. The notion that description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted. For example a devise of 'the house owned by me at No 19, Theatre Road Calcutta' is obviously a mere shorthand indication of some simple but essential attributes of the house. How many stories, rooms, doors, windows, closets has it? What is the colour of paper on the respective walls, the kind of carpet on the floors, the number of steps on each stair flight, the pattern of the window frames? These and a hundred other details would go to fill out the description. Without them, it is imperfect, in an absolute sense. Yet no one would insist that the devise was void for uncertainty for lack of the addition of these details. Why? Because the few features mentioned do happen to suffice to fulfil the purpose of interpretation namely to enable us to find the object designated, and to select it with fair certainty from others. Certainty in other words, is a relative term. It signifies that the few terms employed are the essential ones for the purpose. Had they not been in themselves sufficient, we might even have looked at extrinsic declarations of intention. Conversely then, an excessive description is not inherently fatal if the essential terms of it can be ascertained. A devise of 'my yellow house at No 19 Park Street, Calcutta' may lead us to a white house at that place, and if we can surely believe under all the circumstances that the street number of the house, not the colour of the paint, is the essential term, we are to apply the devise to that house. Just as we found that the omitted terms were not essential to applying the description so we may find that some of the inserted terms are not essential. We are doing it no violence by ignoring the non-essential terms for neither the omission nor the insertion of non-essential terms alters its essence as a whole. By conceiving clearly the singleness of each description as a symbol of a single object, we appreciate that the imperfections of either omission or insertion do not destroy its character as a single effort at the designation of a single object. And so we come to the maxim '*falsa demonstratio non nocet cum de corpore constat*'. The practical problem in a particular case is to ascertain which specific term is the essential one. But the important point of theory is that the application of the description is entirely consistent with the general process of interpretation. *Ignore § 2476*. The characteristic of cases within the rule is that the description so far as it is false applies to no subject at all and so far as it is true applies to one only. *Per Alderson B in Moriel v. Fisher*, 4 Exch 591 *West v. Landau*, 11 H L C 375 *Hebb v. Stanley*, 16 C B (N S) p 775. The rule is a rule of good sense. If the language is clear but does not fit because of some of the words which have been inserted there if it is possible to reject the part that makes it inapplicable the Court will do so. *Couten v. Truefitt* (1899) 2 Ch 309 (312), see also *Couten v. Truefitt* (1898) 2 Ch 351 *Eastwood v. Ashton* (1955) A C 900, *Hatcham v. All Gen.* (1919) A C 533. A description though false in part may with reference to extrinsic circumstances be absolutely certain, or at

**S 95.** least, sufficiently so to enable a Court to identify the subject intended, & where a false description is superadded to one which by itself would have been correct *Higgin 5th Ed* p 60, see also *Sheeth v Ashraf*, 19 W R 276, *Tal v Joy*, 21 W R 93. In the application of the doctrine of *falsa demonstratio non nocet* it is immaterial in what part of the description the false demonstration appears. It is not necessary that it should follow the true part, and qualify what has gone before. *Cowan v Truefitt* (1899) 2 Ch 309. In that case *Lindsay M R* observed 'I must protest against the way in which the doctrine was stated by the applicant's counsel—that the maxim *falsa demonstratio non nocet* only applies where there is some correct description at the end of the sentence. That is whittling away the doctrine and making it ridiculous, it is a misapprehension.

**Intention** 'As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. *Per Parke B in Llewellin v Earl of Jersey* (1843) 11 M & W 183 at p 189. The intention once found the erroneous description is treated as mere surplusage and is rejected following the maxim *utile per inutile non vitiatur* (Interpretation of Deeds etc p 119). 'Mis takes in the description of legacies like those in the description of the legatees may be rectified by reference to the terms of the gift and evidence of extrinsic circumstances taken together. *Williams v Freecott*, 11th Ed 954.

**Application of the maxim in different classes of cases** According to *Mr Theobald* the maxim is applicable to these three classes of cases (a) where an object is sufficiently described additional words which have no application to any thing may be rejected *Blaque v Gold*, Cor 417 473. *Doe d Dunning v Cranston* 7 M & W 1 (2) where there is a complete description but the testator goes on to add words for the purpose of identifying or elaborating the previous description these words, if inconsistent with the previous description may be rejected. *Armstrong v Buckland*, 18 B & W 201. *Slugsby v Grainger*, 7 H L 273, *Travers v Blundell*, 6 Ch D 436 (3) where there is no continuous description and there is something answering to part of it, and something answering to other part but two together are inconsistent the question is which are the leading words of description? In the first class of cases under the head there is no repugnancy between the general terms and the particular superadded description, in the second and third class there is a repugnancy between the two parts of a description. *Theobald*, 7th Ed 140.

**Illustrative cases** If a testator devise his black horse, having only a white one (*Doo v Geary* 1 Ves Sen, 255) or devise his free hold house, having only leasehold houses (*Day v Triq* 18 P Wms 286, *Doe d Dunning v Cranston*, 7 M & W 1) the white horse in the one case and the leasehold houses in the other, would clearly pass. In these cases the substance of the subject intended is certain and if there be but one such substance the superadded description though false introduces no ambiguity and as by the supposition the rejected words are inapplicable to any subject, the Court does not alter, vary, or add to the effect of the Will by rejecting them. To such case the maxim *falsa demonstratio non nocet* may with propriety be applied. *Guyres v Sweet*, Amb 1 Fem 293. *Parsons v Parsons*, 1 Ves Jun 266, *Dou ell v Sweet* Amb 175. *Guth v Meybrict*, 1 Bro C C 30, *Stoddard v Bushlen* 19 Ves 381. *Smith v Campbell* 19 Ves 103. *Welby v Welby* 2 Ves & B 191. *Richardson v Watson* 1 B & Adol 733, *Muller v Travers* 8 Bing 241. *Doe d Smith v Gallaway* 5 B & Adol 43, and this is the proper limit of that maxim. *Higgin 5th Ed* 61.

**Extension of the rule** In the application of the principle in question the Courts have not confined themselves to cases which are strictly within its terms. It is often found on a disclosure of the facts of the case that of the particulars of which the description is composed each separately finds some corresponding subject but the one is applicable to a larger portion of the material property than the other thereby ruling the question whether the bequest is limited to be restrictive of the other or expressive only of a suggestion or affirmation. It is mere question of construction for it is clear that if the

answer be that the more limited term is mere suggestion or affirmation, it will be disregarded in deciding upon the quantity to be considered as covered by the description. Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his "farm called A his 'house' in a particular place or his 'B estate,'" or the like, then although he adds a clause to the effect that the property is in the occupation of a particular tenant, or is situate in a particular country, street or other locality, and it turns out that such clause is true only of a part of the property, the entire subject may well pass, unrestricted by additional clause, if such a construction be in accordance with the general interest of the testator. *Jurman 6th Ed 126*, citing *Roe v Vernon* 5 East 80 per Lord Ellenborough. In *West v Ludway*, 11 H L C 384 Lord Westbury explains the maxim *falsa demonstratio non nocet*, in the following terms "where some subject matter is devised as a whole under a demonstration which is applicable to the entire land and then that description is followed by words which are added on the principle of enumeration but which do not exhaust all the particulars then the entirety, which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars. In the case of *Travers v Blundell*, 6 Ch D 436 the testator was exercising a power given him by his father's Will over an estate called the Righby Estate which his father had purchased, and Sir G Jessel after saying that the real question in cases of this description was 'which is the leading description, held that the words in the Will that part of Righby's Estate purchased by my father was the leading description, although the enumeration of the closes of which the Will said the estate consisted, made no mention of the two closes *Tibbavandas v Krishnamam*, 18 B 283 (288),

**Inaccurate description.** A testator made a bequest of my "portrait of X to the National Gallery and the executors sent it on there being no doubt as to the identity of the thing bequeathed. The trustees of the National Gallery expressed doubts as to whether it was a portrait of X, whereupon the executors claimed it back for the residuary legatee. Held even assuming the description was wrong the gift was valid and the portrait passed to the trustees of the Gallery. *In re Milner Gibson Cullum Cust v Attorney General* (1924) 1 Ch 456, a testator specifically devised "all my messuage farm lands and hereditaments in Bentley and Bombay in Essex now in occupation of Thomas Gurling purchased by me of Alderman Thrope." It was found that the testator had a farm in Bentley and Bombay called 'Welham's farms' compounded of two small farms purchased by him of Alderman Thrope in 1831 and of another adjoining small farm and a field both purchased by him from Mr Carrington. At the date of the Will and death of the testator the whole of the lands so purchased were in the occupation of Thomas Gurling who found them as one holding. Held that the whole of William's farm passed to the specific devisee. *Norman v Norman* (1919) 1 Ch 297.

## 96 When the facts are such that the language used might

Evidence as to application of language which can apply to one only of several persons

have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to

### Illustrations

(a) A agrees to sell to B for Rs 1,000 'my white horse'. A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.



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**Principle** "If you go to parol evidence to raise the ambiguity, you cannot well refuse it, to explain such ambiguity." *Per Lord Thurlow in Shellenor v Incliquan*, 1 Bro C C 338, 331

**Similar law** *Vide* s 80 of the Succession Act (XXIX of 1925)

**Scope** When there are two or more persons or things, and each of them exactly answers to the description in the Will, then all manner of parol evidence is admissible (*Charter v Charter* L R 7 H L 361) for the language of the Will is complied with whichever person receives the legacy or whichever thing passes under the bequest. (*Poult v 561*) In *Miller v Travers*, 8 Bing 944, Lindal C J said: "The cases to which this construction (*ambiguus verborum latens verificatione suppletur*) applies will be found to range themselves into two separate classes. The first class is where the description of the thing devised, or of the devisee, is clear upon the face of the Will, but upon the death of the testator it is found, that there are more than one estate or subject matter of devise or more than one person whose description follows out and fills the word used in the Will. As where the testator devises his manor Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the Will of the thing intended to be devised, or of the person who is intended to take is true in part, but not true in every particular. As where an estate is devised called A and is described as in the occupation of B and it is found that though there is an estate called A, yet the whole is not in B's occupation, or where an estate is devised to a person whose surname or Christian name is mistaken or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the Will to justify the application of the evidence. "Where the object of testator's bounty or the subject of his disposition (i.e. the person or thing intended) is described in terms which are applicable to differently to more than one person or thing evidence is admissible to prove which of the persons or things so described was intended by the testator. *Wigram, Proposition III* at p 110. See also *In re Stephenson* (1897) 1 Ch 80, *Bernasconi v Allinson* 10 Hare, 348. *Doe v Needs*, 2 M & W 129, *Umesh Chaudh v Sageman* 5 B L R 633, 634. So proof may be given of every fact which identifies any person or thing mentioned in a document in which the relation of the words to the facts has to be ascertained. If the language of the document though plain in itself applies equally well to more objects than one evidence may be given, both of the circumstances of the case and of statements made by any parties to the document and as to the intentions in reference to the matter to which the document relates. *Steph Dig Lr* art 91. This rule is applicable where two persons have got the same name as mentioned in the document, but one of them has got an additional name. *Bennet v Marshall* 2 K & J 740, *Doe v Allen*, 12 A & E 451, *Fleming v Fleming* 31 L J Ex 119, *Webber v Corbet*, L R 16 Eq 515. In order to ascertain the intention of the parties to any instrument evidence of the conduct of the parties is admissible. *Watson v Mohesh* 24 W R 176 (177), *Cheetun v Chatterdhore* 19 W R 432.

When an instrument appears, on the face of it to be free from ambiguity but upon an endeavour being made to apply it to the persons or things indicated it transpires that the words are equally applicable to two or more persons or two or more things there is what is called a latent ambiguity. This class of ambiguity sometimes called an equivocation (*Doe v Hiscocks* 5 M & W 363 369, *Douglas v Yellon*, Kay 114 120) is not discovered till the instrument comes to be applied to external circumstances. *Chairman Seragum Muneralpally v The Chittagong Co Ltd* 36 C L J 242=72 Ind Crs 596. In such a case as *Lord Wrenbury* puts it, extrinsic evidence has created the ambiguity, and extrinsic evidence is admissible to resolve it—see the decision of the House of Lords in

*Great Western Railway and Midland Railway v Bristol Corporation*, 87 L J Ch 414 at p 429 and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted. Reference may in this connection be made to the observation of *Baron Alderson in Smith v Jeffryes*, 15 M & W 561 at p 572, of *Mr Justice Erskine, Baron Parke*, and *Findlay, C J in Shore v Wilson*, 9 Cl & F 355, of *Lord Wensleydale in Water Pail v Fennell*, 7 H L C 650 at p 685, of *Lord Halsbury in Van Diemen's Land Co v Marine Board of Table Cape*, (1906) A C 92, and of *Lord Atkinson in Watchan v Attorney General*, (1919) A C 533=87 L J P C 150. The decision of the judicial committee in the last mentioned case shows that the principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to ancient instrument and where the ambiguity is patent as well as where it is latent. *Chairman Seraguny Municipality v Chittagong Co Ltd*, 36 C L J 242=72 Ind Cas 696. If the language of a document directly describes two sets of circumstances but cannot have been intended to apply to both, evidence may be given to show to which it is intended to apply. *Ngacho v M'se Uu*, 10 Bur L L 245. Where a usufructuary mortgage deed provides for the payment of revenue by the mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of deed or as it might be re-assessed from time to time, evidence may be given under this section to show what was meant. *Furzand v Kanur*, 22 O C 270=59 Ind Cas 264.

**Application of the rule.** The general principle is this laid down by *Bovill C J in Grant v Grant*, L R 5 C P at p 385. "In each case this kind of parol evidence is not admissible for the purpose of controlling, varying, or altering the Will of the testator, but is admitted simply for purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words in which the intention is expressed. If such evidence establishes that the description in the Will may apply to each of two or more persons, then a latent ambiguity is exposed, and rather than that the devise should fail altogether for uncertainty the law allows the ambiguity which is exposed by parol evidence to be cleared up by similar evidence, provided such parol evidence is sufficient to enable the Court to ascertain the sense in which the testator employed the particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the Court cannot give effect to that part of the Will." This case was affirmed in L R 5 C P 727. Thus where the devise was 'to George Gord the son of Gord,' and there appeared by extrinsic evidence to be two persons answering such description, evidence was allowed of the circumstances and of the testator's statements of intention to show which of the two persons he meant. *Doc v Needs*, 6 L J Ex 59=2 M & W 129. *Parke B* in delivering the judgment of the Court in the above mentioned case observed: "If upon the face of the devise it is uncertain whether a deviser had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual, such would have been a case of *ambiguity patens* within the meaning of *Lord Bacon's* rule, which ambiguity could not be helped by averment, for to allow such evidence would be, with respect to that subject, to cause a parol Will to operate as a written one, or adopting the language of *Lord Bacon*, 'to make that pass without writing which the law appointeth shall not pass but by writing.' But here on the face of the devise no such doubt arises. There is no blank before the name of *Gord* the father, which might have occasioned a doubt whether the devi or had finally fixed on any certain person in his mind. The deviser has clearly selected a particular individual as the devisee upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the deviser, and to construe his Will, it would have appeared that there, were at the date of the Will two persons to each of whom the description would be equally applicable. The evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever, it only enables the Court to reject one of the subjects, or objects, to which the description in the Will applies, and to determine which of the two

**S 96.** *discreet* is understood to be signified by the description which he used in the Will. He is pointed out in the devise itself by a description which, so far as it goes is perfectly correct." Notwithstanding the rule of law, which makes a Will void for uncertainty, where the words, aided by evidence of the material facts of the case are insufficient to determine the testator's meaning—Courts of law, in certain special cases admit extrinsic evidence of intention to make certain person or thing intended, where the description in the Will is insufficient for the purpose. *Wigram 110* "The conclusion, then, which these cases appear to warrant is that the only cases in which evidence to prove intention is admissible, are those in which the description in the Will is unambiguous in its application to each of several objects" *Wigram* p 183 "But there is another mode of obtaining the intention of the testator and *Lord Abinger* in *Doe v Hiscocks* 5 M & W 363 (367) "which is by evidence of his declarations of the instructions given for his Will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the Will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted and that is, where the meaning of the testator's word is neither ambiguous nor obscure, and when the devise is on the face of it, perfect and intelligible but from some of the circumstances admitted in proof an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the Will) the testator intended to express. Thus if a testator devise his manor of S to A B and has two manors of North S and South S it being clear he means to devise one only, whereas both are equally denoted by the words he used in that case there is what *Lord Bacon* calls an equivocation: the words equally apply to either manor and the evidence of previous intention may be received to solve this latent ambiguity. So "where one person accurately fulfils the description, and no one else does you cannot admit parol evidence to show that such person was not intended. *Per Mallins V C* in *Re Wolerton Mortgaged Estates*, 7 Ch D 199, *Re Raven* (1915) 1 Ch 673 see also *Doe v Westlake* 4 B & Ald 57, *Webber v Corbett* L R 6 Eq 515, *Hornood v Griffith* 4 D M & G 700. But the rule contained in this section is applicable where the gift is 'to the four children of my cousin E B' and where in fact E B had six children, two by one husband P and four by another husband B. *Hampshire v Pierce* 2 Weg 216 see also *Jones v Neuman* 1 W Bl 60 *Doe v Allen* 12 A & E 451 *Grant v Grant* L R 5 C P 727 *Nassey v Jeffry*, (1914) 1 Ch 375 *Hurdson v Hurdson* (1905) 1 I R 353 *Re Balle Wrigthson*, (1920) 2 Ch 330. This rule is also applicable to deeds and contract. *Higmore* § 2472

**Ambiguity—Evidence of intention** It is commonly said that extrinsic evidence is admissible in cases of latent ambiguities whereas such evidence is inadmissible in cases of patent ambiguities. But upon examination the maxim proves not to be an universal guide for, on the one hand there are many recognised authorities for the admission of parol evidence to explain ambiguities appearing on the face of the Will, while on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished for what is the meaning of the words he has used. It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible because the ambiguity complained of has been raised by the extrinsic facts is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity and that by which it is to be removed for the former is confined to developments of facts with reference to which the Will was written, and to which the language of the Will expressly or tacitly refers, and therefore, it lies within the strict limits of exposition which it cannot be denied that the latter transgresses. To render the ground tenable, it must be taken to support the proposition only so far as it asserts that, if an ambiguity is introduced into an otherwise unambiguous Will by parol evidence of the state of the testator's family or other circumstances, that ambiguity may be removed by further

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evidence of the same nature. But in admitting this interpretation of the rule all distinction between patent and latent ambiguities is lost for in every case the Judge by whom a Will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity it is true, may not be explained by any other kind of evidence and so far the first branch of the canon is undoubtedly true. But by our hypothesis to this precise extent, and no further is the latter branch true also. We come therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words), and that, consequently, if true, its application must be confined to a special class of cases. It remains for us to see in what cases, if any, such evidence is admissible. Suppose, then that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable. The uncertainty as to which of these was in the testator's contemplation would if the investigation stopped here necessarily be fatal to the gift. Under these peculiar circumstances however declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity pointing out (if they can) the actual subject or object of gift among the several properties or persons answering to the description. Of this nature are the examples given by Lord Byron in illustration of the maxim, '*Ambiguitas verborum latens verificatione suppletur nam quod ex facto oritur ambiguum verificatione facti tollitur*', and are styled by him as cases of equivocation." *Jarman, 6th Ed* 516 518

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies

**97** When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply

#### Illustration

A agrees to sell to B "my land at X in the occupation of Y." A has land at X, but not in the occupation of Y, and he has land in the occupation of Y but it is not at X. Evidence may be given of facts showing which he meant to sell

**Principle** 'The characteristic of all these cases is that the words of the Will do describe the object or subject intended and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever, it only enables the Court to reject one of the subjects or objects to which the description in the Will applies and to determine which of the two the testator understood to be signified by the description which he used in the Will' *Parke B in Doe v Needs* 2 M & W 129

**Scope of the section** This section is the converse of the preceding one in that there is language partially applicable to two sets of facts but wholly applicable to neither. In this case, as in the former extrinsic evidence is admissible for discovering the meaning. It is an extension of the rule laid down in section 95. *Cun Tr* 286. According to English law where the description of the person or thing be partly applicable and partly inapplicable to each of the several subjects though extrinsic evidence of the surrounding circumstances may be received for the purpose of a certaining to which of such subjects the language applies yet the evidence of the author's intention will be inadmissible. *Doe v Ilwaco* 5 M & W 33. *Taylor* § 1226. Section 1340 of the California Civil Code says 'When applying a Will, it is found that

**S. 97.** there is an imperfect description, or that no person or property exactly answers the description mistakes and omissions must be corrected, if the error appear from the context of the Will or from extrinsic evidence, but evidence of the declarations of the testator as to his intention cannot be received." But according to *Prof Wigmore* there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event, and there is thus no competition between the words and the extrinsic utterance, it is simply a question which words shall be ignored as unessential part of the description. *Wigmore* § 2474. *Sir James Fitz James Stephen* also said "Conclusive is the authorities upon the subject are it may not, perhaps be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case, the wish to avoid the evil of permitting written instruments to be varied by oral evidence, and the wish to give effect to Wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 (=ss 95-97) and in cases falling under paragraph 8 (=s 96) or to exclude such evidence in both classes of cases and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts." *Steph Dig Fr* 186. In this Act also no such distinction is made between declarations of intention and other evidence and therefore in all cases where extrinsic evidence is admissible whether under sections 95 and 97 or section 96 declarations of intention will be admissible. *Woodroffe Et p* 663, *Ireland Et* 6th Ed 284. *Cum Ev* 275-277. The law on the subject is thus laid down by *Brace P J* in *Willard v Danah*, 163 Mo 660-68 S W 1023 "The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers but it is morally or legally certain that it was intended to apply to one or the other, thus bringing the case within the rule established by the second class of cases, in which direct or extrinsic oral evidence including expressions of intention is admissible. Such evidence was therefore admissible in this case in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the Will to the objects of the testator's bounty to prevent the fourth clause of the Will from perishing and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the Will but let in light by which that intention rendered obscure by outside circumstances, may be more clearly discerned, and the Will of the testator in its entire scope effectuated according to his true intention and meaning." *Wigmore* § 2171. In *Ryall v Hanman*, 10 Beav 536. A devised property to *Eli abeth* the natural daughter of B. B has a natural son *John*, and a legitimate daughter *Eli abeth*. The Court may infer from the circumstances under which the natural child was born and from the testator's relationship to the putative father that he meant to provide for *John*. *Steph Dig Et* 102. A leaves a legacy to his niece, *Eli abeth Stringer*. At the date of the Will he had no such niece but he had a great great niece named *Eli abeth Jane Stringer*. The Court may infer from these circumstances that *Eli abeth Jane Stringer* was intended but they may not refer to instructions given by the testator to his solicitor showing that the legacy was meant for a niece, *Eli abeth Stringer* who had died before the date of the Will and that it was put into the Will by a mistake on the part of the solicitor. *Stringer v Gardiner*, 27 Beav 354-4 D & J 465. Criticising on that decision *Sir James Fitz James Stephen* said "So in a decision as that in *Stringer v Gardiner* the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his Will appears to me to be a practical refutation of the principle or rule on which it is based. Of course every document whatever must to some extent be interpreted by circumstance. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist and therefore in every case whatever every fact must be allowed to prove to which the document does or properly may refer but if more evidence than

this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that why should declaration of intention be excluded? If the question is, 'what did the testator say? Why should the Court look at the circumstances that he lived with Charles, and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that 'Foster means 'Charles,' is like saying that 'two means 'three'. If the question is 'what did the testator wish?' Why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, 'what would the testator have meant if he had deliberately used unmeaning words?' The only answer to this would be he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void. *Steph Dig Ev* pp 186 187

**Cases** The illustration to section 97 allows that if A agrees to sell to B "my land at X in the occupation of Y" and A has land at X but not in the occupation of Y, and his land in the occupation of Y but it is not at X, evidence may be given to show which was intended to be sold. Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies. *Kanappa v Perialthambi Goundan* 30 M 397 (399). So where land is described in a document by boundaries and area is wrongly specified the land within the boundaries will pass whether it be less or more than the quantity specified. *Bhayaalal v Dwarla* 15 C P L R 163. In such a case the maxim *falsa demonstratio non nocet* applies and the land specified within the boundaries passes by the deed irrespective of their extent. *Pahalwan Singh v Maharaja Muhessin Balsh Singh* 9 B L R P C 150=16 W R 5 P C. *Sherb Chunder v Brojanath*, 14 W R 301, *Vijayandas v Maomed Ali*, 5 B 208, *Modee Huddin v Sandes* 12 W R 439, *Filam v Protap*, 20 W R 221, *Zemul Ali v Ramdoyal* 18 W R 25, *Karee Abdul v Buroda Kant* 15 W R 394. *Tribhubhan v Krishnamam*, 18 B 283, *Subhaya v Muthiah* 78 Ind Cas 111=46 M L T 182, *Harmohan v Rameswar*, 61 Ind Cas 737. *Bina Kalmi v Rajendra* 64 Ind Cas 751, *Narain v Jauhar*, 50 P L R 1922. *Aga Cho v Mi Se Mi*, 10 Bur L T 245.

Where the description of property sold is such that one portion of it applies to the whole of the house but the boundaries given below apply only to a portion of the same and both read together do not apply correctly either to the whole house or to a portion of it, a case of latent ambiguity arises. Extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention was to convey the whole house or only a portion of it. *Abdul Gham v Ishiq Hussain* 66 Ind Cas 442=(1922) Oudh 162. Where in a sale certificate there are two descriptions of the property which cannot be reconciled it is open to the Court to look at the decree and decide which governs the sale. *Mulhar Ahmed v Kahu Ahmad* 1924 All 856. If the language of a document directly describes two sets of circumstances but cannot have intended to apply to both evidence may be given to show to which it is intended to apply. *Aga Cho v Mi Se Mi* 10 Bur L T 245. In the case of an ambiguity in the description of land in a mortgage deed it is open to a party to show by other evidence what land was actually covered by the deed. *Ramchandra v Arshad Ali*, 13 Ind Cas 721.

**Whole of it does not apply correctly to either** This section has application when the whole of the language used in a document does not apply correctly to either. Because 'if I have some land wherein all the demonstrations are true and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands where all those circumstances are true. This rule is based upon the 13th maxim of Lord Bacon which is as follows: '*non accipi debent verba in solam limitationem quae competunt in limitationem veram*'. So where a given is devised and there are found two species of property the one to

- S 98.** and precisely corresponding to the description in the devise and the other not so completely answering thereto, the latter will be excluded, though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject', *Jarman, 6th Ed* 1216. A devise of lands described in a particular place and in the occupation of a particular person, will not pass lands not in that place or not in the occupation of that person. *Parlin v Parlin* 5 Taunt 321, *Francis v Angel*, 26 B & W 913. see also *Jalsa v Mathurapur* 33 A 66=7 A L J 1093=6 Ind Cas 494. 'Where a testator has devised all his lands at any particular place extrinsic evidence is not admissible for the purpose of showing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of time, or of the testator having dealt with them as one property or of his having been in the habit of referring to them as forming one property under one distinguishing name'. Per *Biggally L J* in *Homer v Homer*, 8 Ch 758 at p 771.

**98** Evidence may be given to show the meaning of illegible Evidence as to or not commonly intelligible characters of meaning of illegible foreign, obsolete, technical, local and provincial characters etc. expressions, of abbreviations and of words used in a peculiar sense

#### Illustration

A, a sculptor agrees to sell to B, "all my mods" A has both models and modelling tools. Evidence may be given to show which he meant to sell

**Principle** "Where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in foreign language in the case of ancient instruments where by the lapse of time and change of manners the words have acquired in the present age a different meaning from that which they bore when originally employed, in cases where terms of art occur,—in mercantile contracts which, in many instances, use a peculiar language employed by those only who are conversant in trade or commerce,—and in other instances in which the words besides their general common meaning, have acquired by custom or otherwise, a well known peculiar idiomatic meaning in the particular country in which the party using them was dwelling or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expand the real meaning of the language used in the instrument in order to enable the Court or Judge to construe the instrument." In the same case *Lord Wensleydale* (then *Mt Baron Parke*) said "I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present enquiry) and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument and to apply it practically. In the first place there is no doubt that not only where the language of the instrument is such as the Court does not understand it is competent to receive evidence of the proper meaning of that language as when it is written in a foreign tongue, but it is also competent where technical words or peculiar terms or indeed any expressions are used, which, at the time the instrument was written, have acquired an appropriate meaning either generally or by local usage or amongst particular class. This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself by themselves and without reference to extrinsic facts on which the instrument is intended to operate."

**Scope of the section** In order to interpret or ascertain the meaning of a written document, parol evidence may be given of the meaning or sense in which not only words, but also signs symbols private marks or nicknames, have been used. Such evidence may be given although the words etc., the meaning of which is in question, appear to have been used with a particular meaning only by the person whose document is under construction, and is not so used by any class of persons or in any locality. *Kell v Chamee* 23 Beav 195 *Cockle Cas* 362. So in order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters of foreign obsolete, technical local, and provincial expressions of abbreviations, and of common words which from the context, appear to have been used in a peculiar sense but evidence may not be given to show that common words the meaning of which is plain and which do not appear from the context to have been used in a peculiar sense, were in fact so used. *Stephen Dig* Li art 92 (2) "If the words themselves are intelligible" said Lord Thurlow in *Shelburne v Ingham* 1 Bro P C 338 342 'there is no instance where parol evidence has been admitted to explain them into a more vulgar sense.

If words have in themselves a positive precise sense I have no idea of its being possible to change them. But 'where certain words have obtained a precise technical meaning we ought to give them a different meaning that would as Lord King and other Judges have said be removing land marks. In *Beacon L & F Ars Co* 1 Moore P C N S 79, 98, Lord Chelmsford said 'In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain. See also *Per Mallis V C* in *Kilmer's Trusts* L R 12 Eq 183 186. Prof Wigmore in his Law of Evidence in considering both the theory and policy of the above rule said 'That the theory of it is unsound ought not to be doubted. There can be in the nature of things no absoluteness of standard in interpretation. An advanced communism might conceivably bring men to such a level of intellectual uniformity that their thoughts would be expressed in invariably identical symbols. But till that day comes the varieties of individual expression and sense must be unquenchable. So long as men are allowed to grant and contract freely, and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective, and individual. The fallacy consists in assuming that there is or can be one real or absolute meaning. As to the argument of policy the case is somewhat different. There is much to be said for the traditional rule, though not all that is said is sound. The truth is that whatever virtue and strength lies in the argument for the antique rule leads not to a fixed rule of law but only to a general maxim of prudent discretion. In the felicitous alliteration of that great Judge, Lord Justice Bowen it is not so much a canon of construction as a counsel of caution. (*Re Jodiell* L R 44 Ch D 590). The distinguished Master of the Rolls Sir George Jessel once wittily declared to counsel that 'no body could convince them that black (seltedge) was white and yet the Court of Appeals revised his judgment because they were after all convinced of that precise proposition. (*Mitchell v Henry* 1880 15 Ch D 181). To say that it would be difficult to convince him and upon the evidence to fail to be convinced, would have been a rational attitude. But that is very different from an arbitrary rule declaring "a priori" that the judicial mind is legally not open to conviction. There is then, neither in theory nor in policy any basis for an absolute rule declaring that when a word has a plain meaning i.e. by the popular standard neither the local nor the mutual nor the individual standard can be substituted, such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing, Wigmore § 2462.

In *Brown v Byrne* 3 F & B 703 Lord Coleridge J said 'Neither in the construction of a contract among merchants tradesmen or others will the evidence (of a local usage) be excluded because the words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different



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sense from that. What words more plain than 'a thousand,' 'a week' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean 'twelve hundred,' 'a week' 'a week only during the theatrical season' 'a day' 'a working day' Singularly in *Myers v Sand*, 31 & L 306 Lord Blairburn said "I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. The consequence is that every individual case must be decided on its own grounds." See also the observations of Lindley L J and Bowen L J in *Re Jordell* L R 14 Ch D 590 609 614, *Wigmore* § 2162. In India the literal rule should be applied in construing this section. So various words in written documents which *prima facie* present no ambiguity may be interpreted by extrinsic evidence of usage, and their peculiar meaning, when found in connection with subject matter of the transaction, has been fixed by prior testimony of the sense in which they were usually received. *Jyot kumr v Jadu Nath* 34 C L J 160, see also *Gouri Chandra v Raja Mal undu* 9 C W N 710.

**Illegible.** Where the writing is that in ordinary use but illegible the evidence of experts may be adduced to decipher it. *North v* 284. So it is well settled that one skilled in writings may be called to assist in deciphering a writing illegible or uncertain to the ordinary observation. *Masters v Masters*, 1 P Wms 125, *R v Williams* 8 C & P 134. *Wigmore* § 2025. Ineligibility might arise from the use of cypher or shorthand, or other peculiarity of character as the medium of expression or it might be merely bad writing. Referring to a case of cypher Baron Alderson observed "Words on paper are but the means by which a person expresses his meaning and shorthand is in this respect like long hand, and equally admits interpretation." *Clayton v August* 13 M & W 206.

**Foreign expressions not commonly intelligible.** Foreign includes colonial. *Hull v Hull*, 4 Ch D 97, *Cadell v Eile* 46 L J Ch 793. No doubt has ever been made that properly skilled testimony may be sought in proving the existence of a foreign rule of law in general (*vide* s 45). The question that involves the present principle is "When the text of a foreign statute is before the Court may any aid be received in construing or interpreting it?" No one doubts that the aid of a mere translator is proper. But when a translation if necessary has been made is any thing further needed in the way of comment in the text? The answer has always and properly been that such aid may at any time be needed and may always be offered. *Sussex Peerage Case* 11 Cl & F 115, *Guepette v Young* 4 De G & S 221 227, *Di oia v Phillips* 10 H L C 610, *Wigmore* § 1973. The translation of native documents in the High Courts will afford a familiar illustration on the point of language to that of the Court Goodale's Ex 376. As regards construing a foreign document Lord Esher M R said "Now, this writing was a business document, written in Brazil in the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it and the first thing therefore, that the English Court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document—a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil under the circumstances. Therefore you would want a competent translator, competent to translate it in that way and, if the words in Brazil had in business a particular meaning different from this ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. This is the first thing the Court has to do. Then when the Court has got a correct translation into English it has to do what it always has to do in the case of any such document—either a contract or such an authority as this—that is to say it remains what it is to be taken to be the meaning of the party at the time he wrote it and what is to be inferred from the language which he has used." In

the same case *Lindley L J* said 'The document is in Portuguese. The Court cannot take judicial notice of the Portuguese language, and it must have recourse to the assistance of those who understand it. Recourse must therefore be had to translators, and if there are technical expressions, whether scientific, legal or other, recourse must be had to experts in order to get at the correct translation, and in order to express to an English mind the meaning which is conveyed to a Portuguese mind by the words used.' See also *Queen Empress v. Bal Gangadhar Tilak*, 22 B 112 (143). Where *Strachey J* said "We must look at the articles not as grammarians or philologists might do but as the ordinary readers of the *Kesari* would look at them—readers who are impressed not by verbal refinements but by the broad general drift of an article. Two translations have been put before you one of which has been called a free and the other a literal translation. Both are equally official translations. What I advise you is that wherever there is no dispute about the accuracy of the free translation, where its rendering has not been challenged, you should be guided by the free translation. It is altogether a mistake to suppose that because a translation is literal, it is more correct than a translation which is called free." As regards the value of official translation vide *Queen Empress v. Bal Gangadhar Tilak*, 22 B 142, *Harris v. Brown* 28 C 621 *Queen Empress v. Kali Prasanna*, 1 C W N 463 479 *Mahatalu v. Halcem* 10 C L R 293, 300 301.

**Obsolete expressions.** As regards obsolete expressions, the case of *Walker and Shore* is itself an example. Here it being necessary in modern times to put a construction upon an ancient charitable foundation and as to who were designed to take under the terms of Godly preachers of Christ's Holy Gospel, evidence was given from history, contemporaneous with the deed, of the existence of a particular sect assuming to themselves that denomination, and of the founder's connection with them. *Goodrich* Lr 376.

**Technical expressions.** It is obvious that the interpretation of the meaning of the document in respect to ordinary words, being a part of the function of the Court, is not for a witness to speak to. But so far as the words are technical, and the witness speaks to technical usage or meaning there is no prohibition, the Court must determine anew in each instance whether it needs any testimonial aid to interpret the word or phrase in dispute. *Higmore* § 1955. "Evidence as to mercantile usage may be received, but you cannot ask a witness what is the meaning of a written document." *Kirkland v. Aisbel*, 3 Macq Sc App C 766. In most of the cases in this section the word or words may be either wholly unintelligible, or may have two senses—one popular, the other technical. The evidence ordinarily is that of usage sometimes agricultural, generally mercantile. Parties may reasonably be supposed to have used in their contracts terms in accordance with usage. The maxim is *contractus facile insunt quae sunt moris et consuetudinis*. *North* Lr 285. "The rule is that technical words shall have their legal effect unless from other words it is very clear that the testator meant otherwise." *Per Lord Redesdale in Jesson v. Wright* 5 M & S 95. With regard to technical terms where a term of art is employed, or a word connected with some department of the natural world which has become technical and popular in its use among scientific men and men of letters a Court, when called upon to give a construction to such words may avail itself of parol testimony to ascertain the technical and popular use of the word. *Burr Jones* § 455.

In mercantile contracts the question has often arisen on expressions denoting time as for instance "months" whether lunar or calendar (*Jolly v. Yang*, 1 Esp 186), "days" as meaning working days or running ones, freight "in turn to deliver" and so forth. In *Garrison v. Perrin* 2 Com B N S (681) which was a contract for purchase of bales of gambier in passage from Singapore and expected to arrive in London, evidence was received to show that by the custom of the trade a bale of gambier was understood to mean a package of certain description. In that case *Cockburn C J* said "If the term 'bale' as applied to gambier has acquired in the particular trade a signification differing from its ordinary signification, evidence must be received on the subject, otherwise effect is not given to the contract." So a bale of cotton may mean a

**S. 98** bag in the Alexandrian trade, and a compressed bale in the Levant one according to the usage of either trade (*Taylor v Briggs*, 2 Car & P 521), and, in contract to pay at so much per ton for goods shipped at Bombay, cotton to be calculated at 50 cubic feet per ton evidence would be receivable of a usage per according to the measurement at Bombay. *Bottomley v Furber*, 5 Bing 1 *Goodeve Et* 378. So liberal rule permits resort in any case to usage of a trade or locality, no matter how plain the apparent sense of the word to the ordinary reader. In *Smith v Wilson*, 3 B & Ad 728 the defendant was allowed to prove that by the customary meaning of the locality, the term 'thousand' as applied to rabbits meant 100 dozen. In *Hold v Rayner* 1 M & W 31 evidence of a usage was given that where two vessels are named with "and between them in a contract, the goods may be delivered from either at seller's option. In admitting this evidence, *Parke B* said "Yes if you read it strictly, and, but the evidence was that custom reads it so." *Lord Abinger*, said "The Court must look at each contract and say whether in its whole spirit and meaning, and did not mean or in the understanding of the parties." "Days in a bill of lading was held to mean working days." *Corliss v Relect*, 3 Esp 121. In *Grant v Maddox* 15 M & W 737, interpreting the word 'year' evidence was admitted of the professional usage that actors were never paid during the time of vacation. In *Myers v Sari*, 3 E & E 306, which was a building contract proving, for a weekly account of the work done trade usage was admitted to show that weekly account was restricted to a particular part of the work, even though 'the words have a plain general meaning.' In *Mitchell v Henry* L R 15 Ch D 181, which was a case of infringement, the plaintiff's registered description named a worsted having a 'white selvage', part of the work being a dark grey or black mohair, the goods had a dark appearance and *Jessel MR* declaring 'that is a black selvage and not a white selvage' and that 'no evidence would convince them that black was white, declined to give effect to the plaintiff's testimony that the plaintiff's selvage "was what was perfectly well known in the trade as a white selvage", on appeal, this was reversed on the ground that "the question is not whether the selvage is white but whether it is what the trade know as a white selvage." *Wigmore* § 2163. The term 'ten packets of Kent hops at five pounds,' was interpreted as "ten packets of Kent hops at five pounds per cwt. in accordance with the usage in the hop trade." *Spicer v Cooper*, 1 Q B 424. Parol evidence was admissible to show that the term 'in the month of October' according to the mercantile usage, means a particular part of that month. *Chasand v Angerstein* Perke R 45. Unless there is something in the context qualifying it the word 'malik' used in a Will, bears its technical meaning. When a testator bequeathed his property to his issue if he happened to have any, and if he had no issue then to his mother and wife who were to be 'malik and qubiz julad' held that the ladies obtained an absolute estate. *Thakur Prosad v Jamna Kuar* 6 A L J 420, *Chunilal v Bai Mul*, 2 Bom L R 46=24 B 420. *Sunjomom v Rabinath* 30 A 81. *Kandarpa v Jogendra*, 12 C L J 391, *Lahmohan v Chakkanlal* 23 C 804 (P C). *Amarendia v Swadhandy* 14 C W N 458. *Baidas v Bangolap* 26 C W N 126 (P C). *Sastimom v Sibnarain* 26 C W N 425 (P C), *Sulachana v Jagadhatri* 30 C L J 51, *Rajnarain v Ashutosh*, 27 C 41. *Sibnarayana v Tarangini* 8 C L J 20.

**Local and Provincial expressions.** Of local usage a striking illustration is afforded by the case of a lease of a rabbit warren, where the lessee covenanted to leave on the warren at the expiration of the term 10 000 rabbits the lessee or paying for them £ 60 per thousand and evidence was received to show that according to the local usage of that part of the country, 1000 as applied to rabbits, meant 1 200. *Smith v Wilson* 3 Barn & Ad 728, *Goodeve Et* 377. The usage of a trade or locality or sect or dialect being always eligible to supersede the ordinary or popular sense of words it remains merely a question for the particular case whether the parties have in fact spoken according to that standard. Where all the parties are members of the same trade or other circle of persons little difficulty can arise the only requirement is that the special sense alleged should be in fact a usage or settled habit of expression, and not merely the expression of a few persons or of casual occasions. *Russian Steam*

*Nat v Sila*, 13 C B N S 610, 617 Where the usage is not that of a trade but of a locality, the form of it may be common reputation or commonly used documents *Wignore* § 2464 Where in a deed words in use in a particular locality in a peculiar sense are employed oral evidence is admissible under section 94 of the Evidence Act to explain the meaning of the words in question *Chuddu v Creu*, 63 Ind Cas 138

**Abbreviations** Where initials or other abbreviation are to be interpreted, the local usage or repute is of course receivable *Wignore* § 2464 A wager contract to run one greyhound against another, concluded with the initials P P Evidence was received to show that it meant—"Play or Pay,"—that is to say,—win the match, or forfeit the stakes *Ilderson B* said 'standing by themselves those letters are insensible but the evidence confers a real meaning upon them, by showing what the parties intended by them, and that they were inserted with the view of expressing a given thing' So also *Bayon Poole* said 'There can be no doubt the evidence was receivable It is like the case of a word written in a foreign language' The Will of a celebrated sculptor *Nolens* containing a bequest under the term of his 'mod—tools for carving' is a familiar illustration on the part of terms of art The word "mod" was there contended on the one hand to mean modelling tools and on the other models, which latter were of great value, and evidence of sculptors and others was received in interpretation of the word 'mod' *Goblet v Beechey* 3 Sim 21 *Goode v El* 377 On this case the illustration is based Put the case of shorthand writers notes which a Court unskilled in the art of stenography must have explained or interpreted, before it can attach any meaning to the arbitrary signs *Kell v Charmer*, 23 Beav 195

**Words used in a peculiar sense** There is no reason, in the nature of things why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense because what we are seeking, interpretation, is their actual standard, and the popular standard is merely taken provisionally as presumably theirs It can thus be, in theory only a question of fact in each case whether the parties were using a special mutual sense The application of the principle has long been seen in the interpretation of descriptions in deeds because there is there always some concrete and local object fully known to the parties but unknown to the Court, and in every such case it is obvious that the words used must be translated into things and facts the parties to the deed almost always use terms of description which are peculiar to themselves *Wignore* § 2465 *Doe v Burt* 1 T R 701 704, *Van Diemen's Land Co v Marine Board* (1906) App Cas 92 *Squire v Campbell*, 1 Myl & C 459 'The purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself The effect must be limited to definition of the term used, and identification of the subject matter If so limited it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract' Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit They are not the less effective for the purpose of explanation and definition because they purport to carry the force of obligation *Per Wells J* in *Stoops v Smith* 100 Mars 63 In *Doe v Benjamin* 9 A & E 644 652, *Coleridge J* said "The Courts have come to some inconsistent conclusions in cases of this kind, but from the main body of them the principle results that we must look to the intention of the parties, and that by considering the terms of the particular instrument with reference, I agree to the state of facts existing at the time See also *Cooke v Booth* Cowp 819 *Buch v Depryster* 1 Stark 210, *Smith v Doe*, 2 B & B 473 597, *Smith v Jeffries* 15 M & W 561 *Mardanald v Longbottom* 28 L J Q B 297 *Mumford v Gethung* 7 C B N S 305 321 *Bank of New Zealand v Simpson*, (1900) A C 182, *Re Hustabh* (1902) 2 Ch 793, *Salory v World* (1914) 2 Ch

**S. 99** 566 'The will is' says *Blackburn J* in *Grant v Grant*, 5 C P 727, 729 'the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time in order to see in what sense the words were used' *Wigmore* § 2465, 2467 In *Kell v Charner*, 23 Beav 195 a beque t was "to my son W the sum of 100 to my son R C the sum of 100, the testator having in the course of his business used certain private marks or symbols to denote prices or sum of money," this usage was resorted to, and showed that the sums of £ 100 and £ 200 were signified In *re Osier Samuel v Osier* (1909) 2 Ch 60, a beque t was to 'my grand nephew Robert O' There was no 'Robert O' but there was a 'Richard O' Evidence of the memorandum of the testator showing that the testator called Richard "Robert" was admitted, see also *Erien v Halston* (1912) 1 Ch 435 *Wigmore* § 2467 Where a Hindu testator uses technical terms of English law in his Will and those terms have no accepted meaning in Hindu law the rule is that effect of the intention of such terms can not be given *Jotindramohan v Ganendramohan* 9 B L R 377 P C = 1 W R 359, *Kristanomoney v Narendra* 16 I A 29 = 16 C 383 F O B mean Free Bombay Harbour *Hajee Mahomet v Spinner* 24 B 510 (519), see also *Jadu Rai v Bhabataian* 17 C 193, 194, *Aga Synd v Hajee Jacleriah*, 2 Ind Jur 311

Who may give evidence of agreement varying terms of document

**99** Persons who are not parties to a document, or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document

#### Illustration

A and B make a contract in writing that B shall sell A certain cotton to be paid for on delivery At the same time they make an oral agreement that three months credit shall be given to A This could not be shown as between A and B but it might be shown by C if it affected his interests

**Principle** The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained It cannot affect third persons, who if it were otherwise might be prejudiced by things recited in the writings contrary to the truth through the ignorance, carelessness, or fraud of the parties and who, therefore ought not to be precluded from proving the truth however contradictory to the written statement of others *Grant Et* § 279 cited in *Taylor* § 1149 *Holt v Collier* L R 16 Ch D 718 Strangers have not assented to the contract nor can they be heard in a proceeding to set aside or reform it Hence they are at liberty to show that the written instrument does not disclose the true character of the transaction *Burr Jones Et* § 449 To hold strangers bound by acts to which they were no parties and which were behind their backs, would be a manifest injustice, *Cessante ratione cessat lex* the rule therefore, does not apply to them *Nort Et* 286

**Scope of the section** This section being an enabling provision cannot be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof *Pathammal v Syed Kalai Pathar* 27 M 329 *Krishna Suami v Mangala Thammal* 53 Ind Cas 213 It is well settled that the word 'varying' in section 99 covers the same ground as the word 'contradicting' varying adding to or subtracting from in section 92 (*Pathammal v Syed Kalai* 27 M 329) No construction of section 92 can modify the definite language of this section which provides that persons not parties to the document or their representatives in interest may give evidence to show a contemporaneous agreement *Krishna Suami v Mangala Thammal* 53 Ind Cas 213 see also *Maung Ayein v Ma Shue*, 45 C 320 = 22 C W N 257 P C

S. 100.

So extrinsic evidence is admissible to show the real nature of the transaction both as against and as in favour of persons other than parties to the document evidencing the transaction, irrespective of the form in which the transaction may be clothed *Baldeo v Putlu Lal*, 21 Ind Cas 69. The barrier against extrinsic evidence provided by section 92 of the Act is by the express terms of the section itself one to be used only as between the parties to the instrument, or by their representatives in interest. This section expressly gives a free hand to persons who are not in the above category, and by necessary implication when read with section 92, gives similar freedom to the executors of documents against such strangers *Ganpathy v Pandoo*, 1 N L R 115. Under sections 92 and 99 of the Evidence Act, evidence could be given by the promisor to show the real nature of the transaction he being no party to the instrument *Chhutho v Jugga*, 8 Ind Cas 501 *Khondal v Nasar*, 127 P L R 1902 *Paramanand v Arabat*, 20 P R 1899 *Usman v Md Shafi*, 1927 Ad 201 = 98 Ind Cas 989. Where A purported to make a gift of his lands to his daughter B it was open to a creditor of A the husband of B to prove by oral evidence that the transaction was in reality a sale of A and that the property was, consequently, liable to be attached and sold in execution of a decree obtained against him *Jagat Mohini v Ralhal Das* 2 C L J 338. So where the plaintiff is not a party to the transaction he is entitled to give evidence to show what purported to be a usufructuary mortgage was not in reality such but is in fact a sale *Bageshree Dayal v Pancho*, A W N 1906, 89 = 1 A L J 314 = 28 A 473, *Ashfaq v Syed*, 53 Ind Cas 961. The exception in favour of the strangers is to prevent a fraudulent operation of the instrument upon their rights. Therefore creditors of one of the parties may introduce parol evidence for the purpose of showing the fraudulent intent which accompanied and characterized the giving of the instrument. Similarly a person who is suing one of the parties to a sealed instrument upon a cause of action not arising out of the instrument may show that the instrument was in fact a mere device concocted to mislead outsiders dealing with one or the other parties to it and that it did not truly represent the relation between those parties. It is to be observed, however that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument *Brown Parol Li* § 28. So when one although not a party to the instrument has his claim upon it, and seeks to render it effective in his favour as against the other party to the action by enforcing a right originating in the relation established by it or which is founded upon it, the parol evidence rule applies *Burr Jones Et* § 449. A person who does not claim through the settlor is entitled to challenge the validity of a *waqf* on the ground that it was merely an illusory transaction never intended to be acted upon *Mumtaz Ali v Narendra Kishore*, A I R 1928 Cal 253. In a mortgage suit the mortgagors and their representatives will be estopped from disputing that they have not got the interest which was said that they had, but third parties can question the mortgagors title *Rukman v Ankama* 23 L W 664 = 96 Ind Cas 26 = (1926) M W N 939 = A I R 1926 Mad 744.

### 100 Nothing in this Chapter contain-

Saving of provisions of Indian Succession Act relating to wills

ed shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865), as to the construction of wills

**Scope of the section** The Indian Succession Act (X of 1865) has been repealed and re-enacted by the Indian Succession Act (XXXIX of 1925). Chapter VI of the latter Act lays down the rules of construction of Will. So this section does not affect those provisions of the Indian Succession Act (XXXIX of 1925). Therefore these sections of the Evidence Act do not alter the rules of those Wills construction of which are to be made by section 74-111 of the Indian Succession Act (XXXIX of 1925). The Indian Succession Act 2 applies to all Wills which have not been executed by a Hindu, Mahomedan, Buddhist, Sikh or Jain. So all Wills and codicils made by any Hindu, Buddhist, Sikh or Jain on or after

- S. 100** the 1st day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay, and to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits (*Vide section 57 of the Succession Act XXXIX of 1925*) So the rules of construction of document laid down in chapter vi of the Indian Evidence Act are applicable in construction of those Wills which are not governed by the Indian Succession Act (XXXIX of 1925) as well as all other non testamentary documents *Vide Hussonally v Popatlal* 37 B 211 The word affect means "act injuriously upon" *Administrator General v Premlal*, 21 C 732 at p 734 reversed in 22 C 788 (P C)

## PART III.

### PRODUCTION AND EFFECT ON EVIDENCE

#### CHAPTER VII.

#### OF THE BURDEN OF PROOF

**101** Whoever desires any Court to give judgment as to  
 any legal right or liability dependent on the  
 existence of facts which he asserts must prove

Burden of proof

that those facts exist

When a person is bound to prove the existence of any fact,  
 it is said that the burden of proof lies on that person

#### Illustrations

(a) A desires a Court to give judgment that B shall be punished for a  
 crime which A says B has committed

A must prove that B has committed the crime

(b) A desires a Court to give judgment that he is entitled to certain land  
 in the possession of B by reason of facts which he asserts, and which B denies  
 to be true

A must prove the existence of those facts

**Burden of proof**—its origin and place in the law of Evidence ‘Who  
 ever enters in a legal controversy needs to know with precision what is in  
 dispute in point of substantive law in point of fact and in point of form All  
 this he must know before he reaches the trial The ascertaining of it belongs  
 properly, to the period when you state your case the period of pleading It  
 matters not what be the purpose of pleading whether as in the Roman system it  
 be ‘to give notice to the parties respecting the facts intended to be proved’  
 or is at common law, ‘to separate the law from the facts, and to narrow the latter  
 down to a single issue with a view to a trial by a jury (*Longdell, Eq Plead 2nd*  
*Ed* s 34)—the rules of correct pleading involve the ascertaining of all these  
 preliminaries At any rate they are not to be learned from the law of evidence  
 which has no precepts at all on these subjects That branch of the law is wholly  
 concerned with a later stage of the proceedings, the trial, and with the presen-  
 tation to the tribunal of evidential matter for enabling it to answer questions  
 which should have been previously ascertained and shaped and are now assumed  
 to be known The term burden of proof designates a topic which in great  
 part belongs to this preliminary stage of the proceedings So far as it imports  
 the duty of ultimately establishing any given proposition the principles which  
 govern it belong wholly to that stage But the phrase is an ambiguous one  
 and its uncertainty runs into and perplexes the subject of evidence so that  
 the student of that subject needs to reflect carefully on these ambiguities to  
 perceive the bearing on them and to have a clear mind about two or three  
 familiar questions relating to the burden of proof, and two or three fallacies  
 about it which are constantly presenting themselves in the proper region of evi-  
 dence He would do a great service to our law who should thoroughly discrimi-  
 nate, and set forth the whole legal doctrine of the burden of proof The leading  
 maxims about it (often ill understood) have come from the Roman Law During  
 the dark ages and among our Germanic ancestors it had a different and peculiar  
 application It was then the privilege of proof With the use of the jury came  
 a new set of ideas and a new system of pleadings very different from those of  
 Rome and modern continental Europe, and gradually with the slow and strange  
 development of the jury system, and the irregular working of our common-law



**S 101.** pleading, there has come into prominence a new set of discriminations. Much that in other times and countries was not the subject of judicial discussion and remained hidden among the unrecorded customs of forensic usage now, through the working of our double tribunal of Judge and jury, and the constant necessity of marking their respective boundaries and of reviewing in a higher Court not merely the instructions given by the trial-Judge to the jury, but the whole conduct of the trial—comes out into the region of judicial rules and precedent. *Thayer Proc. Treat. Fr.* 353, 354

**Burden of proof—meaning of the term** The expression burden of proof has been used several ways (1) as meaning the duty of the person alleging the case to prove it (2) as meaning the duty of the one party or the other to introduce evidence. (*Mclure's Fr.* § 30) (3) There is an indiscriminate use of the phrase, perhaps more common than either of the two in which it may mean either or both of the others. *Thayer Proc. Treat. Fr.* 355

**Duty of the person alleging the case to prove it** The burden of proof in this sense means 'the burden of establishing a case whether by a preponderance of the evidence or beyond a reasonable doubt' (*Best Fr.* p. 268) or as *Prof. Wigmore* terms it "the risk of non-persuasion of the jury or tribunal." (*Wigmore* § 248.) Whenever A and B are at issue upon any subject of controversy (not necessarily legal) and M is to take action between them and their desire is hence respectively to persuade M as to their contention, it is clear that the situation of the two as regards its advantage and risks will be very different. Suppose that A has property in which he would like to have M invest money and that B is opposed to having M invest money. M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B and the disadvantage with A for unless A succeeds in persuading M up to the point of action A will fail and B will remain victorious, the burden of proof, or in other words, the risk of non-persuasion is upon A. This does not mean that B is absolutely safe though he does nothing for he cannot tell how much it will require to persuade M, a very little argument from A might suffice, or if M is of a rashly speculative tendency the mere mention of the proposition by A might without more effect M's action so that it may be safer in any case for B to say what he can on his side of the question and thus in fact he as well as A, has more or less risk, in the sense that there are always chances of A's persuading M, no matter how trifling his evidence and argument. But nevertheless the risk is really upon A in the sense that if M after all is said and done remains in doubt and therefore fails to pass to the point of action, it is A that loses and B that succeeds, because it is A who wishes the action taken and needed as a pre-requisite to accomplish the persuasion of M. The risk of non-persuasion therefore, i.e., the risk of M's non-action because of doubt may properly be said to be upon A. This is the situation common to all cases of attempted persuasion whether in the market the home or the forum. (*Wigmore* § 248.) The radical difference in litigation, as distinguished from practical affairs at large is as to the mode of determining the propositions of persuasion which are a pre-requisite to M's action. In affairs at large, these are determined solely by M's motion of the proper grounds for his action—depending thus on the circumstances of the situation as judged by M. In litigation these pre-requisites are determined first and broadly by the substantive law which fixes the groups of data that enter into legal relations and constitute rights and duties and secondly and more in detail by the laws of pleading and procedure which further group and sub-divide these larger groups of data and assign one or another sub-group to this or that party as pre-requisites of the tribunal's action in his favour. The substantive law will narrow the total facts that can in any event be involved and in the second place the law of pleading will further sub-divide and apportion these facts. *Ibid.* If the pleadings consist of the allegation of certain facts by the plaintiff and their denial by the defendant, the burden of proving the facts be they negative or affirmative is upon the plaintiff. In order to recover he must prove his case. If the plaintiff alleges certain facts and the defendant admits those facts but alleges other facts which he claims to be a defence the burden of proof is on the defendant. It is not

upon the plaintiff because it is not necessary for him to prove his case, on account of the admission of all the facts. An admission upon the trial does not affect the burden of proof. To relieve the plaintiff it must be a formal admission in the defendant pleading of the facts which constitute the plaintiff's case. *McKelvey's Ex* § 31. The burden of establishing remains throughout the entire case where the pleadings originally place it. It never shifts. *Best Ex* 268. In *Central Bridge v. Butler*, 2 Gray 130, it was put thus 'The burden of proof and weight of evidence are two very different things. The former remains on the party affirming a fact in support of a case and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established.' In *Abath v. V E Ry Co* (1883) 11 Q. B. D. 440. *Brett v. R* said. It is contended (I think fallaciously) that if the plaintiff has given *prima facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention appears to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the proposition ought to be stated thus: the plaintiff may give *prima facie* evidence which unless it be answered, either by contradictory evidence or by the evidence of additional fact, ought to lead the jury to find the question in his favour; the defendants may give evidence, either by contradicting the plaintiff's evidence, or by proving other facts, the jury have to consider, upon the evidence given upon both sides whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. Then comes the difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff, in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

**Burden of proof**, as meaning the duty of the one party or the other to introduce evidence. The party having the risk of non persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action; there is no need for the opponent to adduce evidence, and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of non persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non persuasion, is a distinct one for it is a duty towards the Judge, and the Judge rules against the party if it is not satisfied. *Wigmore* § 2487. A clear expression of it is found in an opinion of Lord Justice Baren in *Abath v. N E Ry Co*, 32 W. R. 50-53. 'In order to make my opinion clear, I should like to say shortly how I understand the term 'burden of proof'. In every law suit somebody must go on with it, the plaintiff is the first to begin and if he does nothing, he fails. If he makes out a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails. The test, therefore as to burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular point of the case, because it is obvious that during the controversy as to the question there are points at which the onus of proof shifts, and at which the tribunal must say if the case stopped there that it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast but as soon as he in his turn, finds evidence which, *prima facie*, rebuts the evidence against which he is so answer, the burden shifts until again there is evidence which rebuts the defendant's. So, if it becomes the question as to onus of proof is only a rule which says that the burden of proof rests of going further, if he wishes to do so. In *Wigmore's Principles of Evidence* 1 Sim. & St. 153, in the course of a discussion of the burden of proof in a legitimacy, the Judges were asked by the House of Lords, "whether

**S 101.** case where there is *prima facie* evidence of any right existing in any person the *onus probandi* be always, or be not always, upon the person or party calling such right in question " They answered, through *Mansfield C J* "That in every case in which there is a *prima facie* evidence of any right existing in any person the *onus probandi* is always upon the person or party calling such right in question " *Stephen* lays it down that "The burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear on the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by proving facts, which raise a presumption in his favour. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence but the burden may in the course of a case be shifted from one side to the other, etc." (*Steph Dig Ev* arts 95 and 96) *He also says* "The burden of proof is shifted by those presumptions of law which are rebuttable, by presumptions of fact of the stronger kind and by every species of evidence strong enough to establish a *prima facie* case against a party" *Thayer Pre Treat Ev* 358 In *Radha Kishen v Jag Sahu*, 47 M L J 329 = 80 Ind Cas 791 = 26 Bom L R 732 = 23 A L J 959 P C Their Lordships of the Privy Council said 'As in all questions of onus, a certain amount of evidence may cause the onus to shift and evidence on the lender's part that the money could not, in the circumstances have been raised at least interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail' See also *Manmohan v Muthana*, 7 C 225

**Burden of proof whether shifts** 'After all the evidence is in whether introduced by the plaintiff or by the defendant it must appear that the person who had the burden of proof has a preponderance of the evidence in his favour if he would win the case. The burden of proof fixes upon the party who has the duty of first going forward with the case. If he fails to introduce any evidence at all or if he fails to introduce sufficient evidence to justify a submission of the case to the jury, the case without any evidence being introduced by the other party, must go against him. If he introduces enough evidence to justify a submission of the case to the jury, the case may still be as it were hanging in the balance. The jury may or may not find from the evidence introduced that he has proved his case. If however he has introduced sufficient evidence to make out what is known as a *prima facie* case then in the absence of evidence to controvert such case the jury would find—for the Judge would so instruct them—in his favour. Right here we run up against that other sort of burden of proof noticed above which is not really burden of proof at all but only the use of that term to express something very different. When the plaintiff has introduced enough evidence to make out a *prima facie* case, the defendant, unless he would see the verdict for the plaintiff, must take up the case and introduce evidence to controvert or weaken the effect of that which the plaintiff has introduced. This is the burden of going forward with the evidence or the 'burden of proceeding' as it may be called to distinguish it from the 'burden of proof'. The defendant may in his turn introduce such evidence as will make it, in the absence of further evidence on the part of the plaintiff, clear that the facts are in his favour. The verdict, if the evidence stopped at this point, would be for him and the burden of proceeding is shifted again to the plaintiff. Thus in the course of a trial upon the various facts, in issue, the burden of proceeding may shift from one party to the other. The burden of proof however remains upon the shoulders of the party who had it at the outset and is unaffected by the evidence as the trial proceeds. *Mellett's Fr* 71. In applying the rule however a distinction is to be observed between the burden of proof as a matter of substantive law or pleading and the burden of proof as a matter of adducing evidence. The former burden is found at the commencement of the trial by the state of pleadings or their equivalent and is one that never changes under any circumstances whatever and if after all the evidence has been given by both sides the party having this burden on him has failed to discharge it, the case should be decided against him. *Mellett's*

Vol 13 p 133 citing *L v Stoddart* 25 T L R 612 C C A *Pickup v Thames Insurance Co* (1875) 3 Q B D 599 600 C A *Wakelin v London and South Western Rail Co*, (1886) 12 App Cas 41. The burden of proof in the former cases then never changes. It remains to the end of the case with the party who has it at the outset. *McIntyre v F* § 32. Burden of proof means the burden of establishing a case as well as the duty or necessity of introducing evidence. The burden of establishing remains throughout the entire case exactly where the pleadings originally place it. It never shifts. The burden of proof in the sense of introducing evidence may shift constantly as evidence is introduced by one side or the other, as the one scale or the other preponderates. *Rhola v Bhagwant Rao* 13 C P L R 159. *Robins v National Trust & Co* 101 Ind Ca, 903=1927 P C, 515.

**Scope of the section.** Before the Court can proceed to hear a case it is, obviously, necessary to determine which party shall begin or upon whom the burden of proof of the whole case lies. The general rule is that the party who alleges any matter in issue must prove it. This would be simple enough if there were only one fact in issue but there may be several facts in issue the burden of proof of some one being on one party and of others on the other party. The position is practically this that the burden of proof lies at first on the party against whom judgment would be given if no evidence at all were adduced. *Cockle v F* 123. This section is based on the general rule that the burden of proof lies on the party who asserts the affirmation of the issue or question in dispute, according to the maxim *Fa incumbit probatio qui dicit non qui negat*. (The burden of proof lies upon him who asserts not upon him who denies)—a rule which the common sense of mankind at once asserts and which however occasionally violated in practice, has ever been recognised in jurisprudence. *Best* § 269. So it is often said that the burden is upon the party having, in the first instance, the affirmation of the allegation. But this is not an invariable but not even always a significant circumstance the burden is often on one who has a negative assertion to prove a common instance is that of a promisee alleging non performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough but it merely advances the inquiry one step, we must then ask whether there is any general principle which determines to what party's case a fact is essential. The truth is that there is not and cannot be any one general solvent for all the cases. *Higmore* § 2486. In criminal cases there is generally no difficulty, as all the allegations are invariably made by the prosecution, on whom the general burden of proof invariably lies. In a civil case, the pleading must be looked at in order to settle the questions. The plaintiff naturally, in his statement of claim makes the first allegations. If the defendant, in his defence, pleads a traverse or denial of an allegation made by the plaintiff that puts it in issue and leaves the burden of proof upon the plaintiff. If the defendant pleads a confession and avoidance, admitting the plaintiff's allegation, but alleging further facts by way of defence, the matter in issue is not the plaintiff's allegation but that of the defendant if denied by the plaintiff, and the burden of proof is therefore upon the latter. But if there are several allegations and the burden of proof of some is on one party and of others on the other party there is a distribution of issues the general burden of proof is upon the plaintiff. This is so even if all the allegations of fact are admitted by the defendant and the only question in issue is the amount of unliquidated damages. The result is that the general burden of proof is almost invariably upon the plaintiff. *Cockle v F* p 124. The elementary rule contained in section 101 of the Evidence Act is a rule that is inflexible and must apply to all cases. *Basiruddin v Sahibulla* 32 C W N 160. So the burden of proof in the sense of adducing evidence, is a burden which may shift continually throughout the trial according to the evidence in one scale or the other preponderates. *Abraham v North Eastern Rail Co* 11 Q B D 440. *Pickup v Thames Insurance Co*, 3 Q B D 594 599 600 C A. *Wakelin v London and South Western Rail Co* 12 App Cas 41, *R v Stoddart* (1909) 25 T L R C C A. This burden rests upon the party who would fail if no evidence at all or no more evidence, as the case may be, were adduced by either side. In other words, it rests before any evidence whatever is given upon

- S 102.** the party who has the burden of proof on the pleading, i.e., who asserts the affirmation of the issue, and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side. *Abirath v North Western Rail Co Supra*, *Walsham v London and South Western Railway Co* (1896) 1 Q B 189 n, 196 n

**102** The burden of proof in a suit or proceeding lies on that person on whom burden of proof lies person who would fail if no evidence at all were given on either side

### Illustrations

(a) A sues B for land of which B is in possession, which, as A asserts, was left to A by the will of C B's father

If no evidence were given on either side, B would be entitled to retain his possession

Therefore the burden of proof is on A

(b) A sues C for money due on a bond

The execution of the bond is admitted, but B says that it was obtained by fraud which A denies

If no evidence were given on either side A would succeed as the bond is not disputed and the fraud is not proved

Therefore the burden of proof is on B

**Scope of the section** The general burden of proof is upon the party who would be unsuccessful in the case if no evidence at all were given, and such party has a right to begin. *Irwin v Hughes* 1 M & Rob 465. In that case *Alderson J* said, 'questions of this kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay the proper test is which party would be successful if no evidence at all were given'. Now here supposing no evidence to be given on either side, the defendant would be entitled to the verdict for it is not to be assumed that the work was badly executed therefore the onus lies on the plaintiff. 'The test, therefore as to the burden of proof or onus of proof, whichever term is used, is simply this to ask one self which party will be successful if no evidence is given (or if no more evidence is given)'. *Houder v Irwin* in *Abirath v North Eastern Railway Co* 11 Q B D 440 remarked "This section makes it clear that the initial onus is on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. It may be said that it is not necessary to determine at what particular point it shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff and then once again from the latter to the former and so on the more so in contested proceedings as evidence gradually continues to be adduced but at the conclusion of the trial when the issues come to be judged it has to be seen whether the initial onus which section 101 casts upon the plaintiff has been discharged or not. *Basiruddin v Sahebulla Paramank*, 42 C W N 160. So it is clear that burden of proof in the sense of the burden of introducing evidence often changes during the trial. *Ida Daulata v Ganesh* 4 B 295. *Shif v Williamson* 9 A 395. *Nistaram v Kali Parshed* 23 W I 431. *Kameshor v Bharat* 1 C W N 18. *Gowinda v Joshi* 7 B 73. *Hemchandra v Kali Pros* 1880 C 1012. *Suleiman v Mehadi* 2 C W N 186. Where owing to particular circumstances the onus is sometimes on the plaintiff, and very likely evidence may suffice to discharge the onus and shift it to the other side. 'Slight evidence means evidence which does not go the whole length of proving a particular fact but merely suggests it. *Hur Dyal v Jay Kaur*, 14 W R 107. The burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him. *Kishiben v Lalaram* 8 S L R 185.

**103** The burden of proof as to any particular fact lies on **S 103.**

Burden of proof as to that person who wishes the Court to believe to particular fact in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

*Illustration*

(a) A prosecutes B for theft and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question he was elsewhere. He must prove it.

**Scope of the section.** The difference between this section and section 101, consists in this. By section 101 the party has to prove the whole of the facts which he alleges to entitle him to judgment when the burden of the proof is on him. The present section provides for the proof of some one particular fact. The illustration sufficiently points to the meaning. The whole of the facts, however numerous and complicated, which go to make up the prisoner's guilt must be proved by the prosecution. If the prisoner wishes to prove a particular fact his *alibi*, for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission, or if he wishes to throw that in as an additional fact, he must prove it. *Not Ex 290*. So the burden of proof of any particular fact is upon the party who alleges the affirmative of such fact. It is only necessary to add and to emphasise that the substance and not the mere form of the pleading is to be considered. The position cannot be altered nor can the Court be misled by the ingenious manipulation of language. This rule as to the burden of proof applies generally to negative averments unless by reason of their complexity or difficulty of proof or by virtue of some statutory provision the burden is cast upon the person denying the allegation. *Coole Cas Ex 125*. In *Souard v Leggitt* 7 C & P 613 Lord Abinger C B said: 'Looking at these things according to common sense we should consider what is the substantive fact to be made out and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases, a party, by a little difference in the drawing up of his pleadings might make it either affirmative or negative, as he pleased. The plaintiff here says you did not repair, he might have said 'you let the house become dilapidated. I shall endeavour by my own view to arrive at the substance of the issue and I think in the present case that the plaintiff's counsel should begin. Where the plaintiffs wished the Court to believe that there was wilful neglect or that by railway servants, it lay on the plaintiffs under s 10, to give proof of the act.' *B B and C I Railway v Ramlal* 43 B 769=21 Bom L R 779=52 Ind Cis 516. The plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to property accrued to him is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. Thus a plaintiff alleging that a certain person died before another must prove the fact affirmatively. *Rangappa v Rangaswami* (1923) M W N 232=88 Ind Cis 249=A I R 192, Mad 1005.

**Negative allegations and Burden of proof.** It is always possible to make an allegation in a negative form so that the defendant must answer it affirmatively, as where the defendant said 'he had done the work properly' the plaintiff having alleged, apparently, that it was not done properly. The proof can not be shifted by putting an allegation in a negative form. The question, is on the facts who substantively alleges the 'affirmative in substance'? He begins and proves. *Coole Cas 125*. So the general rule is that the burden of proof is upon the party who alleges the matter in issue, even although his allegation involves a negative. *Abrath v North Eastern Ry Co* L R 11 Q B D 440. The cases are somewhat confusing' says Mr *McLehary* upon the subject of negative allegations and the application of the principles of burden of proof thereto. One distinction which is often lost sight of will help to reconcile many seemingly conflicting divisions. There are two sorts of

**S 102** the party who has the burden of proof on the pleadings, i.e. who asserts the affirmation of the issue, and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side. *Abirath v North Western Rail Co Supra*, *Walton v London and South Western Railway Co* (1896) 1 Q B 189 n, 196 n

**102** The burden of proof in a suit or proceeding lies on that person on whom the burden of proof lies if no evidence is given on either side

### Illustrations

(a) A sues B for land of which B is in possession which, as A asserts, was left to A by the will of C, B's father

If no evidence were given on either side, B would be entitled to retain his possession

Therefore the burden of proof is on A

(b) A sues C for money due on a bond

The execution of the bond is admitted, but B says that it was obtained by fraud which A denies

If no evidence were given on either side A would succeed as the bond is not disputed and the fraud is not proved

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**Scope of the section** The general burden of proof is upon the party who would be unsuccessful in the case if no evidence at all were given and such party has a right to begin. *Irwin v Hughes* 1 M & Rob 465. In that case Alderson B said, questions of this kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay the proper test is, which party would be successful if no evidence at all were given? Now here supposing no evidence to be given on either side, the defendant would be entitled to the verdict for it is not to be assumed that the work was badly executed, therefore the onus lies on the plaintiff. The test, therefore as to the burden of proof or onus of proof, whichever term is used, is simply this to ask oneself which party will be successful if no evidence is given (or if no more evidence is given)? *Boutin v The Abirath North Eastern Railway Co* 11 Q B D 440 remarked "This section makes it clear that the initial onus is on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief the onus shifts on to the defendant to prove the circumstances, if any, which would disentitle the plaintiff to the same. It may be said that it is not always easy to determine at what particular point it shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff and then once again from the latter to the former and so on: the more so in contested proceedings as evidence gradually continues to be adduced but at the conclusion of the trial when the issues come to be judged it has to be seen whether the initial onus which section 101 casts upon the plaintiff has been discharged or not." *Basiruddin v Sahrbulla Paramank* 32 C W N 160. So it is clear that burden of proof in the sense of the burden of introducing evidence often changes during the trial. *Pule Darlata v Ganesh* 4 B 29; *Shitka v Balkum* 9 A 18; *Astaram v Kali Parshed* 23 W L 431; *Jamshor v Pharat* 10 W N 18; *Ganaiya Jaha* 7 B 73; *Hemchandra v Kali Pr* onus 101; 1012; *Suleman v Mehadi* 2 C W N 186. Where owing to particular circumstances the onus is sometimes on the plaintiff and very slight evidence may suffice to discharge the onus and shift it to the other side— "slight evidence" means evidence which does not go the whole length of proving a particular fact but merely establishes it. *Har Dyal v Py Kri* 101 W L 107. The burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him. *A. D. v. Lalaram* 5 N L R 185.

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### Illustration

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

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**Scope of the section.** The difference between this section and section 101 consists in this. By section 101 the party has to prove the whole of the facts which he alleges, to entitle him to judgment when the burden of the proof is on him. The present section provides for the proof of some one particular fact. The illustration sufficiently points to the meaning. The whole of the facts however numerous and complicated, which go to make up the prisoner's guilt must be proved by the prosecution. If the prisoner wishes to prove a particular fact his *alibi*, for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission or if he wishes to throw that in as an additional fact he must prove it. *Not Ex* 290. So the burden of proof of any particular fact is upon the party who alleges the affirmative of such fact. It is only necessary to add and to emphasise that the substance and not the mere form of the pleading is to be considered. The position cannot be altered, nor can the Court be misled by the ingenious manipulation of language. This rule as to the burden of proof applies generally to negative averments unless by reason of their complexity or difficulty of proof or by virtue of some statutory provision the burden is cast upon the person denying the allegation. *Coelle Cas Ex* 125. In *Souard v Leggull* 7 C & P 613 Lord Abinger C B said 'Looking at these things according to common sense we should consider what is the substantive fact to be made out and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by a little difference in the drawing up of his pleadings might make it either affirmative or negative as he pleased. The plaintiff here says 'you did not repair' he might have said, 'you let the house become dilapidated'. I shall endeavour by my own view to arrive at the substance of the issue and I think in the present case that the plaintiff's counsel should begin. Where the plaintiffs wished the Court to believe that there was wilful neglect or theft by railway servants it lay on the plaintiffs under s 10, to give proof of the act. *B B and C I Railway v Ramul* 43 B 769=21 Bom L R 779=52 Ind Cis 16. The plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to property accrued to him is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. Thus a plaintiff alleging that a certain person died before another must prove the fact affirmatively. *Rangappa v Hanagasuam* (1927) M W N 232=88 Ind Cis 249=A I R 1925 Mad 1005.

**Negative allegations and Burden of proof.** It is always possible to make an allegation in a negative form so that the defendant must answer it affirmatively as where the defendant said 'he had done the work properly,' the plaintiff having alleged apparently that it was not done properly. The proof can not be shifted by putting an allegation in a negative form. The question is on the facts who substantially alleges the affirmative in substance. He begins and proves. *Coelle Cas* 125. So the general rule is that the burden of proof is upon the party who alleges the matter in issue even although his allegation involves a negative. *Abrath v North Eastern Ry Co* L R 11 Q B D 410. The cases are somewhat confusing says Mr *Wheley* upon the subject of negative allegations and the application of the principles of burden of proof thereto. One distinction which is often lost sight of will help to reconcile many seemingly conflicting divisions. There are two sorts of



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## Illustrations

- (a) A sues B for land of which B is in possession, which as A asserts, was left to A by the will of C B's father
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**Scope of the section.** The difference between this section and section 101, consists in this. By section 101 the party has to prove the whole of the facts which he alleges, to entitle him to judgment when the burden of the proof is on him. The present section provides for the proof of some one particular fact. The illustration sufficiently points to the meaning. The whole of the facts, however numerous and complicated, which go to make up the prisoner's guilt must be proved by the prosecution. If the prisoner wishes to prove a particular fact, his *alibi*, for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission, or if he wishes to throw that in as an additional fact, he must prove it. *Not L 290*. So the burden of proof of any particular fact is upon the party who alleges the affirmative of such fact. It is only necessary to add and to emphasise that the substance and not the mere form of the pleading is to be considered. The position cannot be altered, nor can the Court be misled by the ingenious manipulation of language. This rule as to the burden of proof applies generally to negative averments unless by reason of their complexity or difficulty of proof or by virtue of some statutory provision the burden is cast upon the person denying the allegation. *Coelle Cas* 125. In *Souard v Leggatt* 7 C & P 613, *Lord Abinger C B* said: 'Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases, a party, by a little difference in the drawing up of his pleadings, might make it either affirmative or negative as he pleased. The plaintiff here says, 'you did not repair,' he might have said, 'you let the house become dilapidated.' I shall endeavour by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin. Where the plaintiffs wished the Court to believe that there was wilful neglect or theft by railway servants it lay on the plaintiffs under s 10, to give proof of the act. *B B and C I Railway v Ramlal*, 43 B 769=21 Bom L R 779=52 Ind C 1516. The plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to property accrued to him is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. Thus a plaintiff alleging that a certain person died before another must prove the fact affirmatively. *Rangappa v Mangaswami*, (1925) M W N 232=88 Ind C 15249=A I R 1925 Mad 1005.

**Negative allegations and Burden of proof.** It is always possible to make an allegation in a negative form so that the defendant must answer it affirmatively, as where the defendant said he had done the work properly, the plaintiff having alleged, apparently, that it was 'not done properly'. The proof can not be shifted by putting an allegation in a negative form. The question, is on the facts who substantially alleges the 'affirmative in substance'. He begins and proves. *Coelle Cas* 125. So the general rule is that the burden of proof is upon the party who alleges the matter in issue even although his allegation involves a negative. *Abrath v North Eastern Ry Co* I R 11 Q B D 410. 'The cases are somewhat confusing' says *Mr Mclellan* 'upon the subject of negative allegations and the application of the principles of burden of proof thereto. One distinction which is often lost sight of will help to reconcile many seemingly conflicting divisions. There are two sorts of

**S 104.** negative propositions (1) Those which are a necessary part of the case sought to be established and which must be specially alleged in the pleading, (2) Those which are merely implied from the allegation of affirmative facts, since the existence of such affirmative facts precludes the negative thereof. *McKelvey v Pt* § 33. In an action for malicious prosecution the plaintiff made two main allegations (1) that the defendant prosecuted him, (2) that he had no reasonable cause for the prosecution the first being affirmative and the second negative. The burden of proof of both of them is on the plaintiff *Coyle v Pt* 130. This is an essential element in the plaintiff's case and he must establish this negative fact by a preponderance of evidence in order to recover. As to this fact, therefore, the burden of proof is with the plaintiff at the start and remains with him throughout the trial. But it is a negative fact has no bearing on the case and does not affect the burden of proof. *McKelvey v Pt* § 34. In *Abnath v North Eastern Railway Co* 11 Q B D 410 457 *Bowen v Pt* 11 and 'Now, in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a Judge can see no reasonable and probable cause for instituting it. In one sense that is the assertion of a negative and we have been pressed with the proposition that, when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case the proof of the assertion still rests upon the plaintiff. The terms negative and affirmative are, after all, relative, and not absolute. In dealing with a question of negligence that term may be considered either as negative or affirmative according to the definition adopted in meaning the duty which is neglected. Whenever a person asserts affirmatively is part of his case that a certain state of facts is present or absent or that a particular thing is insufficient for a particular purpose, that is an avowment which he is bound to prove positively. As to the burden of proceeding—i.e. of introducing evidence—that at the start is with the plaintiff. He must make a *prima facie* case on his negative proposition before the defendant need go forward with any evidence. Of the second class of negative propositions, perhaps as good an illustration as any is found in a case where the plaintiff seeks to recover upon an express contract. In his complaint he sets forth the contract and the burden of proof is upon him to establish its existence by a preponderance of evidence. The affirmative allegation of the contract relied upon implies the negative allegation that the contract was not something different from that alleged. If therefore the defendant alleges as a defence that there was a special contract under the terms of which there is no liability while the burden of proceeding—i.e. of introducing evidence as to such special contract—is upon him the burden of proof still remains with the plaintiff. He must satisfy the jury by a preponderance of evidence that no such special agreement was made. It will be found that most cases which are cited to support the proposition that the burden of proof shifts because of a negative allegation, to the shoulders of the other party who must establish the affirmative are cases where what is really being talked of is burden of proceeding. *McKelvey v Pt* 93. The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative the party who avers a title cannot be absolved from proving it. *Moshuq Ali v Husumissa* 114 Ind Cas 113=A I R 1929 Oudh 204, *Pulm Behari v Watson*, 9 W R 190=B L R Sup Vol 904(F B)

Burden of proving fact to be proved to make evidence admissible

**104** The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence

#### Illustrations

- (a) A wishes to prove a dying declaration by B. A must prove B's death.  
 (b) A wishes to prove, by secondary evidence, the contents of a lost document.  
 A must prove that the document has been lost.

**Scope of the section** The burden of proof in the sense of adducing evidence, applies not only to matters which are the subject of express allegation in the pleadings, but also to those that relate merely to the admissibility of evidence or to the construction of documents. Thus a party desiring to adduce a hearsay statement (*R v Thompson* [1893] 2 Q B 12) or secondary evidence of lost deed, must first establish the conditions necessary to its reception, and if a document be ambiguous the party tendering it has the burden of showing that his interpretation thereof is correct. *Falch v Williams* (1900) A C 176, 181 (P C), *Halsbury* Vol 13, p 435. The illustrations point the section, which is but a rather verbose way of stating, that no person shall be allowed to give evidence before he has shown that he is in a legal position to do so. *Not Ev* 290

**General principles as regards burden of proof** The doctrine of *onus probandi* only applies to a case when the mind of the Judge is in doubt as to the point on which side the balance should fall in coming to a conclusion. As a case proceeds the *onus* might shift from time to time. *Jellappa v Tippaha* 56 I A 13=53 B 213=111 Ind Cas 13=A I R 1929 (P C) 18=33 C W N 238. The question on whom the burden of proof should fall is of very little importance when evidence has been given into by both sides. *Sati Prosad v Gobinda Chander* 33 C W N 227=A I R 1929 Cal 325. *Mesaw v Abdul Bari*, 119 Ind Cas 222=A I R 1929 R 183. *Gopal Rao v Hiralal*, 83 Ind Cas 246=A I R 1925 Nag 225. *Minabar v Yadao*, 103 Ind Cas 166, *Feroze Din v Nauab Khan* 9 Lah 224=112 Ind Cas 89=A I R 1923 Lah 432. *Sime Darby v Official Assignee*, 30 Bom L R 290=107 Ind Cas 233=47 C L J 339=A I R 1928 (P C) 77. *Sunder Mull v Satya Kinkar* 55 I A 85=47 C L J 403=32 C W N 657=A I R 1928 (P C) 64=54 M L J 427 (P C). *Jeevalhan v Mt Goura*, 95 Ind Cas 826, *Inanendia Nath v Ahluw*, 87 Ind Cas 567=A I R 1925 Cal 1269. *Gopal Rao v Hiralal* 83 Ind Cas 246=A I R 1925 Nag 225. *Bahram v Kamaly* 78 Ind Cas 330=1924 Nag 363, *Saraswati v Yadorao*, 78 Ind Cas 887, *Sonaji v Danlat* 75 Ind Cas 782. *Goverdan Das v Hari Lal* 69 Ind Cas 541. *Mahomed v Majubali* 27 C W N 328, *Nihal Chand v Gurditta* 1923 Lah 611. *Muhammad v Johanda* 90 L J 404=1922 Oudh 774. *Sri Chudambara v Veerarama* 45 M 556=43 M L J 640, *Abinas v Majub* 36 C L J 196=(1922) Cal 461, *Banumali v Salu*, 1 P I F 102=5 P L J 151=55 Ind Cas 841. *Sulan Sao v Kam Mahton* 5 P L J 87=(1920) P 131=P L J 13=54 Ind Cas 652. *Jhari Singh v Tottaram* 52 Ind Cas 860. Burden of proof depends on circumstances of each case. *Duarka Prosad v Nasir Ahmad*, A I R 1925 Oudh 16. The pleading of burden of proof wrongly is immaterial provided no party is prejudiced. *Hem Chandra De v Imiyobala* 52 C 121=84 Ind Cas 693=A I R 1925 Cal 61. The question upon which party the *onus* of proving any particular point lies is undoubtedly a question of law. *Mussammat Niamat v Mahomed Fuz*, 65 Ind Cas 745. The fact that the *onus* was wrongly placed is immaterial when it does not affect the decision on the merits. *Ahmad Far v Mahomed Ali*, 3 Lah L J 445. The term *onus probandi* in its proper use merely means that if a fact has to be proved the person whose interest it is to prove such fact, should adduce some evidence however slight, upon which a Court could find the fact he desires to have found. It does not mean that he shall call all conceivable or available evidence. It merely means that the evidence he lays before the Court should be sufficient, if uncontradicted, to form the basis of a judgment and decree upon that point in his favour. *Unkar Nath v Athu Lal* A W N 1893, 107. Mis placement of the burden of proof is only a ground for remanding the case if the circumstances had been such that by placing the burden of proof on the wrong party, somebody has been misled or taken by surprise or had no opportunity of adducing evidence. *Huklat v Rimqati* 11 C L R 581. Where the *onus* is upon the defendant to prove a certain fact, but the plaintiff, without waiting for the defendant's evidence, took upon himself to prove it he cannot subsequently say that the defendant did not discharge *onus*. *Sajan Kunwar v Joti Prosad* 10 Ind Cas 223. The burden of proof must be placed according to the pleadings and any preliminary examination of the parties, and for the final decision of the case, the burden remains

**S 104,** upon the same party. When the party who has to discharge the burden of proof, has made out a *prima facie* case, in a certain sense the burden of proof shifts on to the other party, for, in the absence of any rebutting evidence, the point at issue would be decided in favour of the party making out a *prima facie* case. When however the Judge has heard the whole case, he must weigh the evidence for both parties, placing the burden of proof as it was originally placed. Supposing the party upon whom the burden of proof lies makes out a *prima facie* case and it is doubtful whether the other party has rebutted this case it necessarily follows that the *prima facie* case is doubtful, and the party entitled to the benefit of the doubt is the party upon whom there was no burden of proof at the outset. Any other rule would obviously be unjust. The party upon whom the burden of proof lies begins and has the first opportunity of proving a *prima facie* case. It is evidently unjust that this should finally shift the burden of proof upon the other party. He could thus be at a disadvantage. *Innes v Ashgar* L B R (1893 1900), 456. Where the defendant, under an impression that the burden of proving a certain fact is in the first instance upon him produces evidence he does not lose his right to insist in the Appellate Court upon the burden of proof being laid upon the right party. Both sides having given evidence and there being no suggestion that any evidence had been excluded, the case may be dealt with as if the burden of proof had been cast upon the right party. *Muhammad v Raghubar* 8 A L J 736. It is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed. *Elgin Mills Co v Muir Mills* 17 A 490 = A W N 1895 113. It lies on him who asserts it to prove that the law of the foreign state differs from ours and in the absence of such proof, it must be held that no difference exists except possibly so far as the law here rests on the specific Acts of the legislature. *Raghunathji v Varyuandas* 8 Bom L R 525 = 30 B 578.

### BURDEN OF PROOF—ILLUSTRATIVE CASES

**Abadi**—stranger in possession. Where a stranger is found to be in possession of houses built on *abadi* sites the landlord has a right to demand possession from him, unless he proves he has a right which entitles him to resist ejectment. He will have to prove that his transferor had a transferable interest in the *abadi* sites and not a mere license to occupy or that the terms of the license were such as disentitled the proprietor from re entry on the site. *Bhagwan v Raghubar* 86 Ind Cas 763 = A I R 1925 Nag 396.

**Accident.** In a suit for damages for loss of a son who helped his father and whose death was caused by an explosion in a railway carriage, the onus is upon the plaintiff to prove that the accident was due to a want of reasonable care and diligence on the part of the Railway Company. *The East India Railway Company v Kalidos* 5 C W N 449 = 28 C 401 P C. Where goods have been committed to a bullock and have either been lost or been returned in a damaged condition and the bullock's liability depends upon his negligence the fact of negligence may be presumed placing on the bullock at least the duty of producing evidence of some other cause of loss or injury. *Hignore* § 2503 see also *Jeyaniam v E I R* 51 C 861. Where the bullock is a common carrier, acting under the customary exemptions as to vis major and the like or under express contractual exemptions, it is generally conceded that the carrier has even the first burden or risk of non persuasion of establishing the fact constituting the exemption. *Hignore* § 2503.

**Accounts.** When a claim is founded on a distinct statement of account signed by the defendant in which he acknowledges a particular sum to be due to the plaintiff it is for the defendant to produce evidence to rebut the *prima facie* case made against him. *Simen Phas v Joruan Mill* 24 W R 202. Where a suit is for account all the evidence necessary to be adduced in order to entitle the plaintiff to a decree is evidence to show that the defendant is an accounting party. *Isim Das v Bhagat Das* 1 A L J 347 = A W N (1905) 1, *Raghunath v Ganpati* 27 A 374. In a suit for account if the plaintiff fails to prove the allegation in the plaint that he had sanctioned an estimate up to a

certain sum, which had been exceeded, the suit is not liable to be dismissed unless the defendants show that they were neither servants nor contractors for profit and loss. *Thomas Owen v Deeruze* 7 W R 737 In a suit on accounts as principal agent the plaintiff must at least allege that the defendant had received the money or any part of them. *Nalin Kumar v Gadadhar* 49 C L J 245 = A I R 1929 Cal 418 Where the accounts between the parties were settled and a balance struck, the burden is on the defendant to prove payment of the amount due. *Indraj Mal v Lye Ram* 6 Lah L J 593 = 86 Ind C 383 = A I R 1925 Lib 278 Every presumption is made against a person suppressing account books and on proof of a *prima facie* case the party suppressing has the burden of proving the contrary. *Venkataramayya v Pitchamm* A I R 1925 Mad 164 Where a plaintiff sues for a specific sum of money due on a balance of account he must start his case and prove the amount due on a balance of account he must start his case and prove the amount due on the account, and till then the defendant need not be required to rebut him. *Rulton Bysack v Bocha Bibee* 12 W R 529 Where accounts have been taken and settled and a party alleges error in the accounts, the onus of proving it rests on that party. *Kakoo v Nutha*, 47 P R 1866 The onus is not on the defendant to prove the contrary, but on the plaintiff to prove his allegation that he has in the account, on which he claims arrears of rent from the defendant, credited the defendant with certain collection from the ryots admitted by the plaintiff to have been made by him. *Mahomed v Brodie*, 1 W R 219 The fact of payments by a banking firm being distinctly put in issue, the mere general statement of the banker to the effect that his books were correctly kept was held not sufficient to discharge the burden of proof that lies upon him the books of the firm being at most corroborative evidence, particularly if he has the means of producing much better evidence. *Baboo Gunga v Baboo Indrajit* 23 W R 390 P C When accounts have been settled they are *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of settlement. *Bhawan Prasad v Juggenath* 13 C W N 309

**Acknowledgment** Where some property is claimed against the maker of an acknowledgment under section 19 Limitation Act, it is immaterial whether at the moment of his making the acknowledgment the claim could have been enforced against him, as against him the acknowledgment is sufficient. *Malladi v Tondepu* 80 Ind C 941

**Acquiescence** In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the existence of his own right which was inconsistent with the rights claimed by the defendants (4) that the plaintiff knew of the defendant's mistaken belief in his rights and (5) that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right. *Kazi Husain v Ram Sarup*, A I R 1929 All 871

**Adverse possession** It is for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. *Rani Hemanta Kumar v Maharaja Jogadindra Nath* 10 C W N 630 (P C) *Mohima v Mohesh*, 16 I A 23 = 16 C 473 A co-purchaser holding an item of property left undivided at a family partition is a mere co-owner and to claim adverse possession of such property he must prove that he repudiated the title of others interested in it to their knowledge. *Vaiyapuri v Subramania*, 114 Ind Cas 337 = A I R 1929 Mad 27 The burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession. *Kanhalya Lal v Guruor*, 27 A L J 1106 = 119 Ind Cas 6 = A I R 1929 A 753 *Radha v English* 7 C L P 364 P C, *Jano v Narsingh Das* 117 Ind Cas 803 = A I R 1929 Lah 549 *Nauab v Gopinath* 13 C L J 625, *Nayantulla v Nana* 13 B 424 If in a suit by a landlord, the tenant proves continuous possession for more than 12 years the zemindar has to prove which portion of the period did not count for the accrual of rights. *Toria v Kumcar*, L R 4 A 185 In a suit for possession of lands which have re-formed upon the old site after diluvion, the defendant set up adverse possession for twelve years. Held that

**S 104** the burden lay upon the plaintiff of proving that the defendant had not been in possession for the period of twelve years next preceding the commencement of his suit *Ranjit Singh v Schoene Kilburn*, 4 C L R 390

**Agent** The burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal. He must show that agency did exist and that the agent had the authority he assumed to exercise or otherwise the principal is estopped from disputing it. *Assaram Briduan v Mathura Das* U B L (1892-1896) Vol II p 1. In a suit to recover advances alleged to be due from a discharged *Gomastha* who pleads acquaintance plaintiff is to prove the payment to and receipts from the *Gomastha*. *Robert Watson v Sudhan* 10 W R 421. Agents entrusted to collect money on account of an insolvent estate are each of them, bound to prove to the assignee or his representative that the expenditure of the several amounts charged in their accounts has been actually and properly made, and the burden of proof lies on such agents. *Ayuf Ali v Patterson* 3 N W P 104. In a suit against a principal for the acts of an accredited agent of his the onus lies on the plaintiffs to prove that the alleged agent was the duly accredited agent of the defendant in reference to the transaction the subject of the claim. *Hathu Ram v Gobind Ram* 3 Agr 131.

**Agriculturists** Law does not recognize the principle of giving benefit of doubt to a party on whom the burden of proof lies. Burden of proving that a person is of an agriculturist tribe is on him especially when entries in Settlement Record are against him. *Phaclar Das v Ghulam Mohammed*, 94 Ind Cas 158=A I R 1926 Lab 484.

**Alluvion and diluvion** Where in a suit by plaintiffs to recover possession of alluvial lands on the allegation of dis-possession the defendants denied the plaintiffs title and possession held that the burden of proof, as to possession and dispossession within twelve years prior to suit, lay on the plaintiff. *James v Dinanath* 11 W R 566.

**Ante dating** The onus of showing that a document duly executed and registered was ante-dated lies on the person who alleges it. *Krishnamurti v Krishnamurti* A I R 1925 Mad 932=49 M L J 252=(1925) M W N 632=85 Ind Cas 882.

**Appeal** In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. *Nabalishore v Upendra Kishore* 26 C W N 322=20 A L J 22=35 C L J 116=42 M L J 23=24 Bom L R 346. *Taramani v Gopal Das* 65 Ind Cas 182. *Firm of Probhu Dial v Dina Nath* 65 Ind Cas 464. *Mustafa Husam v Saudul* 99 Ind Cas 255=A I R 1927 Oudh 66. *Lal Shah v Hiralal* 106 P R 1917.

**Appropriation** Payments of rent cannot be credited to arrears of previous year beyond the term of limitation. Payments for rents are presumed to be for current years and surplus payments for past year. *Taramonee v Kally Churn* W R 1964 Act X Rul 14. Money paid by a tenant as rent without any specification may be credited by the landlord as he thinks fit. *Shurmo Moyre v Kasher Kant* 7 W R 511. Where transactions between two firms of bankers were renewed after an interval without any account of outstanding debts being drawn up and in a suit for the old debts the defendants set up the plea that they were barred by limitation in as much as payments made after the interval were appropriated, by a special agreement, to the discharge of loans advanced thereafter. Held that the onus of proving such special appropriation lies on the defendant. *Rudha Krishun v Hiratal*, 31 C W N 746=45 C I J 318 (P C).

**Arbitration** When a Court is affirmed that a suit has been instituted in contravention of an arbitration agreement it has a discretion to stay the suit, but the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists. *Tolkart v Fateh* 61 Ind Cas 322. *Ganesh Das v Durga Dal*, 60 Ind Cas 776.

**Attachment claim** Although where the assignee of a decree wishes to execute it it is incumbent on him to apply under s. 232 Civil Procedure Code 1882 yet, if at the date of the assignment the judgment debtor's property is already under attachment, it is not necessary for the assignee to apply for a fresh attachment *Haji v Abdullah* 16 A 133=A W N 1894 13

**Auction purchaser** The right of a purchaser at a revenue sale in getting rid of encumbrances is such that he is in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent the presumption being founded mainly upon the principle that every bigha of land is bound to pay and contribute to the public revenue unless it can be brought within certain known and specified exceptions *Nityanund v Banshi* 3 C W N 341, *Forbes v Meer Mahamed*, 20 W R 45

**Avoidance of encumbrance** A person seeking to obtain the benefit of s. 12 Bengal Act VII of 1869 must give some *prima facie* evidence to show that the encumbrance which he seeks to avoid is an encumbrance falling within the terms of the section—that is an encumbrance imposed on the tenure by some one who previously held it *Koylashbaskun v Gocoolmony*, 8 C 230 In a suit by the purchaser of an under tenure under ss. 59 and 60 of the Rent Act (Ben Act VIII of 1909) to obtain possession of lands held by the defendant, on the ground that the holdings are encumbrances which have occurred thereon by an authorized act of the previous holder of the under tenure, it lies upon the plaintiff to show that the defendants' holdings are such encumbrances as the plaintiff is entitled to avoid under section 66 of the Rent Act *Govind Nath v Reily* 13 C 1

**Award** Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing undertakes the burden of satisfying the Court that this is what really happened *Gobend Sing v Bhirkunath* 82 Ind Cis 16=46 A 686

**Bailment** In a suit for damages for loss of goods entrusted to a bailee, the burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised was taken by him *Maung Po Thak v Maung Tha Byau* 74 Ind Cis 18=1923 Rang 74 When loss of goods bailed is established by the plaintiff, it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would under similar circumstances have taken of his own goods of a similar kind and that the loss occurred notwithstanding such care *Trustees of the Harbour v Best and Co*, 23 M 524 *Kashi Kanto v Jhundia Kanta*, 28 C W N 1041, *Munnalal v E I Ry* 82 Ind Cis 772 but see *Shields v Wilkinson*, 9 A 398=A W N 1887, 44

**Benami transaction** Where a party alleges that a certain transaction is benami the burden of establishing that the ostensible owner in whose name the transaction stands is the benamdar lies upon a person who makes the allegation *Collector of Cawnpore v Hamid Ali* 114 Ind Cis 506 *Baynath v Raghu Nath* 12 C L R 186 *Suleiman v Mehdi* 25 C 473 (P C) *Setti Manik v Bijoy* 25 C W N 409 (P C) *Hakim v Bharat* 23 C W N 321 (P C), *Kansar v Rattan Chand* A I R 1929 Sind 195 *Ma Vique v My Tha* 33 C W N 513 (P C) *Ryani v Abani* 94 Ind Cis 33=A I R 1926 C 850, *Sham Lal v Rudha* 39 C L J 98, *Tuka Miah v Babin Chandra*, 1923 Cal 292 *Seth Mool Lal v Rajah Bijoy* 25 C W N 409, *Mukto v Anando*, 2 C L R 48 Where the defendant pleads benami, the onus is on him to prove that the purchase money was supplied by him *Mohammad Yaqub v Bishen Sarup* 11 Lah L J 267 *Do Lal v Bindeshori*, A I R 1929 Pat 440=10 Pat L T 469 In all benami transactions the very object of the parties is secrecy but still the person who alleges that property conveyed on another belongs to himself must prove his allegation and prove it beyond reasonable doubt *Maung Po v Maung Po* 24 A L J 758=96 Ind Cis 142=A I R 1926 (P C) 77 Primarily the party alleging that a person is benamidar is bound to prove it *Tuka Miah v Babin Chandra* 65 Ind Cis 701 In a suit for recovery of possession of land on the ground of purchase, when it has been shown that the alleged vendor is



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not the true owner the plaintiff can only rely on his claim as purchaser in good faith for value from a person who by the act of the true owners had become the apparent owner of and in such cases the burden lies upon the plaintiff *Rullo Singh v Bayrang* 13 C L R 280 (P C)

**Bill of lading** In a suit for damages on the ground of damage done to goods shipped the bill of lading is *prima facie* evidence that the description of the goods therein tallies with the actual condition of the goods. If the shippers want to escape liability the onus is on them to show the goods were in a damaged condition when shipped *Bulby v Charles* 14 Ind Cis 916

**Bill of exchange** The burden lies heavily on a person suing on the basis of a *hundi* to prove that the drawer could have suffered any damage owing to non-presentment of the *hundi* for payment. It will only be held in very exceptional circumstances that the drawer could not have suffered any damage owing to non-presentment *Bhukli Mal v Raghubar* 88 Ind C is 915=23 A L J 861

**Bond** Where the consideration for a bond is disputed the burden of proving repayment is on the person who pleads discharge *Manik v Narbassan* 88 Ind Cas 254=A I R 1925 Nag 376. When the bond contains stipulation as to interest onus is on debtor to prove that the stipulation found its way into the bond without his consent *Keval Ram v Allah Deay* A I R 1925 Lah 64. Where in an unregistered document such as a bond or a receipt or an entry in an account book the execution of which is admitted or proved contains an admission or recital of the payment of consideration the onus lies on the person who executes the document to prove he did not receive the consideration *Ram Chand v Chhumm* 26 P L R 369=6 Lah 470=88 Ind C is 301=A I R 1925 Lah 471 (F B). Where the consideration for a bond is admitted the burden of proving repayments is on the person who pleads discharge *Manik Rao v Nurbassan* 88 Ind Cas 254=A I R, 1925 Nag 376

**Boundary disputes** The onus lies on the person setting up the plan to show that the land is not capable of identification especially where there is no difficulty in marking off an exact area *Juthan v Silloo* L R 3 A 391. On questions of boundary specially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession the rule as to the burden of proving the affirmative is not applicable *Radha Krishnav Vatiyar Rahman* 65 Ind C is 743. The litigants being in the position of counter-claimants both parties are bound to do what they can to aid the Court in ascertaining the true line *Lukhi Naram v Jodu Nath* 21 C 504 (P C)=21 I A 39. In that case their Lordships said: "It is of frequent occurrence especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession that no satisfactory evidence is obtainable. That circumstance can not relieve the Court of the duty of settling a line upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant as much as of the plaintiff to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement." See also *Gayhon v Fiqat Pal* 9 C L J 415=11 C W N 230. In a dispute regarding direction of a boundary removed by one of the parties to a suit the onus of proof that the general direction proved by the other party has been wrongly stated by the other, lies on the party who removes it *Judoonath v Kalee Kristo* 25 W R 524, *Icelandud v Mohesar Singh* 3 W R 19 P C=10 M I A 81. Where a person appeals to the Privy Council from a decision of the High Court fixing the boundary to a certain estate the Privy Council would not interfere with the High Court's decision, if the evidence of his boundary was of the vague and not untruthworthy description and in a measure inconsistent with the allegation in the plaint as to the quantity which he originally claimed as his estate. It also lay upon him to show in what particulars and to what extent as regards his estate the *thalhust* proceedings were wrong *Icelandud Singh v Luchmerrut Singh* 10 C I R 169 P C. In a suit for confirmation of right and possession in respect of lands alleged to be within plaintiff's permanently settled *talook*

held that plaintiff should prove that lands are within his talook *Ganga Mala v Madhub Chunder*, 10 W R 413. In a question of boundary between a *khheraj* tenure and a *Zemindar's mal* land, there would be no presumption either in favour of one or of the other, but manifestly the plaintiff would have to prove his case *Beerchunder v Ramgully*, 8 W R 209. In a suit to recover two parcels of land alleged to have been comprehended in one plot, where defendant's case is that the parcels were divisible into two distinct plots one held by plaintiff and himself jointly and the other by himself exclusively, the burden of proof was held to lie on the plaintiff to show that the plot in dispute formed part of the land held by him and the defendant jointly *Ganga Pershad v Lole Nath* 12 W R 79. When a landlord sues his tenants for *khas* possession alleging that the land in dispute had been encroached upon by the tenant beyond his proper boundaries the burden of proving the encroachment lies on the landlord *Rinday v Nobin* 12 C L R 457. Where the plaintiff sued to recover a quantity of land by rectification of certain survey awards which he averred demarcated erroneously the boundary between his zemindary and the zemindari of the defendants it was held on a consideration of the evidence, that his suit was rightly dismissed because he failed to prove the position or existence of a stream, which he stated was the true boundary between the zemindaries *Rajah Leelanand v Rajah Mohendra Naram* 13 W R P C 7. In a suit for the possession of land once forming a bed of a nullah, but situated in the plaintiff's settled estate held that the defendants, who failed to prove that their *julkar* settlements did not extend beyond fishery rights, were not entitled to recover possession of any land which the drying up of the water way lay bare *Monohun Choudhury v Nursingh Choudhury*, 11 W R 272.

**Carrier** A common carrier in this country is liable as a carrier, that is, he is responsible for the safety of the goods entrusted to him in all events except when loss or injury arises from the act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be ruled by contract. The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence *Akhil Chandra v Indian General Navigation* 21 C L J 565=29 Ind Cas 260, see also 24 C 786=1 C W N 207, 17 M 445, 40 C 716=17 C L J 639.

**Civil Procedure** The burden of proving that a suit is barred under Order 2 rule 2 Civil Procedure Code is upon the defendant *Abdul Qadir v Inam din*, 102 Ind Cas 31. It is settled law in India that the plaintiff in a suit under Order 21 rule 63 Civil Procedure Code has to establish the right which he claims *Mahadeo Misser v Ram Prasad* 8 Pat 890=A I R 1929 Pat 579. In a suit instituted under Order 21, rule 63 the onus of establishing that the transaction on which the suit is based was entered in good faith lies on the plaintiff and the cases under Mahomedan Law are no exception to the rule *Kulsambhi v Balal Khan* 117 Ind Cas 220=A I R 1929 Nag 121. Where plaintiff claimed priority of attachment under s 270 Act VIII of 1879 held that he was not bound to prove that he had obtained a written order under s 23, and that he had published that order in the manner prescribed by s 239 Civil Procedure Code 1879 *Kanhya Lal v Dinonath*, 17 W R 23. Plaintiff in this case had previously failed in her resistance to the attachment made by defendant of property as that of her judgment debtor. The defendant having obtained an order maintaining his attachment, it was incumbent on the plaintiff, who impugned that order by the present suit to prove title under the purchase alleged by her by proving both the payment of the purchase money and her possession since the purchase and the lower Court was therefore held to have been wrong in having thrown the burden of proof in the suit on the defendant *Goriml Umram v Santal* 12 B 270. On a claim being denied satisfactory proof is required of its genuineness and the ordinary tests of evidence cannot be dispensed with because the parties have had certain business relations *Jawal Mall v Nayya Woodahar* U B R (1892-1896) Vol II 230. When a plaintiff seeks by a suit under s 233, Civil Procedure Code to establish his right to property which was attached in execution after having failed in an attempt to procure the removal of the attachment, the burden of proving

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that he acquired property in good faith and for consideration he is on him  
*Vaayan v Bhivraj* 2 N I R 87 In a suit to set aside an order dismissing  
 a claim petition the burden will be on the plaintiff to show that he was entitled  
 to the property *Vakhatappa v Chinniah* 1 L W 362 = 36 Ind Cas 791

**Collusion** Where in execution of a consent decree the party proceeded  
 against sets up that the decree was obtained collusively the burden of proving  
 O I J 689 *Hirhar Prosad v Mahabir* 79 Ind Cas 107 = 11

**Consideration** Where it has been admitted or proved that an admission  
 of consideration has been made or executed in a document the onus of proving  
 want of consideration rests on the person asserting that want of consideration  
*Paras Das v Suraj Bhan* 101 Ind Cas 171 In case of unregistered docu-  
 ments the execution of which is admitted or proved and which contain an  
 admission of payment of consideration the onus is upon the person executing  
 the document to prove that he did not receive the consideration *Tarm of*  
*Gandhi Singh v Anu Ahmed* 96 Ind Cas 820 = A I R 1926 1st 673 see  
 also *Ma Tin v Ramaswami Chetty*, Bur I J 49 = 95 Ind Cas 381, *Pannun*  
*Ram v Ghulam* 27 P L R 163 = 7 Lah 297 = 96 Ind Cas 630 = A I R  
 1926 Lah 491 Where a document was concluded in the following terms -  
 The undersigned promised to pay to A the sum of Rs 1000 payable during the  
 period of one year without interest *Held* that the burden of proof was on  
 the executee to prove consideration where executant admitted only execution  
 while the other members of the family of the executant denied both execution  
 and consideration *Raghu Nandan v Budhu Mal* 86 Ind Cas 270 = A I R  
 1922 Lah 346 An endorsement made in accordance with s 58 (1) of the  
 Registration Act raises the presumption that consideration was paid and the  
*onus* is on the person who alleges that it is untrue *Rajal Chandra*  
*v Prosad Chandra* 99 Ind Cas 229 Where after the equity of redemption  
 has been sold by the mortgagor the mortgagee sues on his bond he must prove  
 by affirmative evidence the validity of the consideration and also that it had  
 passed from the creditor to the debtor The mere admission of the debtor in  
 the mortgage bond does not shift the onus as it would have been if the suit  
 had been brought against the mortgagor alone *Jamm Mohan v Jagabandhu*  
 89 Ind Cas 927 When the execution of a sale deed is admitted it is on the  
 party who pleads that no consideration passed to prove it *Rajaram v Bapu* 20  
 N L R 154 = 79 Ind Cas 596 = 1924 Nag L J 173 *Mangali v Budha Lal* 1923  
*Prasad v Hanikar*, 70 Ind Cas 804 = 1923 P 20, the passing of consideration  
 for a mortgage deed which is more than thirty years old and which was never  
 questioned till the suit thereon was brought should be taken as proved even if  
 the direct evidence is not as strong as might be naturally expected in recent  
 transactions *Jagana v Achanna* 42 M L J 339 = 3, L W 289 In a re-  
 demption action the burden of proving the mortgage amount is on the plaintiff  
*My Shul v Ma Nung* 1 Bur L J 248 Where in a suit to set aside a  
 registered sale deed on the ground of fraud practised upon the creditors and  
 plaintiff but when this is done the onus is shifted on to the defendants to prove  
 consideration *Maung Po v Maung Po* 11 L B R 323 = 65 Ind Cas 322  
 In a dispute regarding the title of two rival purchasers of the same property  
 when the vendor in the first sale-deed admits receipt of consideration the onus  
 of proof lies in the subsequent purchaser not get possession for a long time  
 paid The fact that the first purchaser did not get possession for a long time  
 does not prove absence of consideration *Ut Kastur Bai v Balakam* 68 Ind  
 Cas 732 Where a mortgagor admits before the sub registrar that full consid-  
 eration had been received the onus of proving that full consideration has not passed  
 is on the person making the admissions *Ganga Ram v Rulia* 2 Lah 249 = 64  
 Ind Cas 901 In a suit to enforce a bond the defendant denied execution  
 as well as consideration The Court found that the bond was genuine and  
 from the recitals therein drew an inference that the bond was supported by  
 consideration *Held*, that there was no error of law committed by the lower

**Court** *Jadu Mondal v Jogendra Nath* 68 Ind Cas 303 Where a person executes and delivers a conveyance of his property and also gets it registered and the sale deed contains a recital of receipt of consideration, the burden of proving want of consideration for the sale is on the vendors *J H Pauer v Daw Shue*, 1 Bur L J 22 In a case of a formally registered document in which the receipt of consideration has been recited, the onus of proving that consideration did not actually pass is on the party who alleges non payment In the case of an entry in an account book however the onus is on the party alleging payment to prove it *Rulla Singh v Juma Mal* 60 Ind Cas 730 Either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed *Krishna Kishore De v Narindra Bala*, 34 C L J 33 In a suit for redemption brought by the purchaser of the equity of redemption, the sale deed was a registered document and contained an admission of the executant that full consideration had been paid but the mortgagee contended that the sale was a sham and without consideration Held that the burden was on the executant of the deed and on people claiming under him to prove that what apparently happened did not happen *Fhtishane Ali v Jamma Parsad* 18 Ind Cas 265 (P C) = 24 O C 272 It is the established practice of the Courts in India in cases of contract to require proof that consideration has been actually received according to the terms of the contract, and a contract under seal does not of itself, in India import that there was a sufficient consideration for the agreement A plaintiff however suing to set aside a security admittedly executed by him self, must make out a good *prima facie* case before the defendants can be called on to prove consideration *Kali Prosad Tewari v Prasad Sen* 2 B L R P C 111 = 12 M I A 282 Where in a suit by the endorsee of a *hundi* against his immediate endorser, the defendant pleads want of consideration, the onus is on him to prove his plea *Gourind Ram v Mantora Sahoo* 1 C L R 429 In a suit for redemption by the assignees of the equity of redemption the onus of proving that the mortgagor did not in fact receive the moneys which he acknowledged by his execution of the mortgaged deed to have received, is *prima facie* on the plaintiff *Muhammad Ahahyar v Muhammad Samiuddin* A W N 1887 240

**Contract** The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence *Fum of Ganesh Lal v Fum of Debi* 105 Ind Cas 265 = A I R 1927 Lah 181 The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not intended to perform the contract in the manner recited therein, to prove their assertion *The Fum Kanwar v Fum Ganpat Rai Ram Juan*, 7 Lah 442 = 94 Ind Cas 304 = A I R 1926 Lah 318 The burden of proving that there was an act which rendered a contract impossible of performance lies on the party to the contract who alleges it *Hu cera v Moorooden*, 77 P R 1866

**Contention** Where on the decree as passed several defendants were made jointly and severally liable in the sub sequent suit for contribution by one of them, it was for any defendant, who contended that he was not liable to pay the full share to plead and prove it The mere fact that he was a sleeping partner did not shift the onus from where it primarily lay *Mulla Baksh v Karim Baksh*, 95 Ind Cas 1007 = A I R 1926 Lah 533 In a suit for contribution for money admittedly paid by plaintiff into the Government Treasury on account of defendant's share of the revenue, where the defendants plead previous payment to the plaintiff the onus of proving such payment lay upon the defendants *Mohadeo v Laboree Misser* 24 W R 250 Where in a suit between two judgment debtors to recover money alleged to have been paid in satisfaction of decrees obtained against them by J who had been wrongfully kept from enjoying his share of the property B answers that he entered into possession as plaintiff's mortgagee and plaintiff maintains that the right of possession terminated before the origin of J's claim the burden was held to lie on A to prove that it was so determined *Afzul Khan v Bahadur Singh* 19 W R 156 In a suit for contribution by one co sharer for recovery of excess

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payments of Government revenue made on behalf of other co-sharers to save the estate from sale, the onus was held to be on the plaintiff to prove their shares and the amount of revenue payable thereon *Aghoru Ram v Ramolu Sahu*, W R 1864, 309

**Conversion** In the case of Hindu convert to Mahomedanism the presumption is that they follow the Mahomedan Law and if it is pleaded that notwithstanding the conversion there has been an election to abide by the old law, the onus is on those setting up the plea to substantiate it by clear and unambiguous evidence *Mahomed Ibrahim v Sheikh Ibrahim* 45 M 308=26 C W N 793=36 C L J 61 P C

**Criminal cases** Where the accused give the deceased a beating the previous day and were seen by various persons on the occasion it was highly impossible that they would murder the person next day *Sheo Ram v Emperor* 1923 Lah 130 It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that offence must be strictly proved, and that where the doing of an act without authority or without consent is made a criminal offence and the statute does not expressly put upon the accused the proof of such consent or authority it is a necessary part of the case for the prosecution to negative by evidence such consent or authority *Buy Basu v Queen Empress* 19 A 74=A W N 1896 178 In a criminal case the burden of proof is on the prosecution under section 101 Evidence Act and a conviction must be based on evidence which excludes the theory of evidence not on circumstances of suspicion or on mere probabilities *Queen Empress v Narayan Rat Un Cr C 779=Cr R 43 of 1895* see also *Khosed Ka v Empress* S C L R 542 *Ramasami v Jolananda* 9 M 387 *Queen Empress v Bal Krishna*, 17 B 573 *Queen Empress v Haradhar* 19 C 780, *Tanchanon v Emperor* 2<sup>o</sup> C W N 693 When a person is accused of an offence the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code is upon the accused and it is directed by statute that the Courts should presume the absence of such circumstances *Queen Empress v Iraq Dutt* 20 A 159=A W N 1898 117 see also *Queen Empress v Bai Mahalati* Rat Un Cr C 820

**Custom** Where a person sets up a custom in derogation of a general principle of succession prevailing in a locality he has to prove the same *Ghulam Khan v Ghulam Haider* 75 Ind Cas 211 Where in a suit for possession of a site in a village under a sale deed executed by a person who had been in possession of the site for a long time the defendant alleges that according to the custom of the village the vendor had no right to transfer the site the burden of proving the existence of such a custom lies upon the defendant *Sahel Rao v Jantantao* 78 Ind Cas 192 A person who relies on an alleged custom has to prove that the custom exists and applies to the circumstances of the case *Shah Mohamed v Tuli Bhai* 2 Ind J 175=56 Ind Cas 913 A special family custom involving a departure from the ordinary Hindu law should be properly proved by the person setting it up *Gururu darya v Saharandhuaga*, C W N 33=27 I A 238=23 A 37 P C A custom opposed to the ordinary Hindu law must be proved by those who assert it *Gulab v Shubbalas*, Bom L R 318 *Latti Begam v Nauab Mohamed Ali* 11 P R 1875 *Mt Lupa v Mohantal* 9 C P L R 47

**Damages** In a suit for damages for malicious prosecution the plaintiff must in the first instance make out a *prima facie* case that the defendant had no reasonable or probable cause for the prosecution and acted maliciously *Firdous v Iqbal* I B R (1893-1900) 57 *Mohendra v Surbhothaya* 11 W L R 531 *Hirish v Achu Kanto* 28 C 591=6 C W N 159 *Pestonjy Queen*, B 332 (1 C) *Meethu v Sahu* 27 C 732 *Syama Charan v Thatoo* 6 C W N 295 *Sheekh v Bhromal* 17 C W N 131

**Debt and Debtor** The burden of proving that a certain payment was made in full satisfaction of a debt is on the person alleging it *Biraja Kanta v Jitendra Nath* 19 C J J 740 It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person it is for the debtor to prove that the other person

had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor *Muhamad v Les Tanneurs Lyonnaises*, 49 M 435=A I R 1926 P C 34=31 C W N 1 When a debtor pleads tender of payment as a ground for not being saddled with interest, it is for him to prove such tender *Ranee Shurut Soondwee v Collector of Mymensingh*, 5 W R Act X Rule 69 If a debt is proved or admitted, the burden of proving payment lies on the debtor *Mobarak v Seua Rama*, 35 P R 1807 In a suit by a creditor against the son of a deceased Hindu, it cannot be laid down as a general rule that the burden of proving the nature of the debt lies absolutely either on the creditor or on the son *Mamraj v Balaso*, 16 P R 1878 Where in a suit on a bond, the defendant pleaded want of consideration *held*, he was not relieved of the obligation of establishing his case by the fact of an admission of the plaintiff that the actual consideration was different from that described in the bond *Lal Singh v Chaitram*, 15 C P L R 24 The burden of proof that a creditor by agreeing to an arrangement whereby a firm indebted to him conveyed to two of the partners thereof certain property in trust to pay off his and certain other debts and thereby released the remaining members of the partnership lies upon the parties who were originally liable to such creditor *Kalaulhan v Madho*, 3 N W P 129

**Declaratory title** In a suit for a declaration of title by plaintiff who had been away from his home for 40 years it is incumbent on the plaintiff to establish his identity and his title by strong and cogent evidence and if he fails to do so the suit is liable to be dismissed The defendant is not under any obligation to let in rebutting evidence if the plaintiff's case is itself unsatisfactory *Abdul Solan v Lakshmi*, 50 Ind Cas 870 The plaintiff in a suit for immovable property must rely on the strength of his own title and not take advantage of the weakness of his adversary *Futteh Khan v Badan* 71 P R 1866, *Mega v Sada Ram*, 66 P R 1887 Where a plaintiff seeks to be declared the proprietor of land, he must make out that title affirmatively *Rassonada v Sutarana* 2 M H C 171 A plaintiff must succeed, if at all upon the strength of his own title and not by the infirmity of his opponents *Rahum tuillah Sahib v Mahammed*, 8 M H C 63 In a suit for declaration of plaintiff's reversionary title as heir to his uncle's property and for the reversal of a deed of sale from that uncle set up by the defendant the onus was held to be on the defendant *Bykunt Nath v Garish Chunder*, 15 W R 96 When the plaintiff could not produce the document on which he relies owing to the fact that he was not a party to it and could not from the circumstances of the case, have obtained possession of the document or of a copy of it, while the same circumstances would lead to the inference that the defendants ought to be in possession of it then it would be enough for the plaintiff to make out a *prima facie* case so as to throw upon the defendants the burden of proving the document by primary evidence or by secondary evidence on properly accounting for its non production *Ram v Raghu*, 7 A 738

**Dedication** In a suit for a declaration that a certain property is *naqf* the onus is on the plaintiff to prove that the property has been dedicated as *naqf* *Rahim v Channan*, 55 Ind Cas 210

**Deeds** In a suit to set aside an order of the Small Cause Court in which that Court had held that a certain *Kobala* was *mala fide*, the onus is on the plaintiff that it has been executed *bona fide* *Ishan Chandra v Rikimuddin* 2 B L R A C 326 N=10 W R 412 Where it is found on the face of a deed creating a trust that the transaction is *bona fide* it is for the creditors who impugn the *bona fide* nature of the trust to prove their plea *Kasheshurree v Krishna Kanuni*, 2 Hvy 557 Where certain deeds are duly executed and duly registered the burden of proving that they are not real transaction lies on those who allege the same *Sham Chand v Protap Chandra*, 25 C 78 (P C) =21 I A 186=1 C W N 591=7 Sor 217 *Manjun Singh v Unadut* 12 A 523 A benefit being conferred on a person standing in a confidential relation towards another every onus is thrown upon the person filling such a fiduciary character towards another of showing conclusively that he has acted honestly, and *bona fide*, without influencing the donor, who has acted independently of

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him *Wajid Khan v Enay Ali* 18 C 515=18 I A 141 (P C) The genuineness and due execution of a bond does not dispense with the necessity of proof of consideration therefor *Baboo Ghansham v Chulooce*, W L 1861, 197 Where the executant of a mortgage deed denies receipt of consideration in a suit based upon the mortgage, having however, previously admitted receipt thereof, before the Registry Officer, the burden of proving non receipt of consideration would not be shifted on to the plaintiff by the mere circumstances that the plaintiff had not mentioned the bond or the interest accruing thereon in the income tax returns submitted by him *Ali Khan v Indor Parshad*, 23 C 950 (P C)=23 I A 92 In a suit upon a bond containing an acknowledgment by the executant of the receipt of the whole sum in cash where it is proved that only a part of the sum has been received by the defendant the onus is on the plaintiff to prove in some other way the advance alleged by him *Lala Lal Shmi v Sayad* 1 C W N 82 (P C)

**Easement** Where in a suit for possession, the defendant claims a right of easement the onus is on him to establish it *Duni Chand v Nizamuddin*, 26 P L R 301 Where in a suit for injunction the defendant sets up that he had acquired a right of easement the onus is on him to prove that he had acquired an easement *Bya Ram v Bry Lal*, 26 P L R 42=A I R 1927 Lah 297 Where in a suit for possession, the defendant claims a right of easement the onus is on him to establish it, *Duni Chand v Nizamuddin* 26 P L R 301 Where the right to have a way of water course over certain land is disputed by the owner thereof and in order under s 532 of the Criminal Procedure Code, has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the onus of proving the claim in a subsequent suit by the owner to establish his right to the exclusive use of the land *Obhoy Churn v Lukhy Vonce* 2 C L R 555 In an ejectment suit, the defendant in possession though a trespasser is entitled to require the plaintiff to prove that he has a superior title *Kalu v Barsu* 19 B 803 In a case where an easement is claimed over defendant's water the plaintiff is bound to establish that he acquired it by grant or uses *Ughray Singh v Rashdharee Singh* 17 W R 281 In a suit to remove certain outlets in one aqueduct, on the allegation that plaintiff is entitled to exclusive user of the water, held that the plaintiff was bound to make good the title alleged *Omaet v Kishen* 10 W R 83

**Ejectment** Where the plaintiff pleaded that he was a ruyat and sought to eject the defendants who were according to him under rayats Held that the plaintiff had to prove how he was entitled to possession in other words, how the tenancy came to an end The initial onus is on the plaintiff by virtue of ss 101, 102 and 109 of the Evidence Act to prove this and it is only after that is done that the onus is shifted on to the defendants to prove circumstances disentitling the plaintiff to the relief sought *Basiruddin v Sahebulla* 32 C W N 160=105 Ind Cas 857=A I R 1927 Cal 966 In a suit for ejectment even though the defendant has no title he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title deed on which he relies as having given him a title superior to that of the defendant is a valid one *Tenkata Subba Rou v Iigneswaradu* 110 Ind Cr 514=(1928) M W N 236=A I R 1928 Mad 840 It is not the law that because the defendant in an ejectment suit is found to be a tenant of some land under the plaintiff, the burden of proof is cast on the plaintiff to establish that the land he seeks to recover is out side the tenure of the defendant *Asfat Sheikh v Sachindra Kumar* 91 Ind Cas 761=A I R 1926 Cal 759 In a suit by the recorded tenant to eject the sub-tenant where the latter pleads that there was no relationship of land lord and tenant between him and the recorded tenant, the burden is on the defendant to show that he did not hold the land from the plaintiff *Isuor Din v Dham* 1 R 5 A 212

The plaintiff an occupancy tenant sued to eject a sub-tenant Held that since the plaintiff was still recorded as occupancy tenant the burden of proof certainly was on the defendant who asserted that his occupancy right had been

extinguished *Ashiq Ali v Ajodhya*, L R 5 A 97 (Rev) see also *Umad Ali v Sadullah* L R 5 A 281 (Rev) Where in a suit by a person as owner of land to eject the defendant the latter sets up the existence of a tenancy entitling him to retain possession, the burden is upon him to prove the nature of his tenancy and his rights to remain in possession *Probodh Chandra v Bursinha*, 71 Ind Cas 319 Where the recorded tenant of a holding who has been paying rent to the landlord brings suit to eject his subtenants and the latter sets up a claim of occupancy rights, the onus of proving the right is upon them *Tulshu v Raghun* L R 3 A 51 (Rev) Where the plaintiff alleges his prior possession and subsequent dispossession by the defendant the burden is primarily upon him to establish that he was in possession within the statutory period *Akdon Lal v Hajendra Naram* 29 C L J 259=51 Ind Cas 70 In a suit to eject mental where the ownership of the plaintiff is proved and the defendant sets up a right of permanent occupancy the burden of proving such a right is on the defendant *Rangasami v Gnana Sambandu*, 22 M 261

**Enhancement of rent** In cases of enhancement of rent, onus lies on the landlord to show that he is entitled to such enhancement *Brendia v Ali* 39 C L J 605, *Hem v Kali*, 26 C 832 *Raj Krishna v Kali*, 6 B L R App 122 *Rama Nath v Jote Kumar* 11 C I J 1 *Surja v Baneswar*, 24 C 251 But when in such a suit the tenant pleads that no enhancement should be granted on the ground that he is a tenant at fixed rate, the onus is on the defendant to prove that he is such a tenant *Gudar v Brynandan*, 5 C W N 880

**Execution** Under section 102 of the Evidence Act, when once the execution of a document is proved, if a party alleges circumstances that would nullify the document not binding on him it is for him to prove such circumstances *Krishna Kurup v Veeran Kutty* 116 Ind Cas 145 Where the execution of a document is admitted the onus is on the executant to prove that he did not understand its terms, even if he is an illiterate person *Chandra Lal v Mahmud Hassan*, 27 P L R 641=97 Ind Cas 71=A I R 1926 Lih 692 Where in a suit on a mortgage bond alleged to be lost the defendant denies execution, his alternative plea of payment does not amount to an admission of the mortgage sufficient to relieve the plaintiff from proving the loss of the original deed and to entitle him to sue upon a copy of it *Mohammad v Zahur* 24 A L J 964=97 Ind Cas 82 The onus of proving that a recital in a bond is wrong is on the executant of the bond *Firm of Gulab Ram Leher v Ganga Sarup*, 27 P L R 160=93 Ind Cas 509=A I R 1926 Lih 299 An admission by the defendant regarding the putting of a signature or a thumb mark on a document does not amount to an admission of execution so as to shift the burden of proof on the defendant This is specially so where the defendant pleads that when he signed the document it was blank *Pubhu v Tula Ram*, 20 A L J 672=68 Ind Cas 809 A person to whom a decree is transferred must prove his title to execute it if his title be disputed *Ganesh v Chundee*, 6 W R M 126 Where in execution of a decree a share of an estate is sold and the representatives of the purchaser absorb more land than belonged to that share and bring a suit to declare their rights held that there should have been a clear finding as to what was the extent of the share originally purchased and that, in determining the claim of the representatives to the increase, the burden of a very distinct nature should be laid on them *Unopoorina v Raj bullar*, W R (1864) 151

**Fraud** The burden of proving the fraudulent nature of the transaction lies ordinarily on the person who seeks to impeach it *Lachmi Naram v Mt Na ajun Fatima* 94 Ind Cas 927=A I R 1926 Oudh 501 In a suit to set aside an *ex parte* decree on the ground that summons was not duly served on him, the burden of proof is on the plaintiff *Muhammad Din v Berry & Co* 89 Ind Cas 736 Where a party attacks the validity of a registered document on the ground that it was not registrable in the place where it was done and proves that there was no such plot as the one in the registration area or that it did not belong to the party, then the onus is on the other party to show there was no fraud on the registration law *Mt Surja v Bjar*, 26 O C 336=73 Ind Cas 13 The persons who seek the interference of the Court on the ground of fraud should prove



**S 104.** *it Bishen Salu v Inmole Pandey*, A W N 1882, 10 In a suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud, the onus lies upon the plaintiff to make out that the sale was fraudulent *Ramgati v Imtari* 1 B L R S N 20 Where the defendant alleged that plaintiff's assignment was fraudulent, the onus was on him to prove that the transaction was not bona fide *Lalchari v Sruvath*, 3 B L R A C 73 Note Where a decree holder in a suit to establish his claim to certain property as that of his judgment debtor, alleges that the deed of sale conveying to defendant was fraudulently executed held that the decree holder was bound to prove the fraud *Lala Rudra Prasad v Binode Ram* 3 B L R A C 71 (note) = 10 W R 321 When a man has committed a fraud and has obtained property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit The mere fact that some hints and clues reached the injured party which perhaps if vigorously and acutely followed up, might have led to complete knowledge of the fraud is not enough to constitute a clear and definite knowledge of it *Rahimbhoy v Charles*, 17 B 341 P C = 20 A 1

**Good Faith.** The burden of proving the good faith and fairness of a transaction is on the person who claims benefit thereunder *Gunabai v Motilal* 59 Ind C 18 625-A I R 1925 Nag 398

**Government revenue.** In a suit for contribution for money admittedly paid by the plaintiff into the Government treasury on account of the defendants' share of the revenue, where the defendants plead previous payment to the plaintiff held that the burden of proving such payment was upon the defendants *Mahadeo v Lahore*, 24 W R 250

**Guardian and Ward.** Where an alienation by a guardian is questioned by a minor after attaining majority the onus of proving that the transaction was for necessity is not always and necessarily very heavy on the defence and if it is established that the consideration for the alienation impugned went in discharge of previous debts and there is evidence that some of such debts were contracted to give the minors estate the burden of proof though in the first instance it lay upon the defence, is shifted on to the minor and it is he who must show that the alienation attached by him was not for a purpose binding upon him *Krishna Rao v Anjassami Panday* 21 Ind C 18 426, see also *Hamman Pershad Panday's Case* 6 M I A 393, *Syed Looft Hosseins Case* 23 W R 424 *Oomed Kar v Hura Lal* 6 S D R N W P 611, *Sardar Knpal v Bilwant Singh* 17 Ind C 18 666=17 C W N 302 P C

**Hindu Law—Adoption.** Where the plaintiff wants to have the adoption by the widow set aside as being without authority the onus lies upon him *Hindyal v Roy Kisto Bhoomul* 24 W R 107 In a suit for possession of land by the plaintiff setting up a title by adoption it lies on the plaintiff to prove the fact of adoption *Jana v Mohamda* 59 P R 1893

**Hindu law—Alienation by Hindu widow.** Where the validity of alienation by a Hindu widow is the question for the consideration of the Court the onus of proving the necessity for the alienation rests with the alienor *Dhasee Singh v Huroomarte*, 1 Ind Jur O S 99, *Nund Coomer v Ganja Purand* 10 W R 91 *Himali v Jadab Chunder*, Cor 119 So in cases of alienation by a Hindu widow when the legal necessity therefor is questioned its existence must be shown by the party standing on the conveyance *Bissonath v Pall Bahadur* 1 W R 217 *Lala Brij v Indur* 18 C W N 619 (P C) = 36 A 187, *Nabakishore v Upendra* 26 C W N 322 (P C) *Hari v Kasi* 19 C W N 170 (P C) *Radhakishore v Mirlounjoh*, 7 W R 23, *Debi Gossud v Golap Bhajal* 10 C 721 (T B)

The onus of proving due execution of a document purporting to have been signed by a Hindu widow lies upon the plaintiff (creditor) who relies upon the signature of the widow as binding the estate which she represented *Jymlarun v Yanda* 19 C 249 (P C) = 19 I A 1 In the case of mortgage by a Hindu widow the onus probandi lies on the mortgagee to prove, first that the charge

on the estate was the act of the widow and secondly that the debt so charged was a competent act of the widow *Caraly Veneata v Collector of Musulipatam* 10 W R 47 P C = 11 M I A 619 So in a suit by her of a mortgagee against a Hindu proprietor's heirs in possession after the death of his widow to enforce a mortgage by her, the burden of proving the money to have been advanced to the widow for the purpose justified by legal necessity is on the plaintiff *Maheshwar Bakshi v Ratan Singh*, 23 C 766 P C = 23 I A 57 = 6 M L J 127, *Sham Sundar v Achan* 21 A 71 (P C) = 2 C W N 729, *Kamun v Mahomed*, 10 B L R 1 P C, *Jugsahu v Radha* 5 P L J 287 Where after a widow's death the reversioner sued the donee for the possession of the house the burden is on the donee to prove that the widow had, when she executed the deed of gift such absolute right of ownership as would entitle her to alienate and deal with the property in any manner which would go beyond her life interest *Ganpat Rao v Ram Chunder*, 11 A 296

**Hindu Law—Alienation by manager or guardian** Where a person after attaining majority, questions as to the sale of his property by his guardian during his minority the burden of proving the *bona fide* lies on the person who upholds the purchase *Roop Narain v Sugadhar* 9 W R 297 The leading case on the subject is that of *Thimmaman Prasad Panday v Musst Babon Munaj Koonnan* 6 M I A 393 = 18 W R 81 There then I or ships of the Privy Council laid down the following rules (1) The power of the manager of an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power It can only be exercised rightly in a case of need or for the benefit of the estate (2) But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate (3) The actual pressure on the estate, the damage to be asserted, or the benefit to be conferred upon it, in the particular instance is the thing to be regarded (4) The lender is bound to enquire into the necessities for the loan and satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting, in the particular instance for the benefit of the estate (5) If he does so enquire and acts honestly the real existence of an alleged sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge (6) Under such circumstances he is not bound to see to the application of the money' The same rule is applicable in the case of an alienation by the *karta* of a joint family property *Nauab Naik v Bto Jaghnath*, 41 A 571 P C = 23 C W N 700

**Hindu Law—Alienation by Shebait** "The authority of the shebait of an idol's estate would appear to be analogous to that of the manager or an infant heir *Prosunno v Golab* 2 I A 145 151 = 14 B L R 450 = 23 W R 253 *Abduram v Shama Charan* 14 C W N 1 (P C)

**Hindu Law—Inheritance** Where a man comes forward to claim a property by right of inheritance, in the absence of acquiescence by the defendant, he must establish his descent and legitimacy *Chandan v Bhadruti Singh* 30 Ind Cis 220

**Hindu Law—Joint Family** The question as to the *onus* clearly depends on the pleadings of the particular case *onus* is not an invariable obligation resting on a party to a suit fixed and pre-determined by rules of evidence It not only changes according to the nature of the pleadings but it frequently changes according to the progress of the evidence It is true that the normal condition of a Hindu family is joint and that in law there is a presumption to that effect, but such a presumption may vanish altogether in certain circumstances, in other circumstances it may become very weak and again it may shift at one stage of the trial from the shoulders of one party and be fixed on the shoulders of another *Sa joo Prosad v Deodat Lal*, 4 O W N 958 = 105 Ind Cis 410 = A I R 1927 Oudh 199

**Hindu Law—Partition** Where in a suit for possession on the ground of a prior partition the plaintiff proves severance of interest, it will be on the defendant, who sets up a case of some of the brothers remaining joint to prove that

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pler *Challa Lakshmakka v Bala Ranzappa*, 91 Ind Cas 285=A I R 1926 Mad 388 The presumption of Hindu law being that a partition is complete, when a party says some lands were kept joint the burden of proving it lies on him *Jagannath v Babu* 81 Ind Cas 1039 see also *Vaidyanata* 32 M 191 *Ranganu v Sudarapulu* 31 M L J 472=35 Ind Cas 52, v *Ayazunani Ballurshna v Raja* 27 Ind Cas 736=(1915) M W N 17 The normal state of every Hindu family is joint Presumably every such family is joint in food worship and estate In the absence of proof of division such is the legal presumption but the members of the family may sever in all or any of these three things *Deonaiam v Agyan* 31 C W N 53, *Neellisto v Bur Chandra* 12 M L A 523 540=13 W R P C 21, *Tiruch v Jodhester*, 19 W R 178 *Gobind v Doorga* 22 W R 248 *Ganjendar v Sardar*, 18 A 176 *Katama Naichan v Raja of Shiva Ganga* 9 M I A 539 *Barnanun v Choudhury* 14 C L J 183=12 Ind Cas 6 *Nageshar v Ganesha* 42 A 368, 381=47 I A 57=38 M L J 521=22 Bom L R 59

**Hindu Law—Self Acquisition** When an acquisition has been made with the assistance of a joint family property which yield some income though not substantial the burden of proof is on him who asserts the acquisition to be separate *Sulhandan v Bryanandin* 1923 A 574, *Abhaidat v Partap*, 3 O W N 40, *Hordat v Dhandh* 84 Ind Cas 1011, *Harnanayan v Suresh* 1925 P 161 *Sircar v Hindu Law* 312

**Hindu Law—Stridhan** A Hindu wife seeking to exempt property from responsibility for her husband's debts must clearly prove that she had *stridhan* and that she purchased the property with her self-acquired funds *Bojomohan v Radha Kumaree* W R 1864 60

**Hundi** Where a *hundi* is not presented for payment and the drawer withdraws the money after many days the burden of proof lies heavily on the payee to prove that the drawer did not suffer any loss and the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage and burden is certainly not discharged by the oral admission of the defendant drawer that some time or other subsequently he got back his money *Blal Lal v Raghubir* 23 A L J 861=53 Ind Cas 915=A I R 1921 All 811

**Income tax** When an assessee states that he has no income from a certain source and officers of the Income tax department disbelieved him it is for them to prove that he has such income and not for him to prove the contrary Any assessment based on the inability of the assessee to prove his negative statement and on general assumption only is bad and should be cancelled *In re Bishnu Jappa Chaudhury* 79 Ind Cas 100=50 C 907=A I R 1921 Cal 337

**Insolvency** In a suit against an insolvent and the Official Assignee for the sale of mortgaged property the *onus* is on the plaintiff to show that title deeds in his possession after the insolvency were deposited with him as security before adjudication *Mull v Mulho Das* 23 I A 106 The burden of proof of upporting a purchase from the insolvent of the whole of his assets just prior to the insolvency falls on the person claiming that the purchase was made *He v F C Sechase* 22 C W N 335

**Insurance** A claimant under a life-policy must prove that the age of the insured is correctly given *Oriental Government Insurance Co v Narasimha* 20 M 201 But no such *onus* is cast upon the claimant where the age has been proved and admitted by the company in writing *Ibid*

**Inventions** It is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed *Tilpat Mills Co v Muir Mills Company* 17 A 490

**Jurisdiction** It is for the party who seeks to oust the jurisdiction of the ordinary Civil Court to establish right to do so *District Board of Bangalore v Anandappa Narasimha* 20 Ind Cas 121 *Sh M v Hakim* 1928 I 121 (F R) *Uppa v Munshi* 21 L 22=61 Ind Cas 254

**Lakhiraj and rent free land** Where the question in a case is whether the land in question is within the geographical limits of the village belonging to the Zemindari of which *palm* was granted to the patnidars and it is proved that the lands are really within the ambit of the villages and where the defendants claim those lands as *Nisfar Pnattor*, the *onus* rests on the defendants *Abdul Bari v Hishullesh*, 49 C L J 546 = A I R 1929 C L J 459

**Land Acquisition** Where a public body seeks to acquire under the Land Acquisition Act, any portion of a block which is structurally connected with the main block the *onus* is on that body to show that the portion is not reasonably required for the full and unimpaired use of the house *Venkataram nam v Collector of Godavari*, 27 M 350

**Landlord and tenant** In an ejectment suit the land holder came into Court with the allegation that the tenants had cut his *tabi* crops. The tenants alleged that the crops were theirs. The lower Court placed the burden of proof on the defendant. *Held* that the first issue should have been whether the *tabi* crop was shown by the plaintiff and the burden of proof should be thrown on the plaintiff. *Held* also that if the burden is wrongly thrown in such cases the decision is liable to be set aside. *Nathu v Gopal* 13 R D 862. In the case of a tenant at will burden is on the tenant to prove that tenancy is closed. *Mahomed v Sadik*, A I R 1925 Sind 36. In proceedings for appraisement of crops when the landlord falsifies accounts in order to claim a larger amount for himself the *onus* is on him to show what the actual yield is. *Bhumeswarai v Sudhdeo*, 6 Pat L J 419 = 85 Ind Crs 566 = A I R 1925 P 505. When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands the *onus* of proving that he has such a right is upon the tenant and proof of long occupation at a fixed rent does not satisfy the *onus*. *Nainapillai v Ramanatham* 47 M 337 = 51 I A 83 = 46 M L J 546 = 22 A L J 130. Where a tenant sets up adverse possession against his landlord, and the Revenue Records show him to be a tenant, the *onus* is not discharged by the fact that the rent which he paid did not exceed the amount of revenue and the cesses. *Ram Das v Chandi*, 69 Ind Cas 363 (1).

**Legitimacy** Where a person claims under section 112 of the Evidence Act, to be the son of a deceased, he must prove that he was born within 280 days after the death of his father, the burden of proving the non access of the deceased and his wife lies upon him who impugns the legitimacy. *Narendra v Ramgobind*, 1 Bom L R 213. Where a person is born 223 days after the death of his father, the burden of proof that he is not the son of his father lies on those who contest his legitimacy. *Patil v Ickhia*, 5 Bom L R 477. It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage. In such cases no certain inference can be drawn from the evidence as to the conduct of relations and friends. *Thalwimal v Nawab Ali* 9 Bom L R 264 = 5 C L J 1 = 17 M L J 56.

**Limitation** The burden of proving that a payment was made which would enlarge the time under the Statute of Limitation is upon the plaintiff who claims the benefit of such payment. *Barada Kanto Roy v Jatindra Nath* 49 C L J 560. In a suit to recover possession of lands as heir, where limitation is pleaded, plaintiff must prove his possession within 12 years prior to suit. *Bhiloo v Mottu*, 9 W R 251, *Jagadamba v Ramchandra* 6 W R 327. *Dunobandhu v James Ferlong*, 9 W R 155. *Kedarnath v Mohesh* 1 W R 67. In all actions for ejectment where the defendants are admittedly in possession, and a *fortiori* where they had been in possession for a great number of years, and under a claim of title it lies upon the plaintiff to prove his own title. *Mohama v Mohesh* 16 C 573 = 16 I A 23 (P C).

**Malicious prosecution** In an action for malicious prosecution, it lies upon the plaintiff to make out a *prima facie* case of malice and want of reasonable and probable cause before the defendant can be called upon to show that he acted bona fide and upon reasonable grounds, believing that the facts within his know-

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**Marriage** It is for the person who says that a marriage took place to bring forward satisfactory evidence in support of the alleged marriage when there is no documentary evidence in support, and no certain inference can be drawn from the evidence as to the conduct of relations and friends, the oral evidence in the case being wholly untrustworthy *Arnyal v Nabab Ali* 5 C L J 1 (P C)

**Mercantile Usage** Where a contract is alleged to be an "office dhara" and where the office dhara refers to the practice of certain firms as seen in printed forms used by them a plaintiff relying on the term "office dhara" must produce and prove the printed forms above mentioned *Dassomal v Ram Chand*, 86 Ind Cas 364=A I R 1925 Sind 90

**Mesne profits** Where mesne profits are claimed by a person out of possession he must in the first instance give some evidence of proving *prima facie* that the profits were somewhere about the sum he alleges and then the burden of proving that they were less shifts to the other side *Jaitalsao v Lal Fahe Singh* 20 N L R 52=75 Ind Cas 826=1924 Nag 117

**Minor** Where a deed is executed by a person who alleges himself to be a minor at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority *Sadiq Lal v Joykashore* 47 C L J 628=32 C W N 874=A I R 1928 (P C) 152 The burden of proving that a particular deed is void on the ground that its executant was a minor at the time of its execution lies on the person who makes the allegation *Munna Lal v Kameshori Dulla* 114 Ind Cas 801=A I R 1929 Outh 115 The burden of proving that the executant of a document is a minor lies on the person alleging it *Surja Prasad v Joti Prasad* 87 Ind Cas 445=L R 6 All 283=47 A 493=A I R 1925 All 681 In a suit brought on the basis of a contract, the burden of proof lies on the party who asserts that he was a minor at the time of contract *Khanhailal v Debi Prasad*, L R 6 All 219=87 Ind Cas 778=A I R 1925 All 399 *Swaj v Joti Prasad*, L R 6 All 293=87 Ind Cas 441=47 A 493=A I R 1925 All 681 *Naram Singh v Chhany* 22 A L J 461=79 Ind Cas 945 When the validity of a contract is questioned on the ground that the executant is a minor it is for the plaintiff to establish by *prima facie* evidence that the contract was valid and entered into by a person who was competent to do so *Bachcha Lal v Hosan Singh*, 66 Ind Cas 814=(1922) All 240 It is on the executant of a deed who pleads that he was a minor on the date of the execution of the deed to prove his plea *Kandhai v Mohammad* 63 Ind Cas 52, *Naramtullah v Gopraj*, 53 Ind Cas 136=6 O L J 376

**Mortgage** Where a mortgage deed contains an admission of receipt of consideration before the Sub Registrar the onus is upon the mortgagor to disprove his admission *Goundappa v Sonlal*, 109 Ind Cas 149 Where land is mortgaged without possession and possession is subsequently given to the mortgagee the burden of proving that the transaction by which possession was given was an outright sale lies in the first instance on the mortgagee *Maung Pua v Maung Lo Sa* 5 Kang 668 Where joint family properties are mortgaged at a high rate of interest the mortgagee must prove that the rate is justified and that there was necessity for the same *Kedar Nath v Bhukhan Singh* 92 Ind Cas 679 In a suit for redemption the onus is on the plaintiff to prove the mortgage he set up, i.e. that it was still subsisting *Rinda v Sunlata Prasad* 95 Ind Cas 945 Where a mortgagor admits execution of a mortgage deed it is for him to prove that he has not received the consideration recited in the deed *Jua Ram v Thanda Singh*, 92 Ind Cas 46 Where land is mortgaged without possession and subsequently possession passes to the mortgagee the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it *A F Chetty Firm v Mohamed Kasim* 3 Rang 367=90 Ind Cas 1011=A I R 1925 Rang 577 Where the rate of interest is usually high,

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the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate. *Sagor Singh v Mithura*, 87 Ind C 1035=A I R 1925 Oudh 750 Ordinarily the onus is on the *quondam* mortgagee to prove the validity of the foreclosure proceedings. It does not cease to be so simply because, there was an entry in the register that mutation had been effected in favour of the mortgagee. *Kuldu v Suran*, 26 P L R 751 Where the execution of the mortgage document is admitted but it is pleaded it was fictitious and merely a sham the onus of proving it lies on the party who sets it up. *Chhidu v Desray*, 21 A L J 793 In a suit for redemption the burden of proving a mortgage is upon the mortgagor. *Rampi v Mikhim Tal* 71 Ind C 651=1923 All 111

**Notice** Where the defendants led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the onus on the other side. *Ladha Ram v Inda Ram*, 1923 I L 339 The burden of proving a purchase without notice of a prior mortgage or contract is on the subsequent purchaser and the rule is the same for moveable as well as immovable property. *Maung v Bansu* 75 Ind C 329=2 Bur L J 63=1923 Rang 153 The burden of proof of the giving of notice of the inquiry into the conduct of a person lies on the authority holding such enquiry. *Rangaswami v Seshari*, 1 L W 611 Where there is an affidavit of the person serving the notice of proper service thereof, the party who impugns the fact ought to prove that there was no service. *Krishna v Bhandor* A I R 1925 Cal 722

**Partition** Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. *Subramanya v Subramanya* 56 I A 248=52 M 519=31 Bom I R 830=A I R 1929 (P C) 156 The onus is heavy on the person who desires to show that certain partition lists were not acted upon and the parties continued to be joint in spite of the lists. *Venkata Krishnayya v Rangayya*, A I R 1928 M 865 In a partition suit among Muhammadans, burden is on plaintiff to show that it was acquired by the help of joint fund. *Yusuf Mohamed v Abubucker*, A I R 1925 Sind 26

**Purdanashin lady** Where a person relies on a document purporting to be a gift and is making a claim against a *purdanashin* woman, based upon a document of this kind, it is incumbent upon him to give satisfactory evidence that the document has been explained and understood by the lady. *Aisha Bibi v Muthfur-unnissa*, 22 A L J 205=L R 5 A 97=78 Ind C 180=16 A 310

**Partnership** Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death. *Ismail v Tayyabali*, A I R 1929 Sind 182

**Perpetual and permanent settlements** If a person sets up as against the Government a permanent or perpetual settlement it is incumbent on him to make out that case. *Prosunno v Secretary of State*, 26 C 792=3 C W N 695

**Possession** In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside. *Sati Prasad v Gobinda* 56 C 805=33 C W N 227=A I R 1929 Cal 325 The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession is forced to institute a suit under Order 21, rule 103 C P Code does not shift the burden of proof on to him. *Razman v Falur Mahomed* 82 Ind C 861=A I R 1925 Sind 201 Where in a suit for recovery of possession of land or declaration of title the defendant in possession does not admit the title of the plaintiff, but says that the plaintiff is his *benamidar* it is for the plaintiff to prove that the defendant is not the owner. *Lal Mahmud v Ayejuddi Sheikh*, 57 Ind Cas 972 Where the plaintiffs who are in possession

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of a property before the institution of the suit ask for a declaration of their title and confirmation of their possession as against the defendant, who seeks to disturb the possession it is for the defendant to show that he has a better title than the plaintiffs *Mahomed Husan Mia v Abdul Hamid*, 50 Ind Cas 131

**Posting of letter** The presumption is that if a letter properly directed is proved to have been posted, it reached its destination and was received by the person to whom it was addressed *Kamthya v Khalik*, 8 Pat L T 633=102 Ind Cas 821=A I R 1927 Pat 305

**Pre-emption** It is a settled rule of law that a very slight proof will shift the burden to the vendee to prove the actual payment of the price entered in the deed *Abid Ali v Han Prosad*, 119 Ind Cas 459=A I R 1929 Oudh 486 In a suit for pre-emption, when the plaintiff alleges that the price mentioned in the sale deed is fictitious or inflated the burden of proof is on him to show that the property is sold for a price less than what is stated in the sale deed. Even slight evidence may be sufficient to shift the *onus* on to the defendant *Shuapi v Rotnam*, 89 Ind Cas 768 In a suit for pre-emption the *onus* is on the vendee to prove that the consideration stated in the sale deed was really paid and there was an actual payment *Ahmadyekhan v Gulmur*, 75 Ind Cas 271

**Promissory note** Where the execution of a promissory note is admitted, the burden of proving absence of consideration is on the party who sets it up *Hanhar Prosad v Mahabir* 79 Ind Cas 1055 Where receipts for money paid are taken in the shape of promissory notes the burden of proof of payment is on the person setting it up *Hoe Moe v J M Seedat* 2 Rang 349=1925 Rang 22

**Railway Cases** Where a Railway Company was sued for compensation for non delivery of goods, held that the Railway must first prove loss of goods and on such proof the *onus* will shift to the plaintiff to prove wilful neglect on the part of the Railway or its servants etc according to the terms of risk note *E I Hy Co v Pujara Lal*, A I R 1928 Lah 774

**Recital in a deed or other instrument** Where a mortgage document was executed by the father of the defendant and contained a recital that the consideration had been received by the executant, the burden lay upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained untrue recital of this description *Benoybhushan v Dhuenbra*, 38 C L J 114=74 Ind Cas 178 The *onus* of proving that a document to which a person has affixed his signature does not contain a correct statement of the facts and of the intention of the parties is on the person who makes the allegation *Ramdas v Chandrabali* 4 Pat L W 237=44 Ind Cas 399 When a party to a contract alleges that it is different from what on the face of it purports to be the burden of proving his case lies on him, since there is a presumption that a transaction is in substance what it is in form *Fshoon Doss v Venkata* 17 M 190

**Record of rights** There being a presumption of the correctness of the entries in a record of rights the *onus* is on the party challenging the same to prove it *Parneswar Singh v Sureba Kuer* 88 Ind Cas 495=6 Pat L T 805=A I R 1925 Pat 30 *Sheo Pershad v Jhaman Singh* 3 Pat L J 87=87 Ind Cas 41=A I R 1925 Pat 498 Where the record of rights contain an entry showing a person as possessing occupancy rights the person who wants to challenge it ought to show it is wrong. The mere fact that he was holding without rent is not sufficient *Gauri v Jhanda L R* 1 A 372 The entry in a record of rights of an occupancy right creates a presumption in favour of the tenant which it is for the landlord to rebut *Bisesswar v Parbhoo Nath* 34 Ind Cas 506.

**Release** In a suit to set aside a release deed on the ground that it was obtained by misrepresentation and that there was no consent, when the defendant pleads that there was consideration and that the arrangement came to was reasonable, the *onus* is on him to prove it *Hem Singh v Bhagaboto Singh*, 80 Ind Cas 67

**Rent** Where the rent has never been paid the burden of proof that rent was agreed to must surely lie on the person who asserts it and that in this case lies on the defendant in the suit for ejectment *Suldeo v Abdul*, L R 4 A 229

**Sale** Mere denial by the vendor of the receipt of the consideration and knowledge in the recitals of a deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving the payment of consideration Where the plaintiff wished to set aside a contract of sale of which there has been performance and under which the defendant was in possession and enjoyment of the subject matter and in possession of the title deeds he must establish at least a good *prima facie* title to the relief he seeks *Rampal Ram v Subha Singh*, 1 Pat L J 17=53 Ind Cas 83

**Sale for arrears of revenue** In a suit by a ryot against an auction purchaser claiming protection from ejectment under the proviso of section 37 Act XI of 1859, the *onus* of proving the character of the holding, is on the ryot *Donmu v Pudmu*, W R 1864 Act X 128 Where a taluk is sold at a revenue sale under Act XI of 1859, the burden of proving that under tenures in the taluk fall under any of the exceptions to s 37 of that Act, lies on him who alleges the under tenures to be within those exceptions *Rash Behari v Hara Monce* 15 C 55 The right of a purchaser at a revenue sale in getting rid of incumbrances is such that he is in many cases allowed to have the benefit of throwing the burden of proof on his opponent *Nityanund v Banshi*, 3 C W N 341

**Specific performance** In a suit for specific performance of a contract if the plaintiff proves his prior contract the burden of proving a subsequent *bonafide* transfer for value without notice under section 27(b) of the Specific Relief Act lies on the party alleging it *Ramdeni v Guman*, 10 Pat L T 307=119 Ind Cas 70=A I R 1929 Pat 300

**Vendor and purchaser** Where a person enters into an agreement to sell his property to one person but subsequently sells it to another person, it is for the vendee to prove that he is a transferee in good faith and without notice of the original contract *Juan Das v Lorind Chand*, 96 Ind Cas 175=A I R 1926 Lih 580 Where after an agreement to sell lands in favour of a person the lands are actually sold to another the burden of proving that the vendee had no notice of the prior agreement to sell is on him and on the person who had an agreement to sell in his favour *Imam Din v Muhammad Din*, 89 Ind Cas 122 A person who derives his title through a purchase must prove that his vendor had a title in the property sold *Gulab Din v Monji Ram*, 38 P L R 1919=51 Ind Cas 575

**Wills** "In the Court of Probate" says *Baron Parke* in *Baker v Ball*, 2 Moo P C 317 at pp 319, 320 "Where the *onus probandi* most undoubtedly lies upon the party propounding the Will, if the conscience of the Judge upon a careful and accurate consideration of all in evidence on both sides, is not judicially satisfied that the paper in question does contain the last Will and testament of the deceased, he is bound to pronounce his opinion that the instrument is not entitled to probate For if the party upon whom the burden of proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal of the truth of the proposition which he has to maintain he must fail in his suit" Where it has been proved that a Will has been duly executed by a person of competent understanding and apparently a free agent the burden of proving that it was executed under undue influence is upon the party who alleges it *Boys v Rossborough* 6 H L C 6 (19) So "the *onus probandi* lies in every case upon the party propounding the Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator In all cases the *onus* is imposed on the party propounding a Will, it is in general discharged by proof of capacity and the fact of execution for which the knowledge of and assent to the contents of the instruments are assumed *Barry v Butlin* 2 Moo P C 482 (484) *Brojeswar v Rasik* 85 Ind Cas 581, *Woomesh v Rashmoni*, 21 C 279, *Surendra v Ramdasi*, 47 C 1043=21 C W



**S 105.** N 860 *Raymudar v Ramjatal* 5 Lah 263, *Mul Lahai v Waman*, 69 Ind C 572, *Lala Singh v Kumar Bhojy Protap*, 41 C L J 300, *Raj Bachan v Shal ram* 5 O L J 519=47 Ind C 963, *Murad v Akadun* 12 Ind C 49=114 P W R 1911 *Prasannomoyi v Baiduntha*, 25 C W N 779, *Ryudurai v Krishna*, A I R (1926) Pat 269, *Binedeswar v Ml Baisakha*, 24 C W N 674 *Saoyoni v Haridas* 26 C W N 113 *Robins v National Trust Co Ltd* 101 Ind C 903 (P C)=A I R 1927 P C 515 *Ranganya v Sheshappa*, 101 Ind C 416 The onus of proving capacity to execute a Will lies on the person who wants to propound the Will *Uttarai v Jansetty* 26 Bom L R 579=29 C W N 45=1924 (P C) 28 The burden of proving a Will lies on those by whom it was propounded *Bhagbhari v Akhatun* 50 Ind C 118 The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non execution of the Will to him *Kesho v Vithal* 8 N L J 123=89 Ind C 465=A I R 1925 Nag 427

**105** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances

#### Illustrations

(a) A accused of murder, alleges that by reason of unsoundness of mind, he did not know the nature of the act

The burden of proof is on A

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control

The burden of proof is on A

(c) Section 325 of the Indian Penal Code provides that whoever except in the case provided for by section 335 voluntarily causes grievous hurt shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 325

The burden of proving the circumstances bringing the case under section 335 lies on A

**Scope of the section** The rule that every one is presumed to be innocent till he is proved to be guilty, is sometimes spoken of as if it was peculiar to the administration of criminal law. In the Indian Evidence Act, s 101, illustration (a) it is given as a particular instance of the general principle equally applicable to a suit for ejectment and to a trial of murder. The rule merely means that a person who is accused of a crime is not bound to make any statement or to offer any explanation of circumstances which throw suspicion upon him. He stands before the Court as an innocent man till he is proved to be guilty. It is the business of the Crown to prove him to be guilty, and he need do nothing but stand by and see what case has been made out against him. As far as the case of the Crown is concerned he cannot be called upon to take part in the proceeding, except in so far, for his own protection, the Court may question him under s 342 of the Criminal Procedure Code. If there is a piece of evidence against the prisoner which might be cleared up one way or the other by a word from him he is not bound to say that word. He is entitled to rely on the defence that the evidence as it stands is inconclusive, and that the Crown is bound to make it conclusive without any help from him. Further in making out their case, the prosecution have to get rid of every presumption against it, and to a certain extent, there is a presumption in favour of innocence. When the case for the Crown has closed

it is for the prisoner or his adviser, to consider whether any case which he need answer has been made out against him. This will depend on the nature of the charge. The definition of every offence must be satisfied by proof, and if this proof fails as regards any necessary item in the whole fact. Assuming the minimum of proof to be supplied the Crown has offered evidence which may be sufficient for a conviction. The question is whether it is sufficient. It may be that the evidence is unworthy of belief or that, if believed it is consistent with the innocence of the prisoner in either of which cases he ought to be acquitted. It may be, however, that if it is believed it is sufficient for a conviction and then it will be necessary either to contradict it or to explain it away. When the matters have reached this point it is evident that the presumption of innocence has vanished. There is no presumption in favour of the existence of any particular fact which is necessary to make out innocence. If it is necessary for a man's defence to establish an *alibi*, he must prove it. [Rule section 103 illustration (6) *supra*] If a man does an act which is *prima facie* criminal but which may be explained away it is his business to offer the explanation, and to supply the evidence which will prove it. (Rule section 106 *infra*) If he relies on the existence of circumstances bringing his case within any of the general exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence it equally lies upon him to prove that the circumstances exist, and till this proof is offered the Court will assume that they do not exist. *Maynes Cr I* in pp 239 240. So where insanity is alleged on behalf of a prisoner, the burden of proving such a degree of insanity as exempts him from punishment lies on the prisoner. A mere doubt is to his insanity is not sufficient. The jury must be satisfied by the prisoner on whom the *onus* lies, that he was insane. *Per Rolfe B in Reg v Stiles* 3 C & K 185. So under the provisions of this section an answer setting up the right of private defence must be supported by evidence, giving a full account of the transaction from which the charge against the accused person arises. *In re Jamsheer Sirdar* 1 C L R 62. Unless a plea that the acts with which an accused person is charged as constituting an offence came within one of the exceptions named in the Penal Code is distinctly taken by the accused the Court is not competent to infer from the evidence in the case that any such exception exists in favour of the accused. *Queen Empress v Chauri* A W N 1898, 209, *Queen Empress v Sulha* A W N 1898 210. So this section is an important qualification of the general rule that in criminal trials the *onus* of proving everything essential to the establishment of the charge against the accused lies on the prosecution. *King Emperor v Agra Chu* U B R 1906 Lxvise, 7.

This section is at variance with what was formerly the law in regard to those exceptions which are called special. *Mal L* 81. General exceptions are those applicable to all crimes and are stated in chapter IV of the Penal Code. Special exceptions are exceptions restricted to a particular crime. Formerly it was the duty of the prosecutor to negative the existence of special exceptions. The duty of proving special exceptions might press hard on the accused, when applied strictly to such an offence as defamation the definition of which is really contained in the exceptions. *Ibid*. The state of law before the passing of the Indian Evidence Act (I of 1872) was thus stated by *Prinsep J* in *In the matter of the Petition of Shibo Prosad Panday* 4 C 124 (130) "The Penal Code contained a chapter of general exceptions to offences (Chapter IV), and for certain offences special exceptions were provided. The Code of Criminal Procedure made especial provisions for these exceptions and the burden of proof to establish any of them. The effect of ss 235 and 236 was that it was for an accused person to establish the existence of any of the general exceptions while s 237 provided that if the charge denied the existence of any of the especial exceptions to an offence, the absence of circumstances constituting such exception was to be assumed. This was the state of the law without Presidency towns until the Evidence Act I of 1872 and the Code of Criminal Procedure of 1872 were passed, when ss 235 and 237 were repealed with the rest of that Code and in their place s 105 of the Evidence Act was enacted which threw the burden of proof on the accused to prove the existence of any general or special exception." So far, then, as the Special Exceptions are

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concerned, an important alteration has been made in the law. *Field Fr* 350. But in *Imperor v Hajid Husam* 22 A 151 at p 456 the Court observed. The Evidence Act in laying down the principle set forth in section 105 has at times been said to have introduced something new and to have put the law regarding criminal cases upon a different basis than the one upon which it stood before it was enacted. We are unable to take this view. Undoubtedly in criminal trials the *onus* of proving every particular element, if we may use the term, which goes to the making of an offence lies upon the prosecution, and if the prosecution do not prove all such elements and room is left for doubt the benefit of that doubt must unquestionably be given to the accused. But there are several cases both in English and in Indian case-law which satisfy us that in enacting section 105 the Legislature laid down no new principle but put in a crisp and rigid form that which was before generally acted upon. *King v Turner*, 5 M & S 206. *Rex v Handson*, quoted in Russell on Crimes Vol 3 p 107, *Reg v James Johnson* (1902) 1 Q B 540. In the case of most general exceptions the circumstances which bring the case within a general exception are circumstances within the special knowledge of the accused person and lie within the rule that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. In *R v Turner* 5 M & S 206 Lord Ellenborough said. The question is upon whom the *onus probandi* lies whether it lies upon the person who affirms a qualification, to prove the affirmative or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied and according to the argument of to-day every person who lays an information of this sort is bound to give satisfactory evidence before the Magistrate to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. See also *Spiers v Parler*, 1 T R 140 and *Jelf v Ballrod* 1 B & P 468, *Heath J*. In *R v Stone*, 1 East, 639, the Judges were equally divided on the point. So even in England there has been some doubt whether if a statute creating a crime contains exemptions or provisos the indictment should negative them or leave the defendant to claim the benefit of them under a plea of not guilty. *Russell on Crimes* p 1934. In *R v James* (1902) 1 K B 540 an indictment against a married woman for stealing the moneys and chattels of her husband did not aver that she was the prosecutor's wife nor that she had taken them when leaving or deserting, or about to leave or desert the husband. It was contended that in as much as a wife cannot at common law be guilty if stealing from her husband the indictment was bad as not containing the words necessary to bring it within 45 & 46 Vict C 75, c 16. After considering all the prior authorities on this point of pleading it was held that conditions in a statute creating an offence, which are a necessary ingredient in the offence are an essential part of the indictment but that it is not necessary to make any allegation as to provisions in favour of the defence nor to negative exemptions or exceptions where they are matter of defence and not part of the statutory definition of the crime, i.e., where the exception etc. is not so far incorporated directly or by inference with the enacting clause that the enacting clause cannot be read without the qualification introduced by the exception. This rule overrides the rule applied in some old cases that the test was whether the exception was part of the enacting clause or tacked on in a proviso or included in another clause of the statute. *Russell on Crimes* p 1935. In *R v Audley*, (1907) 1 K B 383=76 L J K B 270 the rule laid down in *R v James supra* was applied to an indictment for bigamy by a British subject at Gibraltar, which did not aver the accused to be a British subject nor contain any reference to exemptions contained in 24 & 25 Vict C 100 s 57 nor negative any of them. And it was held that the rule above stated applied equally to negative and positive averments. *R v Jameson* (1896) 2 Q B 425 431, *Russell on Crimes* p 1935. When evidence has been given by the defence to support the defence of an exception the burden of proof is discharged if the evidence is believed and the jury have their ordinary duty of deciding a question of fact on the evidence before them. *Whomed v Emperor*, 70 C 318=1923 Cal 517.

**General exceptions** Under this section the burden of proving the existence of circumstances bringing the case of an accused person within any of the general exceptions in the Penal Code is on the accused, and the Court shall presume the absence of such circumstances. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by defence that a general exception would apply then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. *Anandi v Emperor*, 71 Ind Cas 689=45 A 329. In a defence of insanity the onus lies on the person alleging it, i.e., the person charged. *King Emperor v Sheodin* A W N 1901, 132. It is for the party setting up the right of private defence, to prove that he was within the exceptions stated in the Code. *Veerananadan v Emperor* 1912 M W N 404=11 M L F 251=15 Ind Cas 310, see also *Emperor v Gullu* A W N 1904, 113=1 Cr L J 427. Although this section places on the accused the burden of proving in a criminal trial, that they have acted within their legal rights in exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution as well as for the evidence for the defence, on such plea being set up. *In the matter of Kalicharan Mukherjee*, 11 C L R 232. Where an accused person has raised pleas inconsistent with the defence which would bring his case within one of the general exceptions in the Indian Penal Code, he cannot in appeal, set up a case, upon the evidence taken at his trial that his act came within such general exceptions, the circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record. *King Emperor v Wajul Hasan* 7 A L J 438=32 A 451=11 Cr L J 374=6 Ind Cas 589. So the burden of proving the existence of circumstances bringing the case of the accused within certain exception is thrown upon the accused. *Aung Myat v Queen Empress*, L B R (1893 1900), 207. see also *Emperor v Ali Raza* 26 Cr L J 310. When one man takes away the life of another, he should prove circumstances, if any justifying his doing so. If the act is done in exercise of the right of private defence it lies upon him to show that he did not exceed that right. *Asiruddin v King Emperor*, 8 C W N 714=1 Cr L J 708, *Yusuf Husun v Emperor*, 40 A 284=16 A L J 169=44 Ind Cas 675=19 Cr L J 371. This section says nothing about pleas but places the burden of proof in certain circumstances on the accused. But if the prosecution has already performed the task for him by letting in evidence circumstances from which such a plea necessarily follows, it is the duty of the Court to give him the benefit of it. *Mangal Ganda v Emperor* 254 Cr L J 1077=81 Ind Cas 901=1925 Nag 37.

**Special exceptions** Under the Criminal Procedure Code, 1861 it was necessary in a charge upon a section of the Penal Code containing special exceptions, to aver the absence of any special exception. *In re Shubo Persad* 1 L R 4 Cal 12. This necessity no longer exists in regard to either special or general exceptions. *Cum Et* 296. So now the burden of proving the existence of circumstances bringing a case within any special exception or proviso contained in any part of Penal Code is upon the person accused and the Court shall presume the absence of such circumstances. *Emperor v Chand Singh* 8 Ind Cas 259=11 Cr L J 612. The onus to show that any offence falls within a general exception of the Gambling Act is upon the accused and it is for him to show, in order to bring the case under s 10 of the Gambling Act that the game played is a game of mere skill. *Ram Neeraz v Emperor*, 15 Cr L J 276=23 Ind Cas 484. The burden of proving the exception of good faith is on the accused. A mistake of law does not make an exception under s 79 of the Indian Penal Code even when due care and attention under s 52 is proved. As a rule, when the act done comes within the words of the Penal Code proof of a general or special exception is required to take it out of the same. *Queen Empress v Bu Mahal v Rat Un* Cr C 820. The English rule is thus stated by *Lord Altherton in Rex v James* (1902) 1 K B 540 (547) "It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same

**S 106.** section of the Act of Parliament creating the offence unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clauses so that the enacting clause cannot be read without the qualification introduced in the exception. But this section must be construed without reference to any technical rule of English Law. This section which applies generally to all criminal trials is analogous to the last part of section 11 of Stat 11 & 12 Vict C 41 which applies to summary proceedings before Magistrate and which runs as follows: 'If the information or complaint in any such case shall negative any exemption exception proviso or condition in the statute on which the same shall be founded it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.' *Emperor v A J Coote* 23 Ind Cas 195=15 Cr L J 213=7 Bur L T 187=7 L B R 319. The words not authorized in section 291 A, Indian Penal Code means no more and no less than 'unless authorized or not having been authorized or without authority' and are in the nature of an exception or proviso and under section 105 of the Evidence Act the burden of proof lies on the accused to show that the lottery was authorized by Government. *Ibid*. In prosecutions under the old game laws of England, which made certain acts offences unless the accused had certain qualifications it was not necessary for the prosecution to prove the absence of such qualification. So too, in action for a penalty under 55 Geo III C 191, section 20 for practising as an apothecary without having obtained a certificate of qualification it was held that the onus lay on the defendant to show that he had obtained a certificate and that it was not necessary for the plaintiff to prove the negative. *Apothecaries' Company v Harborton* 2 B & Ald 40.

Where a person is charged with having in his possession any quantity of fermented liquor larger than that specified in s 3 (1) (n) of the Excise Act and pleads that he purchased it for his private use and not for sale, the burden of proving such special exception lies on him under s 105 or s 106 Evidence Act. *King Emperor v Maung Pua* 5 L B R 52 (I B)=2 Ind Cas 543. Although the general rule in all the criminal proceedings is that the onus of proving every thing essential to the establishment of a charge against an accused lies on the prosecution, yet this section constitutes a departure from that rule and makes it obligatory upon the Courts to presume the absence of such circumstances as may bring the accused within some general or special legal exemption, unless or until their existence is shown by the accused or is admitted by the prosecution itself. So in a defamation case when once the complainant has proved that the accused has made a *prima facie* defamatory imputation it rests with the accused to show that he is justified in doing so. *Abdur Razal v Gaur Nath* 4 P W R 1910 Cr =5 Ind Cas 714=11 Cl L J 205. *Gouramma v Ieramma*, 6 Mys J J 496. Under this section the Court has to regard the absence of grave and sudden provocation as proved until the contrary is proved by the accused on whom the onus lies. *Emperor v Upendia* 19 C W N 673=21 C L J 377=16 Cr L J 561=30 Ind Cas 113 (F B).

Burden of proving fact especially within knowledge

**106** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him

#### Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him

**Principle.** The principle underlying this section is based upon the capacity of parties to give evidence. This section has its origin in the well known maxim *Lex neminem cogit ostendere quod nescire presumitur*. The law will not force a man to show a thing which by intendment of law lies within his knowledge. *Ploud* 46, *Best* E. § 274. From the very nature of the question in dispute all

or nearly all the evidence that could be adduced respecting it must be in possession of or be easily attainable by, one of the contending parties who accordingly could at once put an end to litigation by producing that evidence while the requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be production of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant. *Ph & Im Lc* § 29, *R v Burdett* 1 B & A 94 *Dulson v Evans* 6 L R 57, *Caldar v Rutherford*, 3 B & B 302, *Sunderland Marine Insurance Company v Kearney* 16 Q B 925, *Best Lc* § 271

**Not a general rule.** The characteristic then of the burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages and apportionments definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favour by the tribunal. It is thus apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having the affirmative allegation. But this is not an invariable test, nor even a significant circumstance, the burden is often on one who has a negative assertion to prove. A common instance is that of a promise alleging non-performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the enquiry which determines to what party's case a fact is essential. The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience of different situations. The controversy whether a plaintiff in tort should be required to prove his own carelessness or the defendant should be required to prove the plaintiff's carelessness has depended in part on experience as to a plaintiff being commonly careful or careless in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available. This last consideration has often been advanced as a special test for solving a limited class of cases, i.e. the burden of proving a fact is said to be put on the one who presumably has peculiar knowledge enabling him to prove its falsity if it is false. But this consideration furnishes no working rule, if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as one to be kept in mind in apportioning the burden of proof in a specific case. There is then, no one principle, or set of harmonious principles, which afford a sure test for the solution of a given case. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one, and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific cases, resting for its ultimate reasons upon broad and undefined reasons of experience and fairness. *Green Lc* § 11(w)

**Scope of the section.** This is an exception to the general rule. Where the subject matter of a party's allegation [(whether affirmative or negative)] is peculiarly within the knowledge of his opponent it lies upon the latter to rebut such allegation. *Phup Lc* 31. In *R v Turner* 5 M & S 206 211, *Bayley* 1 and 'I have always understood it to be a general rule that if a negative averment be made by one party which is peculiarly within the knowledge of the other the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative'. This rule is applicable whether it be affirmative or negative and in civil or criminal cases. *Dulson v Evans*, 6 L R 60. It is only reasonable that where one party can easily produce what holds him harmless, and the other party have great difficulty in

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doing so the *onus probandi* should be thrown upon the former. In illustration (a) it might be impossible for the other side to prove his opponents' intentions. In illustration (b) we see how easily the accused can exonerate himself. *Not Ex* 291. When a negative is averred in pleading, or a plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative, but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it, or upon his failure to do so it must be presumed it does not exist, which of itself establishes a negative. *Burr Jones* § 181. For instance where a carrier has undertaken to carry goods safely fire and robbery excepted, or where a horse has been warranted sound except as to a kick on its leg, or in the ordinary case of marine policies of insurance, when the underwriters provide for their own immunity in certain contingencies. It has been said that when the means of proof are peculiarly within the knowledge of the defendant or prisoner, a general sense of convenience shifts the burden of proof, as for instance where a hawk or pedlar stands charged with trading, without a license it is easy for him to produce his license, and so end the discussion, where as it might throw the most serious impediment in the way of the prosecutor if he were bound to prove that the hawk was not licensed. *Not Ex* 291. But where the fact lies solely within the knowledge of one party, there is an important consideration in determining the amount of evidence necessary to be produced by the other party. 'The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the burden of proving that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. *Steph Ex* Art 96. This is often illustrated in prosecutions for selling liquor or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted for example by producing the book in which the licenses are recorded, and if the book fails to show that a license has been granted the burden is shifted upon the defendant to prove the fact claimed by him, but the greater number of authorities hold that where a license would be a complete defence the burden is upon the defendant to prove the fact so clearly within his own knowledge. *Burr Jones* § 181. In *Commonwealth v. Theriot* 24 Po 374 (U S) the Chief Justice said. The last exception necessary to be considered is that the Court ruled that the prosecutor need give no evidence in support of the negative averment, that the defendant was not duly licensed thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defence. The Court entertain no doubt, that it is necessary to aver in the indictment, as a substantive part of the charge that the defendant at the time of selling was not duly licensed. How far and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty upon which there are conflicting authorities. Cases may be suggested of great difficulty on either side of the general question. Suppose under the English game laws an unqualified person prosecuted for shooting game without the license of the lord of the manor and after the alleged offence and before the trial the lord dies and no proof of license, which may have been by parol can be given? Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again suppose under the law of this commonwealth it was made penal for any person to sell goods as a hawk and pedlar without a license from the select men of some town in the commonwealth. Suppose one prosecuted for the penalty and the indictment, as here contains the negative averment, that he was not duly licensed. To support this negative averment, the select men of more than

three hundred towns must be called. It may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden to succeed without proof. This is true, but when the proceedings are upon statute an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other side, if it exists leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty who should not produce a license. Besides the common law rules of evidence are founded upon good sense and experience and adapted to practical use, and ought to be applied as to accomplish the purposes for which they were framed. But the Court have not thought it necessary to decide the general question, cases may be effected by special circumstances giving rise to distinctions applicable to them to be considered as they arise. In the present case, the Court are of opinion that the prosecutor was bound to produce *prima facie* evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all averments necessary to constitute the substantive offence must be proved. If there is any exception, it is from necessity or that great difficulty, amounting practically to such necessity or, in other words where one party could not show the negative and where the other could with perfect ease show the affirmative. Thus where plaintiff relies on a document on the face of which there is a material or suspicious alteration, it lies on him to explain it: is a general rule, though circumstances may arise which will exempt him, or even shift the burthen of proof on to the other side, as for instance if the facts concerning the alterations are more especially within his knowledge. *Not Et* pp 292, 293. In *Ellin v Janson*, *Aldeison B* on the dictum of *Bayley J* in *R v Turner*, 5 M & S 206, 211 (*supra*) being quoted said "I doubt, is a general rule, whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it in order to cast the *onus* on the other side." And in *R v Burdett* 4 B & A 95 140 *Holroyd J*, states in the most explicit terms that the rule in question "is not allowed to supply the want of necessary proof, whether direct or presumptive against a defendant, of the crime with which he is charged, but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him whether direct or presumptive when it is unopposed, un rebutted or not weakened, by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true." *Best Ev* § 275.

In *R v Hanson*, (*Russ on Crimes* p 1956) there had been a conviction by two Justices for selling ale without an excise license. The information negatived the defendant's having a license, but there was no evidence to support this negative averment, the only evidence to support the conviction being that the defendant had in fact sold ale. The question was whether the informer was bound to give evidence to negative the existence of a license. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a license, for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation. *R v Turner, supra* was cited as an express authority on the point. *Abbot C J* in delivering the judgment said "I am of opinion that the conviction is right. It seems to me that this case is not distinguishable from *R v Turner*. It is a general rule that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor in general is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *R v Turner* all the learned Judges concur in that principle. I concur in all the observations upon which the judgment of the Court in that case was founded and I think every one of them is applicable in principle to this. The general principle and the justice of the case are here against the defendant. It is urged, that if we decide against the defendant we shall open the door to a great deal of inconvenience, that by no means follows, this man might have produced his license without any possible inconvenience, which would at once



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have relieved him from all liabilities to penalties. Probably the whole enquiry before the Magistrate was as to the fact of selling the ale, and that nothing was said about the license, but however I think, by the general rule the informer was not bound to sustain in evidence the negative averment that the defendant had not a license. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule, there is no general rule to which there may not be exceptions, all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license whereas if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the Magistrate whether the evidence produced is proper to sustain the negative, whether a book should be produced, or an examined copy, and many other questions of that sort whereas none can arise when the defendant himself produces his license. Thus the afore, not being one of the excepted cases, but a case falling directly within the general rule I am of opinion that judgment must be given for the crown. *Apothecaries Company v Bentley Ry & M* 139 = 1 C & P 535 was decided upon the same principle. That was an action for a penalty under the Apothecaries Act, 1815 (55 Geo III C 194) for practising as an apothecary without having obtained the certificate required by the Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary etc "without having obtained such certificate as by the said act is directed. No evidence was offered by the plaintiffs to shew that the defendant had not obtained his certificate. The plaintiffs having closed their case, counsel for the defendant submitted that there must be a non suit. *Abbott C J* said: I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative the plaintiffs are not bound to prove it but that it rests with the defendant to establish his having a certificate. Cf *R v Harris* 10 Cox 541. This section cannot be utilised to help persons who are representatives of other parties and who step into their shoes. *Raghavendra Rao v Venkataswami* 1929 M W N 752 = 30 L W 966 = A I R 1930 Mad 251.

**Fact especially within the knowledge of any person.** Where a suit was brought by the legal representative of a deceased person who was killed at an accident while travelling in the train of the defendant company the onus of proving that there was no negligence on the part of the Railway Company lies on such company. *The Madras Railway Co v Rahhal Kaludas* 4 M L J 251. *Great Western Railway Company of Canada v Baird* 1 Moore's Privy Council Cas New Series 101. In a suit against a Zamindar to reverse the sale of a putnee tenure held under Regulation VIII of 1819 on the ground of non service of notice held that the defendant was bound on the principle laid down in section 106 Evidence Act to prove service. *Doorga Churn v Syed Najmooddeen* 21 W R 397. In a suit by a *Lakherajdar* for the possession of land of which he has been dispossessed by the present *putneedar* and which is in a village whereof the plaintiff had been a former *putneedar* the onus is on the plaintiff to prove that the land was *lakheraj* during the period that he held the village in *putnee*. *Nubo Krishna v Promotha* 5 W R 119. When a *ryot* is holding lands of considerable extent under a zamindar it is a matter peculiarly within his own knowledge of what that holding consists, and if he alleges that one or two plots occupied by him are held under a different title it is for him to show it. *Ram Coomar Ray v Breejoy Gobind*, 7 W R 535. In a suit for pre-emption where the pre-emptor claims the property for a price less than that mentioned in the sale deed *et prima facie* lies upon him to prove that the property was sold for a smaller price. But very slight evidence on his part is sufficient to shift the burden of proof upon the defendant (vendor and vendee) who must know the real facts and who must be in a better position to give evidence relating to actual price. *Bhagwan Singh v Mihal Singh* 5 A 181. *Sanakkul Iyer v Lochman Iyer* 6 A 345. *Sheeporgaiah v Phumray* 9 A 22 = 1 A W N 1857, 39. *Abdul Wajid v Imolal* 29 A 615. *Mulham v Jahan* 16 A I J 535. But the date of the child's birth or death is not a fact peculiarly within the knowledge of its father. It is a fact which

is within the knowledge of any person who was present at the birth or death *Dolganyan Singh v Parsudi Narain*, 11 Ind Crs 202 Where the decree holder of one A attached property standing in the name of A's wife, the onus lies on A's wife that the purchase money was supplied by her *Sanguaraya v Balambul* 17 M L J 339 Where the defendant company intentionally caused or permitted the plaintiff to believe that cash payable in respect of the goods to which the delivery order related had in fact been paid and the plaintiff acted on such belief, held that the defendants cannot be allowed to deny that such cash was paid and that they cannot claim to be entitled to the vendor's lien as against the plaintiffs Where the defendant company adduced no evidence to prove that the goods to which the delivery order related were not ascertained, held that they ought to have proved the non ascertainment of goods because it was a fact which was especially within their knowledge *Anglo India Jute Mills v Omademull* 38 C 127 Where a party propounds a document, the presumption under this section is against him *Tahibani v Blackwell*, 6 S L R 228 In a suit by a purchaser of a tenure or holding at a rent sale to annul an alleged incumbrance, the onus is in the first place on the plaintiff to show that the interest sought to be annulled is an incumbrance, but when once that is established the onus shifts on to the incumbrancer to prove that his incumbrance is saved though being a protected interest The existence of such a 'protected interest' as a right of occupancy is a matter specially within the knowledge of the person claiming it and the onus under s 106 Evidence Act, is on him *Harmoni v Moti Shailh*, 16 C W N 779=15 Ind Crs 30, see also *Jogesh v Rohini* 21 C L J 65, *Somer v Mahabhorat* 16 C W N 777

Where in a suit brought to question the legality of a tax imposed upon the plaintiff under section 85, the defendant Municipality averred that the tax had been imposed upon the circumstances and property of the plaintiff within the Municipality the burden of proving these facts lies on the defendant Municipality, under this section *Debnarian Dutta v The Chairman of the Baruipur Municipality*, 17 C W N 1230=20 Ind Cas 264 In order to apply this section the knowledge attributed to a particular person must be in the nature of something peculiar There is no difference between corporations and individuals so far as the rule of burden of proof goes *Lachminarain v Chaudman Ranchi Municipality* 1 Pat L J 168 Where a suit upon a mortgage is contested by a stranger who denies that the bond was executed and also asserted that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case *Kunorappan v Narayan* 35 Ind Cas 455 In the case of a contract if a plea of infancy is set up, it is for the party who sets it up to prove it *Jodi Bibi v Vajjan Khan*, 26 Ind Crs 407 In a suit against an ordinary bailee the limits of whose responsibility are defined in ss 151 and 152 of the Contract Act for not taking care of the goods and saving them from loss, e.g. loss of fire the bailee should, in accordance with the provisions of section 106 of the Contract Act, call all the material witnesses who were on the spot at the time of the loss but that section of the Evidence Act does not discharge the plaintiff from proving want of due diligence or (expressing it otherwise) negligence on the part of the bailee or his servants *Duarla Nath v The Ruer Steam Navigation Co Ltd* 20 Bom L R 735=27 C L J 615=46 Ind Crs 319 (P C)=1913 M W N 435

In a case where the question is whether a particular act was or was not within the scope of an agent's employment the burden of proving the limit of the agent's authority is on the principal in as much as the character of the authority is a matter specially within the knowledge of the latter *David M Bruce v Mq Kyaw Zin*, 45 Ind Cas 822 see also *Sudaman v Behari*, 15 C W N 953, *Srinikshen v Todhari* 45 Ind Crs 294 *Mothari Concern Ltd v Lachmi* 35 Ind Crs 81 *Madan v Priyanath* 61 Ind Crs 362 *Alhoy v Fradatulla* 61 Ind Cas 883 but see *Jain v Thuker* 2 Pat L J 231, *Mammatha v Rajeswar*, 55 Cil 355=32 C W N 184, *Ishurmali v Keramatullah* 45 Ind Cas 196

An accused person is always entitled to hold his tongue, but where the only alternative theory to his guilt is a remote possibility which, if correct he is in a position to explain, the absence of any explanation must be considered in determining whether possibility should be disregarded or taken into account *Smith*

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*v Emperor* 13 Ind Cas 605=19 Cr L J 189 The fact that a Muhammadan girl below the age of 15 years has attained puberty is a fact within her special knowledge and the burden of proving that lies on her *Helalounessa v Khondalar*, 53 Ind Cas 91 The onus of proving an offence under s 373 I P Code lies on the prosecution but proof of intention or knowledge such as is mentioned in the section must be almost entirely a matter of inference from circumstances Where all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose the burden of proving that she intended to wait until the age of majority had been reached is on the accused *Khetarion v Emperor* 35 C L J 451=(1922) Cal 539 Where property is entrusted to a servant and such servant fails to return the property or to account for it or gives an account which is shown to be false and incredible it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant The provisions of s 106 114 of the Indian Evidence Act can be relied on in support of the above propositions *Sonameah v King Emperor* 2 Rang 476=1925 Rang 47 In proceedings for appraisement of crops when the landlord files his accounts in order to claim a larger amount for himself the onus is on him to show what the actual yield is If he is not able to show what it is he can get only such amount as is admitted by the tenant But in cases where the landlord has never made an estimate or is prevented by the tenants from doing it they cannot thereby deprive the former of his rights This onus will then be on the tenants as persons with special means of knowledge *Bhupeswari v Sulhdeo* 85 Ind Cas 566=6 Pat L J 419=A I R 1925 Pat 505 Where a party fails to give the fullest information about the relationship existing between him and another the Court is justified in drawing presumptions under s 106 of the Evidence Act unfavourable to that party *Mang Iem v Ma Tha Aque* 84 Ind Cas 1009=A I R 1925 Rang 143 Where it is proved that thefts occurred at quite different dates the presumption is that the stolen property passed from the hands of the thief to the receiver at different dates also The burden is then shifted from the Crown to the accused to prove that he received it at one time only in a case where the accused is charged separately of offences of receiving stolen property *Ghulam v Emperor* 96 Ind Cas 120=27 Cr L J 872 The burden of proving the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge does not lie on the mortgagee *Mih Lal v Soni Ram* 115 Ind Cas 451=A I R 1929 All 209 Where a fire is caused by a spark from an engine belonging to a Railway Co, the Railway Co will be liable in damages if it had failed to take all reasonable precaution to avoid diffusion of such sparks as are likely to destroy the adjoining property The onus is on the Railway Co to prove that the engine is fitted with spark protectors *Secretary of State v Darla Piroad* 19 A 559=25 A I J 336=100 Ind Cas 640=A I R 1927 All 349

**Altered instrument** Mr Whitley Stokes in his Anglo Indian Code says 'The Act should have here laid down some rule as to the duty of the party offering in evidence an instrument which on its production appears to have been altered *Stokes Anglo Indian Code Vol II p 911* When the instrument, on its production appears to have been altered, it is a general rule that the party offering it in evidence must explain its appearance, if he is called upon to do so by the issue raised (*Parry v Nicholson* 13 M & W 779 per Parke B) and if the instrument be not admitted by his opponent under notice (*Ierman v Steggall*, 14 Q B D 202), because, as every alteration on the face of a written instrument renders it suspicious it is only reasonable that the party claiming under it should remove the suspicion *Henman v Dufinson* 5 Bing 183 *Clifford v Parley* 2 M & G 910 *Lord Ialmouth v Roberts* 9 M & W 171 *Lord & Bright Ry Co v Larcrough* 2 M & Gr 70 *Lay* § 1519, *Pitamber v Motchand* 1 M I A 420 (129) *Khoob v Moodnaram*, 9 M I A 1 *Lamaswami v Bhawan* 3 M H C R 247 *Kanhaya v Sitaram* 51 Ind Cas 847 This rule is not applicable in cases of documents which are not the foundation of a plaintiff's claim *Amaram v Umedram* 25 B 616

# 107 When the question is whether a man is alive or dead, S 107

Burden of proving death of person known to have been alive within thirty years

and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it

**Principle** Where there is proof of the existence of a state of things and no evidence of its cessation the presumption is that such state of things continues for a reasonable length of time. Hence, if the question is as to the life or death of a person who has been once shown to be living the burden of proving him dead lies at first on the party who asserts the fact. *Wilson v Hodges* 2 East 312, *Kelwick J* however denied this in *In re Aldersey* (1905) 2 Ch 186, *Pouell Lj* 411

**Scope of the section** In *Wilson v Hodges* 2 East 312 *Lord Ellenborough CJ* referred to the case of *Thompson v Walton* 2 Roll Rep 461 where it was decided that where the issue is upon the life or death of a person once shown to be living the proof of the fact lies on the party who asserts the death, for that the presumption is that the party continues alive until the contrary be shown. This presumption of continuance is clearly one of the most practical importance. It is frequently impossible to prove, for instance, the existence of a certain thing in a certain state or condition at the particular moment in question. It is sufficient with the aid of this presumption to prove such existence and state at such an earlier time that according to its nature it may fairly be presumed to have lasted to the moment in question. *Coelle Cas* 7v 29. A person proved to have been alive at a former time is presumed to be alive during the probable period of life's duration, until his death is proved on a presumption of death arises. *Lawson's Presumptive Evidence* Rule 39. The Mahomedan law presumed the death of a missing person ninety years after his birth though he had been seen last within 5 years. But the Hindu law presumed the death of a person of whom nothing has been heard for 12 years or at Benares 15 years. *Cum Lr* 299. The law as it stood before the passing of the Indian Evidence Act is thus summarised by *Mr Goodere* "Presumptions of this class are referred to as existing in favour of stability or immutability. Upon the principle a person once shown to be alive is in the absence of proof to the contrary, presumed living or at all events for a period corresponding with the duration of human life, or until shown not to have been heard of for seven years, while at the expiration of that period the presumption would be reversed and death would be presumed. What is the period which the law could recognize as that of the duration of life has never been arbitrarily fixed, and the application of the presumption might be affected by the particular circumstances in the individual case such as state of health and so forth. Three score years and ten have certainly been prescribed by high authority, as an average limit of human life. Still even the attainment of a hundred is of occasional and not over rare occurrence while instances have been stated extending life to almost half a century further. All ordinary experience, however certainly pointing to a period so rarely exceeding an age of hundred, it would seem that this might be fairly taken as a basis for what after all would be only a presumption, though it has not been ever so fixed by judicial decision. Indeed the period appears never to have been actually fixed at all. A presumption of death at the expiration of a hundred years is recognized however in both the civil and Scotch Law and in a case so long ago is the time of *Lord Hale* there is a dictum of his, that if feoffment be made to the use of one for ninety nine years if he shall so long live and after the death to the use of another this shall not be contingent, for it would be presumed that his life would not exceed ninety nine years. *Hall v Lomer*, Poll 67" *Goodere Lr* 628. "The life of a person once shown to exist says *Justice Hallum* in an American Case "is intended to continue till the contrary is proved or is to be presumed from the nature of the case. The witness if alive is eighty years old, an age that we may admit is an advanced one but is yet one to which life is occasionally—not, unfrequently prolonged. The Court cannot therefore presume, as of course that Hall has not reached

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it *Lord Hale* has indeed said that it shall be presumed that life will not exceed ninety nine years (*Heall v Lomer Poller 55*), and it may be inferred that a man, if of any age already, will not live eighty years besides (*Napper v Sanders Hutton 118*) show me that Hall has been the subject of some quick consuming disease, or of any specific malady at all, and you will change the case.' Here the rule is arbitrarily fixed to thirty years. If a man is shown to have been alive within thirty years the burthen of proving him to be dead lies on the person affirming it *Cum Et 55*. So this section provides in effect, that if it appears that a person, whose present existence is in question was alive within thirty years, and nothing whatever appears to suggest the probability of his being dead, the Court is bound to regard the fact of his being still alive as proved. But as soon as anything appears, which suggests the probability of his being dead the presumption disappears and the question has to be determined on the balance of proof *Mal Ev p 83* Ss 107 and 109 of the Evidence Act should be read together because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together *Dunup v Gobind 8 A 614*

### 108 \*{Provided that when} the question is whether a man

Burden of proving that person is alive who has not been heard of for seven years

is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is \*(shifted to) the person who affirms it

**Principle** Where certain results would have followed if an act or an event had occurred (or not occurred) the absence of those results is some indication that the act or event has not occurred (or occurred). A common class of evidence of this sort is that of lack of news to show probable death of a person or the probable loss of a ship, for as it is usual for living persons to be heard from directly or indirectly by persons having an interest in knowing and for ships officers to leave word of their journey at the ports they touch or with the other ships they pass the lack of any such news indicates their non existence *Higmore Fv § 148*. This is a genuine presumption of universal acceptance to aid proof of death. It is generally said to arise from the person's continuous absence from home for seven years unheard of by the persons who would naturally have received news from the absentee *Higmore Fv § 2721*. In introducing the Bill the *Honble Mr Fitz James Stephen* said 'There are several cases in which Courts would be at a loss to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for for instance may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously six or eight would be equally well but it is also obvious that to have a distinct rule is a great convenience.' *Speech of the Honble Mr Fitz James Stephen on the 12th March 1872*

**Origin and growth of the rule** "It is a rule of presumption that in the absence of evidence to the contrary a person shall be taken to be dead when he has been absent seven years and not heard from. That is a modern rule. It is not at all modern to infer death from a long absence. The recent thing is the fixing of this time of seven years, and putting it into a rule. The faint beginning of it as a common law rule of general application in all questions of life and death is found so far as recorded English cases show in *Doe d George v Jesson 6 East 86* in January 1805. Long before this in 1601 the "Bigamy Act" of James I (Stat. 1 Jac I C 11) had exempted from the scope of its provisions and so from the guilt and punishment of a felon (1) those who had married a second time when the first spouse had been beyond the sea for seven years and (2) those whose spouse had been absent for seven

\* These words in s 103 were substituted for the original words "when and on respectively, by the Indian Evidence Act Amendment Act (18 of 1872) s 9

year, although not beyond the year,—“the one of them not knowing the other to be living within that time” This statute, it may be noticed, did not absolutely treat the absent party as dead, for it did not validate the second marriage in either case. It simply exempted a party from the statutory penalty. Again, in 1667 the statute of 19 Car II, C 6 for redress of inconveniences by want of proof of the decrees of persons beyond the seas or absenting themselves upon whose heirs estates do depend, provided in the case of estates and leases depending upon the life of a person who should go beyond the seas, or otherwise absent him-self within the kingdom for seven years that where the lessor or reversioner should bring an action to recover the estate the person thus absenting him self should be accounted as naturally dead if there should be no sufficient and evident proof of the life and that the Judge should direct the jury to give their verdict as if the person were dead. But if the absent party should not really have died, provision was made for a subsequent recovery by him. The effect of this statute, then, was to end, in a specific class of cases all enquiry into evidence by a certain assumption, or, as it is otherwise called presumption. The rule fixes, for the purpose of a particular inquiry the effect of specified facts, absence for seven years, unheard of is to be accounted as regards this particular inquiry, the same thing as death, it is its legal equivalent.

Now, very likely, in practice similar cases may have been brought within the equity of the statute as *Chief Justice Holt*, in 1632 is reported to have held that a remainder man was within the equity of that law but we hear of no suggestion of a general seven year rule such as we have now before 1805. In the case *Dodd v George v Jesson* 6 East, 80, there was a rule for a new trial in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the statute of limitations, which again turned on the time of the death of the lessor's brother who had gone to sea and had not been heard of for many years. The Court of Kings Bench sustained a ruling that the jury must find the time of death as well as they could that at any time beyond the first seven years they might fairly presume him dead, but the not hearing of him within that period was hardly sufficient to afford that presumption. Observe the way in which *Lord Ellenborough* puts the matter. As to the period when the brother might be supposed to have died according to the Statute 19 Car II C 6 with respect to leases dependent upon lives, and also according to the Statute of Bigamy (1 Jac I C 2), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore in the absence of all other evidence to show that he was living at a later period there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him. This was supporting what the jury had done, on the simple ground that the jury was justified, on the analogy of two statutes in finding death by the end of the seven years, and moreover (looking at *Justice Keble's* ruling which was not questioned upon this point) that they would not be justified in finding it earlier. It was not laid down that they ought to find death at the end of seven years, or that they must, nor was any rule of presumption put forward nor, as I say, was it on any such point that the ruling below was questioned in the full Bench.

In 1809, at *Nisi Prius* (*Hopewell v De Pinna*, 2 Camp 113) in an action against a woman on a promissory note, she pleaded coverture and proved her marriage, but the husband had gone to Jamaica twelve years ago, and it was a question how to prove that he was now living. The defendant insisted that he must be presumed to be alive but *Lord Ellenborough* ruled that evidence must be given of his being alive within seven years. This was given, and the defendant had a verdict. In the other case the aim was to prove death here life, and here the ruling was that a Court cannot assume life now, when all that it knows is that the party has been absent and unheard from for more than seven years. Upon the basis of these cases, there soon appeared in the text books on evidence, for the first time in 1815, a general proposition that where the

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issue is upon the life or death where no account can be given of the person, this presumption (namely that a living person 'continues alive until the contrary be proved') ceases at the end of seven years from the time when he was last known to be living—a period which has been fixed from analogy to the Statute of Bigamy and the statute concerning larcases determinable upon lives (*Phil Et Vol I*, 152). In this form the matter was again put by *Starke* ten years later in the first edition of his book, and by *Greenleaf*, and so by *Taylor* [*Starke Et* 1st Ed part IV p 158, 1 *Gr Et* § 11, 1 *Taylor Et* (9th Ed) § 200]. But the Judges as well as text writers got to expressing what had been put as a cessation of a presumption of life in the form of an affirmative presumption of death and this was put as a rule of general application whenever life and death were in question. And so *Stephen* put it 'A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death'. This rule is set down by *Stephen* among the few presumptions which he thinks should find a place in the law of evidence. *Stephen* published his *Digest* in 1876. Here, then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of like question (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation advancing from what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts. *Thayer Pre. Ev. Et* pp 319-324. But the Indian Evidence Act, which found place in the Statute Book in 1872 went further and by s 107 it allowed presumption to be made of the continuance of life for a period of 30 years from the period when a person is last heard of. But this presumption is not free from criticism.

**Scope of the section.** This section provides in effect that if it appears that a person has not been heard of for seven years, by those who would naturally have heard of him if he had been alive and there is nothing to suggest the probability of being alive the presumption disappears and the matter is at large. *Mal Et* 83. But sections 107 and 108 should be read together because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. *Dhampur Nath v Gobind Saran*, 8 A 614-6 A W N 239. The two presumptions are conflicting and the circumstances might be such that both presumptions were raised. What is to prevail? It was in order to solve this question that the language of section 108 was changed so as to make it clear that in such a case the presumption of death would prevail. For example if A the plaintiff says that X is alive, and upon this assertion claims the judgment of the Court A must prove the truth of the assertion. In order to do so A gives evidence that X was alive 29 years ago. If the Judge believes this evidence and nothing more appears he will be bound to find that X is alive. But B may give evidence that X has been absent for seven years and so get the benefit of the presumption described in s 108. Of course it would do just as well if B were to prove that X was born one hundred and twenty years ago so that according to the common course of natural events he could not be alive now (*Rule* section 114 *infra*) or he may prove that two years ago X went to sea in a ship, which has not since been heard of. But, in all this there is no shifting of onus whilst the evidence is being taken. *Mal Et* p 84. So also this presumption will not arise if the person in question left his home under circumstances which render it improbable that he would communicate with his friends. *Pouell Et* 412. There is no presumption as well that he died at any particular time. *Coel le cas Et* 30. In *Neapon v Doe*, 2 M & W 894 Lord Denman C J said 'We adopt the doctrine of the King's Bench that the presumption of law relates only to the fact of death, and that the time of death whenever it is material must be subject of distinct proof. The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this—that, if he were living he

umption that she died in 1842 *Bouen* case it was said that the principle on person not heard from for seven years is would probably have communicated This is a conclusion which Courts use "It is quite clear therefore that sumption can not arise In this case all what had taken place between L and able she would have entered into further abandoned her religion, and her friends d reproach for doing so The reproaches communications I think this circum rather eccentric course of life which it under it improbable that she could have is If I am right in this view it follows does not arise from the absence of information is natural even if the lady were v *Mc Elroy* Ir Rep 5 Eq 1 it was ent cases are not such as to render it nesent *Hugh Morgan* left Ireland for 1859 resided there for some years, with his wife in 1859 for a temporary erty in Ireland and after a few months fe and son followed him It is contended, ince been heard of by his sister, the only in Ireland I am therefore to presume that on comes into this country and stays for a who is not an alien, but has his resi a for a little time, and then leaves no relatives here and is not heard of for therefore, to be made of his death? by to such cases' A girl of sixteen leaves 1814) she is in a seaport town intending heard of There is no presumption that nd, 14 Sim 28 In that case *Shadwell* teen or seventeen years of age who e son which does not appear to leave her hither But it seems that in August, then intended to go abroad There that all along she has been concealing turn home. The mere fact of her



**S. 108** upon him which was likely speedily to terminate in his death? To which *Mr Hubbock*, in commenting on the subject, adds,—“And the circumstances of the country whether the party had gone having been visited with a fatal disease, war or other similar calamity, or again, the sudden unexplained cessation of his habitual correspondence with several persons, would materially assist the presumption of his death. On the other hand the cause of the absentee's departure, the terms of intercourse on which he had lived with his relatives or the state of the communication between this and the country where he resided may be such as to make the want of intelligence concerning him easily consistent with the supposition of his continuing existence.” *Hubbock* page 174 *Goodier Es* 631. So death may be proved by reputation, by hearsay, or by evidence of facts inconsistent with the theory of the existence of life. The presumption will arise that the death of the absentee has occurred before the expiration of seven years, where any of the following circumstances are shown:—(1) That within that time he was in a desperate state of health. *Webster v. Buchanan*, 13 Ves 362. In the above mentioned case ‘the health was very bad—the chancellor speaks of it as desperate.’ (2) That within that time he embarked on a vessel which has not since been heard of and is long overdue, inquiries having been made at her ports of departure and destination. *Lauson Presumptive Evidence*, rule 50, *Merritt v. Thompson Helt* 550. In the above case the Court observed: ‘The presumption of his death does not rest upon the fact that he has not been heard of for seventeen months, but upon the weightier circumstance that the vessel has not been heard of for seventeen months.’ In *Re Smyth*, 23 L J (P & M) 1, *Sir Creswell Creswell* said: ‘I do not find in the affidavit any statement that enquiries have been made at Barcelona or elsewhere about the crew. The affidavits only state that neither the vessel G S nor any of the crew have been heard of. I should undoubtedly presume that the vessel has been lost, but it does not follow that the crew, or some of them may not have been saved. The case had better stand over until you have written to the agent of the ship at Barcelona and ascertained whether any of the crew have survived.’ Similarly in *Re Bishop* 1 Sw & Tr 303 the same learned Judge said: ‘I think probably the vessel is lost but it does not appear that any inquiries have been made at Demerara as to whether any of the crew have arrived there or have been heard of.’ (3) That at sometime within that period he has encountered a specific peril which includes not the ordinary dangers of travel or navigation but some unusual or extraordinary danger. *Faulkner's Case*, 3 App Pt 220, *Lauson Presumptive Evidence* rule 51. (4) That his habits, character, domestic relations, necessities or facts or circumstances other than those showing exposure to danger would have made it certain that if alive within that period he would have returned to or communicated with his residence home or domicile or have been heard from. *Lauson Presumptive Evidence* rule 52. A son after the death of his father, and knowing of a provision for him in his Will to take effect on the death of his mother leaves home. He is not heard of for many years. He will be presumed to be dead. *Karsten v. Karsten* 15 N Y (S) 366. On March 25 1866 S left her home and was never heard of again. She depended on an income payable in quarterly instalment. She did not appear to claim the amount due in June, 1866. In a proceeding in 1875 the presumption is that she was dead after June, 1866. *Re Beasney* L R 7 Eq 498.

**When no presumption arises.** But the presumption of death at the expiration of seven years being lost, does not arise where it is improbable that the absentee even if alive, would or could have been heard of at, or would or could have communicated with his residence home or domicile or where in other judicial proceedings the absentee is recorded as having been alive subsequently to the end of seven years. *Lauson Presumptive Evidence* rule 53. In 1829 R left her family in England and went to Paris where she took a situation as governess. She continued to correspond with her relatives. In 1835 she wrote to her sister from Paris, saying that she was about to accept another situation, and stating that she had become a Catholic. On receipt of this letter her sister replied in a letter of remonstrance reproaching her for her abandonment of the Protestant religion. No reply was received to this letter, and she was not

subsequently heard of. There is no presumption that she died in 1842. *Bouen v Henderson*, 2 Sim & G 360. In this case it was said that the principle on which the presumption that an absent person not heard from for seven years is dead is based is that if he were living he would probably have communicated with some of his friends and relatives. This is a conclusion which Courts draw from the probabilities of the case. 'It is quite clear therefore that when no such probability exists the presumption can not arise. In this case all the circumstances tend to show that after what had taken place between L and her friends it was extremely improbable she would have entered into further communication with them. She had abandoned her religion and her friends wrote to her a letter of remonstrance and reproach for doing so. The reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life which it appears from her letters she pursued, render it improbable that she could have further communication with her friends. If I am right in this view it follows that the presumption of her death does not arise from the absence of information or of communication when that absence is natural even if the lady were still alive.' Similarly in *Mc Mohan v Mc Phoy* 11 Rep 5 Fq 1 it was said 'The circumstances of the present cases are not such as to render it safe to make that presumption at present. *Hugh Morgan* left Ireland for America some time before the year 1839, resided there for some years, married there, came back to Ireland with his wife in 1859 for a temporary purpose only, he sold all his property in Ireland, and after a few months returned to America, whither his wife and son followed him. It is contended however, that because he has not since been heard of by his sister, the only member of his family who remains in Ireland, I am therefore to presume that he is dead. But suppose that an alien comes into this country and stays for a few months, or that a person who is not an alien, but has his residence abroad, comes here and stays for a little time and then leaves having—to put an extreme case—no relatives here, and is not heard of for seven years, is the presumption therefore, to be made of his death? I do not think that the rule would apply to such cases.' A girl of sixteen leaves her father's house later on (August 1, 1814) she is in a seaport town, intending to go abroad. She is not subsequently heard of. There is no presumption that in 1821 she is dead. *Hatton v England*, 14 Sim 28. In that case *Shadwell v C* said 'Here a girl of about sixteen or seventeen years of age whose father was a farmer, chose for some reason which does not appear, to leave her father's house and to go no one knew whither. But it seems that in August, 1814 she was at Portsmouth, and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she has been concealing herself, and that she never intended to return home. The mere fact of her not having been heard of since 1814 affords no inference of her death for the circumstances of the case make it very probable that she would never be heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time?' She died in August 1873. W, his father, left England for Australia in 1849 from which country he wrote to his wife until 1854 when he ceased to write. In his last letter he said 'I have made up my mind should I reach England in safety not to know, see or have any communication or connection whatever with any one whom I formerly knew. W was never subsequently heard of. There is no presumption that he died before S. *Re Smith* 21 L J (P & M) 182. In that case the Court observed 'The evidence is not sufficient to warrant the presumption that W died before his son. Some expressions used by him in the last letter to his wife would lead to the conclusion that he might have reasons for not again communicating with her. A sailor leaves his ship in a foreign country in 1850, and is not afterwards heard of. It is proved that his intention was to desert. There is no presumption that he died in 1857. *Lalun v Lalun*, 34 Beav 443. *Douley v Winfield*, 14 Sim 277. A was transported from England to New South Wales in 1834 for seven years for a crime. He last wrote to his family on board ship in that year. The records showed that he served his sentence. There is no presumption that he was dead in the year

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upon him which was likely speedily to terminate in his death.' To which *Mr Hubbock*, in commenting on the subject, adds,—“And the circumstances of the country whither the party had gone having been visited with a fatal disease, war or other similar calamity, or again, the sudden unexplained cessation of his habitual correspondence with several persons, would materially assist the presumption of his death. On the other hand the cause of the absentee's departure, the terms of intercourse on which he had lived with his relatives or the state of the communication between this and the country where he resided may be such as to make the want of intelligence concerning him easily consistent with the supposition of his continuing existence.” *Hubbock* page 174, *Goodale Es* 631. So death may be proved by reputation, by hearsay, or by evidence of facts inconsistent with the theory of the existence of life. The presumption will arise that the death of the absentee has occurred before the expiration of seven years where any of the following circumstances are shown. *Viz*—(1) That within that time he was in a desperate state of health. *Webster v Buchmore*, 13 Ves 362. In the above mentioned case “the health was very bad—the chancellor speaks of it as desperate.” (2) That within that time he embarked on a vessel which has not since been heard of and is long overdue inquiries having been made at her ports of departure and destination. *Lauson Presumptive Evidence*, rule 50, *Merritt v Thompson* *Hell* 550. In the above case the Court observed. The presumption of his death does not rest upon the fact that he has not been heard of for seventeen months but upon the weightier circumstance that the vessel has not been heard of for seventeen months.’ In *Re Smyth* 28 L J (P & M) 1, *Su Creswell Creswell* said ‘I do not find in the affidavit any statement that enquiries have been made at Barcelona or elsewhere about the crew. The affidavits only state that neither the vessel *G S* nor any of the crew have been heard of. I should undoubtedly presume that the vessel has been lost, but it does not follow that the crew, or some of them may not have been saved. The case had better stand over until you have written to the agent of the ship at Barcelona and ascertained whether any of the crew have survived. Similarly in *Re Bishop* 1 Sw & Tr 303 the same learned Judge said ‘I think probably the vessel is lost but it does not appear that any inquiries have been made at *Demerara* as to whether any of the crew have arrived there or have been heard of.’ (3) That at sometime within that period he has encountered a specific peril which includes not the ordinary danger of travel or navigation but some unusual or extraordinary danger. *Fagles Case* 3 App P 220. *Lauson Presumptive Evidence* rule 51. (4) That his habits character domestic relations, necessities or facts or circumstances other than those showing exposure to danger would have made it certain that if alive within that period he would have returned to or communicated with his residence home or domicile or have been heard from. *Lauson Presumptive Evidence* rule 52. A son after the death of his father and knowing of a provision for him in his Will to take effect on the death of his mother, leaves home. He is not heard of for many years. He will be presumed to be dead. *Karslen v Karslen* 15 N Y (S) 366. On March 25 1866 S left her home and was never heard of again. She depended on an income payable in quarterly instalment. She did not appear to claim the amount due in June, 1866. In a proceeding in 1870 the presumption is that she was dead after June, 1866. *Re Lonsney* L R 7 Lj 193.

**When no presumption arises.** But the presumption of death at the expiration of seven years being lost if heard of, does not arise where it is improbable that the absentee even if alive, would or could have been heard of at or would or could have communicated with, his residence home or domicile or where in other judicial proceedings the absentee is recorded as having been alive subsequently to the end of seven years. *Lauson Presumptive Evidence* rule 53. In 1829 R left her family in England and went to Paris where she took a situation as governess. She continued to correspond with her relatives. In 1835 she wrote to her sister from Paris saying that she was about to accept another situation, and stating that she had become a Catholic. On receipt of this letter her sister replied in a letter of remonstrance reproving her for her abandonment of the Protestant religion. No reply was received to this letter, and she was not

subsequently heard of. There is no presumption that she died in 1842. *Bouen v Henderson*, 2 Sim & G 360. In this case it was said that the principle on which the presumption that an absent person not heard from for seven years is dead is based is that if he were living he would probably have communicated with some of his friends and relatives. This is a conclusion which Courts draw from the probabilities of the case. "It is quite clear therefore that when no such probability exists the presumption can not arise. In this case all the circumstances tend to show that after what had taken place between L and her friends it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter of remonstrance and reproach for doing so. The reproaches were not calculated to encourage further communications. I think this circumstance taken in connection with the rather eccentric course of life which it appears from her letters she pursued, render it improbable that she could have further communication with her friends. If I am right in this view it follows that the presumption of her death does not arise from the absence of information or of communication when that absence is natural even if the lady were still alive." Similarly in *Mc Mohan v Mc Phoy*, 1r Rep 5 Eq 1 it was said "The circumstances of the present cases are not such as to render it safe to make that presumption at present. *Hugh Morgan* left Ireland for America some time before the year 1859 resided there for some years married there, came back to Ireland with his wife in 1859 for a temporary purpose only, he sold all his property in Ireland, and after a few months returned to America, whither his wife and son followed him. It is contended however that because he has not since been heard of by his sister, the only member of his family who remains in Ireland, I am therefore to presume that he is dead. But suppose that an alien comes into this country and stays for a few months or that a person who is not an alien, but has his residence abroad, comes here and stays for a little time, and then leaves having—to put an extreme case—no relatives here and is not heard of for seven years is the presumption therefore, to be made of his death? I do not think that the rule would apply to such cases. A girl of sixteen leaves her father's house, later on (August 1, 1814) she is in a seaport town, intending to go abroad. She is not subsequently heard of. There is no presumption that in 1821 she is dead. *Watson v England*, 14 Sim 28. In that case *Shadwell V C* said "Here a girl of about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knew whither. But it seems that in August 1814, she was at Portsmouth, and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she has been concerning herself and that she never intended to return home. The mere fact of her not having been heard of since 1814 affords no inference of her death, for the circumstances of the case make it very probable that she would never be heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time?" She died in August, 1859. W. his father, left England for Australia in 1849, from which country he wrote to his wife until 1854 when he ceased to write. In his last letter he said "I have made up my mind should I reach England in safety, not to know, see or have any communication or connection whatever with any one whom I formerly knew. W was never subsequently heard of. There is no presumption that he died before S R Smith, 21 L J (P & M) 182. In that case the Court observed "The evidence is not sufficient to warrant the presumption that W died before his son. Some expressions used by him in the last letter to his wife would lead to the conclusion that he might have reasons for not again communicating with her." A sailor leaves his ship in a foreign country in 1850 and is not afterwards heard of. It is proved that his intention was to desert. There is no presumption that he died in 1857. *Lal m v Lal m*, 31 Beav 143, *Douley v Winfield* 14 Sim 277. A was transported from England to New South Wales in 1831 for seven years for a crime. He last wrote to his family on board ship in that year. The records showed that he served his sentence. There is no presumption that he was dead in the year

S. 103 1840 *Mitcham v. Trust* 15 B. & W. 507, *Law on Pres. & R. 53* see also *Le*  
*Liddendale* 57 Sol. Tol. 3 *Hurley v. Ocean Co.* 21 R. 1

**Presumption of death according to Hindu and Mahomedan Law.** Accord-  
 ing to Hindu Law the presumption of death arising from absence, would  
 apply to the place after an absence of twelve years *Colebrook v.*  
*Digest* Vol. 1 p. 184 *Stranger v. Hindu Law* p. 189 *Mandee Koor v. Khedoo*  
*Lal* 2 May 623 *Kummayon Ghosh v. Keshab Lal* 2 B. J. L. A. C. 121=10 W. R.  
 134, *Sardola Sudder v. Lakshmi Devi* 2 B. J. R. A. C. 137 Note, *Balbhaddar*  
*v. Ram Jovan* 1 Agra 19 *Prize Shawno Mynce Dasso* 9 W. R. 321 *Ghase*  
*v. Insouder* 2 Agra 226, *Kumppan Chetti v. Venkat* 1 M. H. C. 1. It is  
 only when the devolution or succession to the property of a missing Hindu  
 (or Mahomedan) is in question that the Hindu and Mahomedan Law of pre-  
 sumption as to the death of a missing person may have to be applied with  
 reference to s. 24 of Act VI of 1871. But when a suit is by a reversioner for  
 a declaration or for the avoidance of an alienation of property in the posses-  
 sion of the present heir the provisions of section 103 of Act I of 1872 will  
 apply. *Lamshetan Lal v. Loheshwar Singh*, 1 A. 53 (F. B.) Where a  
 person claims another's property on the allegation that the latter was missing,  
 and has not been heard of for more than seven years the question whether  
 such person is to be presumed to be dead is one of evidence and not a part  
 of the substantive law of inheritance. In such a case the presumption of death  
 would arise under this section. *Dhondo Bhidapi* 11 B. 433 see also *Dharup*  
*Nath v. Gopal Saran* 4 A. 614=A. W. N. 1886 239 *Bulaya v. Kirtnapur*  
 11 M. 118 *Hari Chulaman v. Movo Lal Shuman*, 11 B. 89 *Jayant v. Ram*  
*chandao* 18 Bom. I. R. 14=40 B. 239=33 Ind. C. 484 *Jendur v. Julade*  
 71 Ind. C. 305=32 M. L. T. (H. C.) 6 under the Mahomedan Law inheri-  
 tance to the property or share of a missing person cannot open but must  
 remain in abeyance until ninety years have elapsed since his birth or until  
 his death is proved. *Hasan Ali v. Maharban* 2 A. 625 *Lalji Bibi v. Rahat*  
*Bibi*, 7 N. W. P. 149 *Girdhari v. Lado* A. W. N. 1882 107, *Doulat v. Akaya*  
 2 Agra 59. But in a later Full Bench case of the same High Court the e-  
 cases were overruled. In that case *Mahomed J. and* The rule of Mahomedan  
 Law that a missing person is to be regarded as alive till the expiry of 90  
 years from the date of his birth is a rule of evidence and not of succession,  
 inheritance etc., within the meaning of section 24 of the Bengal Civil Court  
 Act. *Mahbar Ali v. Buddi Singh* 7 A. 297 (F. B.)=A. W. N. 1884 313. So the  
 rule contained in section 103 of the Indian Evidence Act applies to the case of  
 a Mahomedan who has been missing for more than seven years. When the ques-  
 tion of his death arises in cases to which under the provisions of section 24  
 of the Bengal Civil Courts Act (VI of 1871) the Mahomedan Law is appli-  
 cable. But see also *Imdad Ali v. Ghulam Idris* 42 P. R. 1492 *Woolia Cassim*  
*v. Woolia Abdul* 2 C. L. J. 236=15 M. L. J. 317=7 Bom. I. R. 922=2 A. L. J.  
 798=10 C. W. N. 43=3 C. 173=32 I. A. 177 *Yusuf Ali Bey v. Ayub Bey*  
 11 A. L. J. 357=18 Ind. C. 920 *Miraj v. Abdul* 43 A. 673

**Time of death.** Though under s. 107 and 108 of the Indian Evidence  
 Act the death of a person is to be presumed at an interval of seven years,  
 there is no presumption as to the time of his death. Therefore if any one has  
 to establish the exact time during the seven years at which the person died  
 he must do so by evidence and can neither rely on the one hand upon the  
 presumption of death nor on the other upon the presumption of the continu-  
 ance of life. *Rangoo v. Muthappa* 22 B. 226. Whenever the question as to  
 the exact time of death arises according to the evidence  
 and circumstances of each case to have occurred at  
 any time not affected by the seven years. *Dharup*  
*Nath v. Gopal Saran* 4 A. 614  
*chunna* 11 M. J. J. 184  
 C. J. in *Mohammed Sharif* v. *Chand*  
 'They contended that  
 during the last seven  
 not heard of and

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*Narayan Bhojwant v Shrinivas Primbai*, 8 B 266 and in the case of *Fauz*  
*Blushan Bomerjee v Surappa Canto Roy Choudhary*, 35 C 25 This last ruling  
 was cited with approval in the case of *Srinath Das v Probodh Chunder Das*,  
 11 C L J 580 *Moolerjee J* says at page 185 — 'The only presumption  
 which is enacted by section 107 of the Evidence Act, is, that the party is dead  
 at the time of the suit but there is no presumption whatever that on the true  
 his death. In my opinion there can be no doubt lay upon the plaintiffs to show  
 construction of section 108 of the Evidence Act by affirmative evidence that *Dildar Ali* survived the appeal. But see *Akbar v*  
 do so, the suit could not succeed. I would dismiss, 11 M L J 295, *Manshar v*  
*Bashu* 8 Ind Cas 55. But *Nicken v Ichand* English cases the presumption  
*Singhra*, 13 R D 385. But according to the period of death, beyond the  
 which is also a legal one fixes no specific time as the seven years the party shall be  
 assertion generally that at the expiration of the subject of *Doe d Knight v*  
 presumed dead. Thus in a governing case on this one abroad had not been heard  
*Nepean* 5 B & Ad 86 where a party who had been the presumption of death did  
 of for above seven years, it was contended that, as party must be presumed living  
 not arise until the seven years had elapsed the was urged, that he ought to  
 throughout the whole of the period otherwise it was years commenced. But the  
 have been presumed dead from the moment the *Chief Justice*, in delivering the  
 contention was overruled and *Lord Denman* *Ch* of *Mathew Knight* abroad for  
 judgment of the Court stated thus — 'The absence from which a jury might  
 seven years without having been heard of is evidently presumed his death. This  
 reasonably presume and in this case have proper presumption in analogy to the  
 period has been adopted as the ground for such presumption and 19 C 2 C 6 as to the  
 Statutes of 1 Jac I C II relating to bigamy, and the lessor of the plaintiff  
 continuance of lives on which leases were held to maintain the case. But such  
 clearly proved the first of the points necessary to lead the mind to believe  
 absence abroad for seven years though it naturally, evidence to warrant a presumption  
 that the party is dead and therefore is sufficient even years clearly raises no  
 notion of fact that the party was dead at the end of seven years clearly raises no  
 inference as to the exact time of the death and period has no tendency to  
 place at the end of seven years. Absence for the same time, and no case has been  
 induce the belief that life has ceased at that precise time down as a rule of law  
 cited, nor do we know of any in which it has been or in which, in point of fact,  
 that such a presumption ought to have been made abroad, and, on the other  
 any such effect has been given to evidence of absence abroad held, that though the  
 hand, one case was referred to in which *Lord Ellenborough* resumed after having sailed  
 loss of a vessel in which a person sailed might be having been heard of and so  
 on a foreign voyage for two or three years without heard was then dead, the time  
 it might be taken that the person who sailed on board was then dead, the time  
 of death was to be decided upon by the Jury according to the special circum-  
 stances. And again in the same case on appeal in the *Exchequer Chamber*  
 (2 M & W 913) the Court said. Now when nothing is heard of a person on  
 for seven years it is obviously a matter of complete uncertainty at what  
 point of time in those seven years he died as of all the point of time the last  
 day is most improbable and most inconsistent with the ground of presuming  
 the fact of death. That presumption arises from the great lapse of time  
 since the party has been heard of because it is considered extraordinary  
 if he was alive that he should not be heard of. In other words it is presumed  
 that his not being heard of has been occasioned by his death, which presumption  
 arises from the considerable time that has elapsed. If you assume that he was  
 alive on the last day but one of the seven years, then there is nothing extra-  
 ordinary in his not having been heard of on the last day, and the previous  
 extraordinary lapse of time during which he was not heard of has become  
 immaterial by reason of the assumption that he was living so lately. The  
 presumption of the fact of death seems therefore to lead to the conclusion that the  
 death took place some considerable time before the expiration of seven years.  
 Sections 107 and 108 both deal with the procedure to be followed when a  
 question is raised before a Court as to whether a person is alive or dead. These  
 sections do not lay down any presumption as to how long a man was alive or

at that time he died *Band Teemanna v Gangula* 16 Ind Cas 43, *Pooma loori v Chelapattai* 33 V L J 295=(1917) 21 V N 723=6 L V 633, *Marey Ramesh v Abdul* 19 A L J 713=63 Ind Cas 286. The earliest date to which the death can only be the date when the suit was filed *Jeshanvi v Bar Divali*, 22 Bom L R 771=57 Ind Cas 525, see also *Bashant v Nayab* 38 P R 1918=45 Ind Cas 70, *Ragur v Dan Bahadur*, 21 O C 148-46 Ind Cas 808, *Monohar Lal v Chinn* L R 3 A 393, *Mulhamad v Abdul*, 64 Ind Cas 468 *Kelhab Das v Ali Shicobal* 45 A 166=21 A L J 393=74 Ind Cas 656, *Gopal Bhuiy v Marayji*, 47 B 451 *Rateli Ali v Ahmad Din*, 100 Ind Cas 833, *Desham v Rham*, 1927 Nig 104=100 Ind Cas 446, *Mahadeo v Harwal sh*, 4 O W N 1077=A I R 1928 Oudh 13, *Jaganmala Singh v Hanuman Singh*, L R 6 All 227 (Rcy), *Jagesham v Mahadeo* 115 Ind Cas 626. If a person has not been heard of for seven years that is a presumption of law that he is dead but at what time within that period he died is not a matter of presumption but of evidence and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential *Lal Chand v Mahant Ramrup*, 24 A L J 105=43 C L J 249=53 I A 24-30 C W N 721=93 Ind Cas 280=28 Bom L R 855=50 M L J 269 (P C), see also *Ganesh Das Aurore*, *In the goods of*, 13 C L J 578=97 Ind Cas 217=A I R 1926 Cal 1056

By persons who would naturally have heard of him. Persons who would naturally have heard of him is not confined to a particular class, they may be relations or strangers *Lausons Pte Eo Rule 45 Doe v Deal*, 4 B & Ald 433. A wife, who left her husband and is in keeping of another is not one of the persons who would naturally hear from him if he were alive *Kantabai v Unnabai*, 117 Ind Cas 209=A I R 1929 N 137

Not been heard of. 'Not been heard of' means that none of the persons referred to above have heard any thing about him which should or would raise a reasonable doubt in his or her mind that he really was no more. *Lausons Pte Eo Rule 46*. The life of N being insured in a Life Insurance Company. An action was brought on the policy in 1874 and the question was whether N was then dead. He had left his home in England for Australia in 1867 and had not been heard or seen by any one since, except as follows. A niece of N, one Mrs C being in Melbourne in January, 1872, saw a man on the street whom she believed to be her uncle N but he was lost in the passing crowd and she was not able to speak to him. She wrote of this to her mother and on returning to England spoke of it to the relay, but they all thought her mistaken. If the evidence of Mrs C was believed N had been heard of within the seven years but if it was not believed on reasonable grounds, then N had not been heard of within the rule *Prudential Assurance Co v Echmonds*, 3 App Cas 487. In that case the trial judge after finding that the jury that not being heard of meant that no member of the family had heard any thing about him which might raise a reasonable doubt in their minds, whether he was dead, added, 'you cannot say that a man has never been heard of, when in the first place one of his nearest relations comes and says she saw him alive and well within three years, still less can you say that he has never been heard of when every member of the family says that they heard that which is now stated.' On appeal this was held to be an error. 'The direction,' said Lord Chancellor *Macmillan*, 'seems to me to come to this. In the first place the juryman believed Mrs C's assertion to be correct, and though she had seen him alive and well of course that ends the case. But then he adds still less can you say that he has never been heard of when a very member of the family states that they heard that which is now stated. Now as far as it extends, if it remained there, there would have been great reason for the jury men to infer from that direction that it would be impossible for them whatever might be the value of Mr C's evidence to consider the presumption as arising when every member of the family had heard what she said, because he is true or he is not true the fact of their having heard it would prevent the assumption arising. I think that would be the reasonable inference from that language,

S 108. but I think it becomes clearer as you go on, that that would be the interpretation that would force itself upon the mind of the jury, because what the learned Lord Chief Baron goes on to say is this you can not have any one called before you that saw him die or saw him buried. You have, therefore, no direct evidence, except the evidence that he was alive two or three years ago. On the other hand you have no evidence whatever upon which you could found the presumption that he is dead,—that is that he has never been heard of by any of his relations for the space of seven years—when you find that every one of the relatives has come forward and every one of the relatives heard that he was alive. Therefore it appears to me that the Lord Chief Baron plainly and distinctly directed the jurymen that they had no evidence before them at all upon which the presumption of law could arise because the presumption of law requires that those relatives should not have heard of him, and you find that all those relatives did hear of him. Of course, in reality that turns upon whether they believe Mrs. C or not, and whether the relatives having heard of him from her they were bound to accept that as knowledge, and so the presumption of death should be disposed of. On the other hand, my lords, I apprehend that that is not the law at all. That would not be such a hearing as could lead you to a reasonable ground, for believing that the man was alive within the epoch. I apprehend my lords that the jurymen are not here directed, as it appears to me they ought to have been that the evidence given by the members of the family as to not having heard of him was fit to found the presumption upon if they came to the conclusion that Mrs. C's story was not to be believed. On the contrary it seems to have been laid down in clear and precise terms that if every member of the family has heard of him whether by a credible story or not then there is a probability of his being alive and the presumption of death would not arise. And Lord Blackburn in the same case added. The plaintiff had failed in proving the actual death of *Robert Nutt* and then he relied upon the rule of law which is generally laid down in something like these terms. If a man has not been heard of for seven years that raises the presumption that he is dead. It is generally so enunciated. I did not say that that is the correct way of enunciating it but I think it may be fairly enough put in those words for this purpose. I think having regard both to the reason of the thing and the decisions we must take not being heard of in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to cull scores of people to say 'I was at school with him. I knew him perfectly well and I have not heard of him for the last seven years. But that would not be enough to raise a presumption that he was dead because if ever so much alive those people might not have heard of him. My lords it appears from the case of *Doe v. Andrew* (15 Q. B. 701) that it is necessary in order to raise the presumption that there should have been an inquiry and search made for the man among those who, if he was alive would be likely to hear of him. Perhaps it is not quite an analogy but it is something like the case of a search for documents before you are allowed to give secondary evidence of a document you must search the places where the document would in the natural course of things be, if it were still in existence and having proved that you have done that you may then give your secondary evidence. In like manner in order to raise the presumption that a man is dead from his not having been heard of for seven years you must inquire amongst those who if he was alive would be likely to hear of him, and see whether or no there has been such an absence of hearing as would raise the presumption that he was dead. In this case the plaintiff undertook to do that and called first a witness who said so and afterwards said that he had heard a report that a Mrs. C had seen him in Australia but that he did not believe it. I am inclined to think that having heard a report would hardly be such a matter as would prevent the fact of the witness saying he had not heard of him being evidence as far as it went. Supposing the jurymen had found as a fact that they thought she was mistaken would or would not the grounds have existed upon which the presumption from a seven years absence would arise that the man not heard of was dead? I think certainly they



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of Melbourne it upset the presumption arising from the relative, including herself never having seen or heard of him and it turned the *onus* the other way. It was possible however, that it might have been proved that the man she was not *Robert Auld*, but somebody else. If that had been proved it would have left the matter just as if she had never made that statement. When she said she thought she had seen him and all the others had heard it from her, although that unexplained and uncontradicted statement reflected the *onus* yet as soon as it was made out by satisfactory evidence that she was mistaken, the hearing from her was gone and the presumption would remain as it was before. Now, my lords, of course it is essential for the purpose of saving whether the proper direction was given by the judge or not to see what the proper direction would have been and then to see if that which would have been the proper direction was given to the jury. I think jury-men who were not lawyers—my lords, I think many lawyers themselves,—would be under the impression that the commonly enunciated rule about a man's not being heard of for seven years would mean in that there has not been a physical hearing of him, and that if the relatives had been told of something which happened within the seven years from which they believed that he was alive that would be a hearing of him and that would put an end to the presumption though it might be proved that the information so brought to the relatives was positively untrue. I cannot think it but that they might think it. They might imagine that the rule of law was absolute and positive that being was enough. If that be so I like it that it is clear that the Lord Chief Baron ought to have given them a direction that in the event of their coming to the conclusion whether rightly or wrongly, that Mrs C was mistaken when she said she saw her uncle and that she did not see him, then there was an absence of ground for believing that he was alive within the seven years the period sufficient to raise the presumption. Now what we the jury men told? They were told 'not being heard of means this, that no members of the family have heard any thing about him which would raise a reasonable doubt in their minds whether he must have been no more. I do not think that in the circumstances that is strictly correct, because I think, though it might have a reasonable doubt which would cause a shift the presumption yet the facts might be more clear the other way and it might be shown that the reasonable doubt was not well founded as in this supposed case. If a respectable person came and said 'your brother, whom you think is dead, is alive, I saw him and spoke to him yesterday' every one must feel that he would raise a reasonable doubt and that it undisputed, it would put an end to the seven years presumption. But suppose the other side should be able to call witnesses to satisfy the jury that the person who thought that he had seen him was quite mistaken, was deceived, the relatives having previously believed that the man who had told them he had seen the brother, was telling them the truth, could it be said, after it was proved that the man who told them that had been deceived into the belief that he had seen the brother could it be said that the evidence, so explained put an end to the presumption arising at the end of seven years? I apprehend not, yet the words of the Lord Chief Baron in the first line might have led the jury to think so, and I must acknowledge that when I read the whole though, I think it did lead the jury to think so, whether so meant or not. I have already said that particular circumstances before them, and the particular contention of the plaintiff's counsel as set out in the bill of exceptions, I cannot help thinking that that would be understood by the jury to mean. If *Robert Auld* has been heard of in matter how or where, and even you are distressed that the hearing was founded upon a mistake that mere fact of hearing is enough. That I think would be misdirection.

Presumption of survivorship. When two persons and especially when two relatives, have perished in the same calamity such as a wreck, a battle, or a conflagration, it often becomes important with a view to determining the right of succession to estates, to ascertain who was the survivor. *Taylor* § 202, *Green* § 29. Direct proof however, can seldom be procured in these cases,

**S 108.** and consequently in the Roman Law and in several other codes recourse is had to artificial presumptions whenever the particular circumstances connected with the death are wholly unknown. The *re* presumptions, are based on the probabilities of survivorship resulting from strength, age and sex. *Ibid*. The common law however does not attempt to ascertain in the absence of any evidence on which to go the survivor of a common catastrophe. Strictly it may be said that the common law presumes neither that one survived nor that all perished at the same moment. *Lauson Pro Le* p 298. But by letting the matter be one unascertainable the practical consequence, as has been said is nearly the same as if the law presumed all to have perished together at the same moment. It is, in fact exactly the same where two persons (whether of the same or different ages sexes or physical conditions) perish in an accident, ship wreck or battle and there is no evidence to show which one of the several survived; the law will not raise any presumption from the fact that one was younger or stronger or of the more hardy sex that he survived an older or a weaker or a less hardy victim. The party alleging that one survived the other must prove it: the *onus* is on him who claims a right or title upon the theory of the survivorship of one to prove that fact affirmatively. *Mason v Mason* 1 Meriv 307, *Wollaston v Berkeley*, 2 Ch D 213. *Re Heuss*, 2 Salk 333. *Re Wheeler* 37 L J (P & M) 10. *Robinson v Saltier* 2 Woods C C 147, *Wing v Agrate*, 5 H L C 183. *In re Benyon* (1901) P 111. *In re Fisher* (1915) 1 Ch 302. *In re Roby* (1913) P 6. *contra Calum v Procurator General* 1 Hagg Ecc 92. In *Wright v Netherwood* 2 Salk 592. *Sir William Wynne* said. With respect to the priority, it has always appeared to be more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time than to resort to any fanciful supposition of survivorship on account of the degree of robustness. In *Re Schoyn* 5 Hagg Ecc 748, the Court and Instances have occurred where under similar circumstances the question has been which of the two survived? But in the absence of clear evidence it has generally been taken that both died at the same moment. *Re Murray* 1 Curt 596. In *Taylor v Deplock* 1 Phill 261. *Sir John Nicholl* said. There is no evidence direct as to this point. Some inferences have been deduced. It is stated that the two bodies were found together. This tends to show that they were in the same situation at the time of death. Upon the whole, I am not satisfied that proof is adduced that the wife survived. I assume both perished at the same moment. See also *Sultherthwaite v Powell* 1 Curt 705. *Underwood v Wing* 4 Deg M & G 657. *Re Wainright* 1 Sw & Tr 257. *Re Ewart*, 1 Sw & Tr 257, *Durrant v Friend* 5 De G & Sm 345, *Scutlon v Fatullo* L R 19 Eq 375. *R v Hay*, 1 W Black 646. *contra Selhel v Booth* 1 Y & C C C 117. Where two persons said *Lord Chelmsford* in *Wing v Ungrate* 6 H L Cas 183 'are at one and the same instant washed into the sea and disappear together, and are never seen any more it is not possible for any tribunal called upon judicially to determine the question of survivorship to form any judgment upon the subject which can be founded upon anything but mere conjecture derived from age sex constitution or strength of body or mind of each individual and as our law has not established any rules of presumption for these rare and extraordinary occasions the uncertainty in which they are involved leaves no greater weight on one side or the other to induce the balance of evidence either way. If therefore it is necessary for W W to establish his claim under the Will of Mrs U that he should prove that she survived her husband he must altogether fail. There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by the one and the same cause nor is there any presumption of law that all of them died at the same time. But the question is one of fact depending wholly on evidence and if the evidence does not establish the survivorship of any one the law will treat it as matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative. *Will Exor* p 939, *Rambhuran v Surja kanta* 11 C W N 883=35 C 25. *Work v Phala*, 14 C W N 341=37 C 103=11 C L J 138, *Re Aldersen* (1905) 2 Ch 181. *Re Benjamen* (1903) 1 Ch 723. *Re Rhodes*, 36 Ch D 586. *Re Leus Frusts* 6 Ch 356. *Re Walci* 1 Ch 120. In the goods of *Spilling*, Dea & Sw 183. *Ommamy v Stilwell*, 23 Beav 328.

But in America two exceptions to the recognized rule are admitted, namely, (1) *Lawson's Presumptive Evidence*, Rules 56, 57 and 58. And the one of several in a common danger which proved fatal to all, who was last seen or heard alive within the operation of the cause of death is presumed to have survived the others. (2) *Lawson's Presumptive Evidence*, Rules 56, 57 and 58. And the one of several in a common danger which proved fatal to all, who was last seen or heard alive within the operation of the cause of death is presumed to have survived the others. *Lawson's Presumptive Evidence*, Rules 56, 57 and 58.

## 109

When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

**Principle** Here the presumption arises from the probability of the continuance of things once shown to exist. *Price v Price*, 16 M. & W. 232, *Avot v*, 205. This presumption of continuance is clearly one of the most practical importance. It is frequently quite impossible to prove for instance the existence of a certain thing in a certain state or condition at the particular moment in question. It is sufficient, with the aid of this presumption, to prove such existence and state at such an earlier time, that according to its nature it may fairly be presumed to have lasted to the moment in question. *Cooley* have generally thought it right to act, as in cases of presumption and in presuming that a tenancy or a partnership or other state of things continues until the contrary is proved. *Per Gault C J in Obbitt v Chisum v Hunt*, 8 C. 72 (79). **Scope of the section** When the existence of a person, or person and relation or a state of things is once established by proof the law presumes that the person, relation or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. So a partnership, agency, tenancy or other similar relation once shown to exist, is presumed to continue until it is proved to have been dissolved. *Lafayette* § 214. It is often said says *Prof. Wigmore*, "that when a person or object, or relation or state of things, is shown to have existed at a given time, its continuance is presumed. In reality, however, a genuine rule of presumption is seldom found, the rulings usually derive merely from certain facts which are admissible or that they are sufficient evidence for the jury in a particular case." *Wigmore* § 214. The provisions of § 109 of the Evidence Act cannot be over-ruled by the rulings of any Court. *Wigmore v. The King*, 8 Bar. L. J. 292 = 73 Ind. C. 500. There is no presumption that the several persons mentioned in *majoratus* are predecessors in interest within the meaning of s. 223. *Bent v. Bent* 1 Ind. C. 500. *Revenue Cols. Bannard v. Bannard*, 98 Ind. C. 574 = A. I. R. 1927 299.

**Partners** This section declares that partnership once shown to exist, is presumed to continue until the contrary is proved. *Lane* *The* *rule* 30. A partnership brings an action on a note it is contended that the plaintiff are not partners. It is proved that there were previously they were partners. The presumption is that they continue to be so. *Anderson v. Clegg* 1 Stark. 107. *Cooper v. Dredge*, 22 Barb. 716. *Clark v. Alexander* 8 Scott N. H. 161. *Clarke* section 26 of the Contract Act. As regards the section *Communion* in and how to have been acting. It is presumed to stand in that relation to each other as partners on the person who affirms it, and by this section the further presumption is made, that the relations of such persons continue to

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be governed by the terms of the original contract which has expired, so far as they may be applicable to a partnership determinable at will. The same rule within the same limitation obtains in the case of a tenancy which is contained after the expiration of the term limited by the lease' *Cun Contract Act Notes* under s 256. 'The evidence of a joint interest in the plaintiffs was sufficient *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with them as partners, and had settled with them as such some two or three years since. There was no evidence of any change or dissolution of partnership and the presumption was that they were still partners. *Cooper v Dedrick* 22 Barb, 516 (A m). In *Persons v Haywood*, 31 L J Ch 670 the members of a firm continued the business after the period limited by the partnership deed, it was held that the partnership could be dissolved only by a special notice, and that no notice having been given it still existed on the original terms and the decree was made for its dissolution on the footing of those terms. *Cun Contract Act* p 522. Where a partnership was admitted to have been in existence in 1816 it was in the absence of all evidence to the contrary presumed to be still continuing in 1838. *Clair v Alexander* 8 Scott N R 161, *Alderson v Clay* 1 Stark 405, *Blandy v De Burgh* 6 Com B 623 (630), *Tay* § 196. Under this section a partnership once existed will be presumed to have continued till its dissolution is affirmatively proved. But the following facts may lead to the inference that it has terminated by some cause or other *viz* (1) the books and accounts continuing up to a certain date only (2) the business being carried on by one of the partners only (3) the plaintiff not taking any part in the business and (4) indents on the firm being made in the name of one only. *Baksh Nahn v Alla Baksh*, 11 P R 1897.

**Principal and Agent.** An authority to do an act once shown to exist is presumed to continue until the contrary is proved. *Prather v Palmer*, 4 Ark 456. *Lauson Pre Et* rule 30. This principle is well established in the case of principal and agent. *Rayan v Lambs* 12 Q B D 460. Where the agency is terminated in any of the way indicated in section 201 of the Contract Act the agent or the third person concerned is affected by the termination only from the date when it becomes known to him. The same rule applies where it is by notice, by death or by insanity that agency is terminated. *Cun Ev* p 446. See also Contract Act ss 182 238. If a man were on several occasions to authorize his mistress to order goods from a tradesman on his credit the jury would be amply justified in finding him liable for articles supplied after the termination of the connection in the absence of any proof that the tradesman had received notice of such termination. *Rayan v Lambs* 12 Q B 460.

**Landlords and tenants.** When once the relation of landlord and tenant is admitted or proved to exist it will be presumed to continue until it is shown by affirmative proof that it has ceased to exist. *Mohun Mahto v Mir Shemsool* 21 W R 5. *Munng Sim v Munng Thru* U B R (1897 1901) vol II 111, *Tiru v Sanjulen* 3 M 118. *Rameshar v Dalpin* 7 C L J 202. *Dattatraya v Sindhar* 17 B 756. Mere non payment of rent though for many years, would not affect the landlords right to rent where the relationship of landlord and tenant once existed. *Bama Charan v Administrator General* 6 C I J 72. *Hango Lal v Abdul* 1 C 314. *Raj Kumar v Alimuddin* 17 C W N 627. *Premnukh v Bhupia* 22 A 517 (I B). *Rameshwar v Gobordhan* 7 C L J 202. *Dulapa v Krishna* 7 B 54. Failure of payment of rent by the tenant to the landlord does not alone operate to create in favour of a tenant a title by adverse possession. *Acquiddu v Chand* 21 C L J 153. *Munng Lin v Munng Shue* U B R (1892 96) vol II 363. *Troughakho v Mohana* 7 C L J 490, *Fau Charan v Sanjulen* 3 M 118. *Milan v Kumar* 7 C L J 615. So where a tenant holds over after the expiration of the term he impliedly holds subject to all the covenants in the lease which are applicable to his new situation. *Tonawo v Young* 2 Camp 40. *Thomas v Parker*, 1 H & N 669. *Fay* § 197. *Chatur v Mukund* 7 Cal 710. *Baj Nath v Paghun Nath*, 16 C W N 46. *Kishori Lal v Administrator General* 2 C W N 703. *Jannat Ali v Catterkhan*, 16 W R 185. *Lem v Raj Kumar*, 6 C W N 559. See also

section 116 of the Transfer of Property Act and section 51 of the Bengal Tenancy Act. The relation of landlord and tenant continues until it is proved to have ceased. *Deviyay v Mahamed Jaffer Sahab*, 36 V 53 = 19 Ind C 455. Where it is proved that the person in possession before the defendant was a tenant of the plaintiff at one time it is for the defendant under s 109 Evidence Act to show when the relationship of landlord and tenant ceased and possession became adverse (*Chahal v Fullmer*, 28 M L J 361 = 27 Ind C 458).

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When the question is whether any person is owner or tenant, the burden of proving that he is owner is on the person who affirms that he is not the owner.

**Principle** Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership, the emphasis being on the occupation or appearance of ownership, and not on the documentary sources of claim and the rule serving merely to shift to the opponent the second burden or duty of producing some evidence to the contrary. If ignore § 2515. Possession is *prima facie* proof of ownership, it is so because it is as it has been described the sum of acts of ownership. This obviously applies both to prior and to present possession. *Terlemire v C*, 1 in *Davis v Dhand*, 8 Bom L R 96 (98). One of the most common manifestations of title to real estate is the presumption from long possession that such possession is lawful rather than unlawful — in other words that it is supported by a grant. It is presumptive evidence of title until the contrary is shown. The title which adverse possession gives is one in fee simple and consequently its acquisition must be safeguarded and all the avenues of approach to it watched with the argus eye of the law that no one is wronged. Theoretically, it leaves possession as the primitive mode of acquisition of all property and constitutes the ultimate foundation upon which title rests. Hence it is necessary that the conscious badge or sign of ownership. This is a principle firmly imbedded in all common law jurisprudence. *Burton Jones* § 75. It is held that the presumption arising from possession is a presumption of seisin in fee. *Whitlock*, L R 1 Q B 1 = 35 L J Q B 17.

Scope of the section. The fact of possession in the eye of law suggests always ownership and whether it is put in Latin as *possession est prima facie dominus*, or in colloquial Anglo-Saxon that "possession is nine points of the law," goes without saying that proof of the possession of property is *prima facie* evidence of title to it, both with regard to moveable and immovable property. Indeed it may be said that the presumption has returned its full growth. *Pollard* says, "It has been said that there is no doctrine of possession in our law. The reason of this appearance is that possession is capable of deceiving even learned persons as that possession is all but swallowed up by owner ship, and the rights of a possessor, or one entitled to possess, have all but monopolized the very name of property." *Hobbs v Pollard*, 117 *The same learned judge* in comparing the status of owner in olden time and now, says that the owner in possession was protected against disturbance but the rights of owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes, the true owner of goods is the person and only the person entitled to immediate possession. *But* § 116. This presumption of ownership from possession is founded on the theory that such possession is rightful. Among other grounds which have been assigned for this presumption are those that it is in accord with the general principles of law to suppose until the contrary is shown, that possession is lawful rather than unlawful, that since the rightful owners of property are not

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likely to consent that their property remain in the continued possession of others who assert title thereto it is natural conclusion that possession of this character is authorized by some grant or license, and finally, as stated by Judge Story, "presumptions of this character are adopted from the general infirmity of human nature, the difficulty of preserving the muniments of title and the public policy of supporting long and uninterrupted possession." *Ricard v Williams*, 7 Wheat (U S) 109, *Burr Jones* § 71. Possession affords *prima facie* presumption of ownership, for men generally own what they possess. *Webb v Felt*, 7 F R 397. *Elliot v Kemp* 7 M & W 312, *Nort E* 295. "If a person is in actual possession, that is evidence that he is seized in fee, unless there be something to show that he had a less estate. I think that if nothing further be shown, it is at least some evidence of a seisin in fee." *Per Patteson J in Doe v Penfold*, 9 C & P 536. The law on the subject is thus stated by *Ellenborough, C J*. "As to the first point made in this case on the part of the defendant it is, that the ownership alleged was not sufficiently proved, it was proved by the captain in the ordinary way that the owners by whom as such, he was appointed and employed, were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross examination, that the ownership was devised to those persons under a bill of sale executed by himself as attorney to one *Lawrence Williams* the former owner it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register or to give any further proof of such of their property, the mere fact of their possession as owners being sufficient *prima facie* evidence of ownership without the aid of any documentary proof or title deeds on the subject until such further evidence should be rendered necessary in support of the *prima facie* case of ownership which they made in consequence of the introduction of some contrary proof on the other side." *Robertson v French* 1 East 130. In *Jones v Williams* 2 M & W 326 *Parke B* said Ownership may be proved by proof of possession and that can be shown only by acts of enjoyment of the law itself. Possession, therefore, has a twofold value it is evidence of ownership and is itself the foundation of a right to possession. *Hori v Dhond* 8 Bom L R 96. Under this section possession, when long and continued upto a recent date leads to a presumption of title. This section refers to the presumption to be made of ownership based on the circumstance of such possession and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. *Per Ranade J in Hanmantao v Secretary of State* 2 Bom L R 111 = 25 B 237 see also *Ma Hui Lun v Ma Me Hla* L B R (1899 1900), 85. Where a prior usufructuary mortgagee is in possession under an unregistered instrument which was not compulsorily registrable a subsequent mortgagee under a registered instrument must be presumed to have had notice of such possession and could not claim any priority over the unregistered instrument. *Bhulji Rai v Idut Narin* 25 A 366 = A W N 1903 81. Under this section possession short of the statutory period which may give a title by presumption is sufficient to raise a presumption of ownership and shift the burden of proving title to the other side. But where neither side can show title the possession which attracts the presumption of ownership must be a possession founded on a *prima facie* right. *Falun Singh v Secretary of State for India* 6 S L R 20. A benamidar cannot maintain a suit for possession of immovable property and the onus of proving that he is not a benamidar lies on him. *Khondhuan v Varma* 24 Ind Cr 301. A plaintiff who has omitted to sue under section 9 of the Specific Relief Act, when he subsequently seeks an order after the summary relief under that section is precluded by limitation from relying in a regular suit for ejectment on s 110 of the Evidence Act. *Harellan v Iswar Das* 2 Pat L J 61 = 38 Ind Cr 797. Where nothing else is known, the person in possession of property is presumed to be the owner. *Jayhoba v Pathoba* 1 Ind Cr 217. *Mang Tha v Fala neappa* 13 Bur L T 20. Where there is strong evidence of possession on the part of a person opposed by evidence apparently strong also on the part of his opponent, in determining the weight due to the evidence on both sides the presumption may well be regarded that possession went with title. *Promode Kumar v Mulu*

1083, 36 C L J 396 = 27 C W N 305. Though section 110 of the Evidence Act recognizes a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. *Kash Nath v Ganesh*, 1923 Bom 361 = 77 Ind C 506. The occupation of a site in a town gives a presumption of ownership. *Ali Khan v Wali Madam*, 78 Ind C 552. An unregistered lease is admissible to show the relation of landlord and tenant and under s 110 Evidence Act it is evidence of ownership. *Linnet v Laxman* 1921 Nig 199. Where the plaintiff is in possession of property of which he says he was the owner the onus of proving that he was not the owner lies on the defendant. *Ali am Din v Aliyann Das*, 103 Ind C 36. Under this section, the presumption is that a woman had power to dispose of all property that was in her possession at the time of her death. *Raj Bachan Singh v Shri Thakurji*, 40 C W N 1179. Where a person is in possession of property and he uses it for four months of every year for letting his cattle, such possession is *prima facie* evidence of title but Court should not say that the person's ownership is established. *Kashchand v Alwanam*, 119 Ind C 701 = A I R 1929 Nig. 318. Prior perceptual possession is *prima facie* evidence of ownership under this section and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for reclamation against another who has no title to the land in dispute. *Alio v Rajeshwar* 118 Ind C 680. Possession acquired tortiously is sufficient against a stranger who can show no better right. 3 *Greenle* 67

**Possession, meaning of.** The word 'possession' contemplated by this section is to be understood as opposed to juridical possession and to denote actual present possession. *Ali Bin Amin v Aga La U B R* 1905 Evidence, 7. Where the possession of a person is perceptual and obtained without ousting any one, it is of such a character as to affect the presumption described in this section and is good against the whole world except the person who could show a better title. To say that a possession is not within the meaning of this section unless it is a possession according to title, would be to render the section meaningless and to introduce a doctrine subversive of the established principles of property law. *Hannabhai v Secretary of State*, 2 Bom L R 1111 = 25 B 387. The mere length of possession by a mortgagee is not in all cases of itself sufficient to justify the presumption that it has become proprietary. *Galabi Khan v Pu Balsh A W N* 1951, 69. This section applies only to actual present possession, and does not declare generally that possession shall always be *prima facie* evidence of title. *Kara Langi v Ahouaz Avasio* 5 C L R 278. This section means that perceptual possession shall be *prima facie* proof of title. *Sambha*

**Burden of proof.** Possession is *prima facie* evidence of complete ownership throwing the burden of showing that it is held on some inferior title upon him who seeks to dislodge the possessor. *Tara Chand v Lalshiman* 1 B 91. *Haung Alm Din v Aliung On Gung U B R* (1897 1901) Vol II 421. The burden of proof imposed on the party out of possession by showing a title seeking to oust the party in possession is only discharged by showing a title of ownership based on prior proprietary title. *Aliung Vne v Aliung Po Gyi, U B R* (1897 1901) Vol II 416. The word possession contemplated by s 110 of the Act is to be understood as opposed to juridical possession and to denote actual present possession and where in a suit for possession based upon title there is also the allegation of wrongful possession obtained by the defendant, the burden of proof of the dispossession lies in the first instance on the plaintiff. But, on proof of his previous recent possession and dispossession by defendant and of his *prima facie* lawful possession on his own account the burden of proof will be shifted to the defendant to prove title to himself and his right to oust the plaintiff. *Ali Bin Amin v Aga La U B R* 1905 Evidence 7. There is no presumption that the property left by a person long deceased is part of undivided estate. When land has been in the exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact. *Aliung Lee Te A*

- S 110.** *Maung Lee Gale v U B R* (1897 1901) Vol II, 418. Where in a suit to eject the defendant from a house which had been in his possession for 5 years without interruption on the ground that he had entered the premises temporarily with the permission of the plaintiff's father and the defendant in reply alleged a sale, the burden of proving permissive occupation clearly lay on the plaintiff. *Ma Hpya v T Chany* 11 Ind C 14 777. In a suit for possession of land on the ground of dispossession or discontinuance of possession such dispossession or discontinuance of possession must be proved within 12 years of suit under art 112 of the Limitation Act and if that is not done the claimant is entitled to recover. *Maung Ngan v Ma Ngan Zon* 1 U B R (1892 1896) Vol II 375. Where the plaintiff alleged a temporary gift and the defendant an outright gift, it was held, on the authority of s 111 that the defendant, being in possession was entitled to retain the land and that there was no trustworthy evidence adduced by the plaintiff that the defendant was not the owner of the land in question the defendant was not called upon to make out a title of his own. *Maung Nyo v Maung Hme* U B R (1892 1896) Vol II, 371. Where the defendant is in possession of land there being no wrongful dispossession of plaintiff and plaintiff asserts permissive occupation by defendant and the defendant asserts possession of land by gift out right, hold that the burden of proof lies on the plaintiff. *Maung Tun v Maung Pu* 1 U B R (1902 1903) Vol II, 141. Evidence 7. Where the question is whether any person is owner of any thing of which he is shown to be in possession the burden of proving that he is not the owner is on the person who affirms that he is not the owner. *Ma Hla v Ma Thail* U B R (1892 1896) Vol II, 377. There is a clear distinction as to the onus of proof between a case in which a plaintiff sues to obtain possession of land by redemption of a mortgage and that in which the defence to a suit for possession of land is twelve years adverse possession by the defendant. In each case, it is for the plaintiff to plead his title and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. In the second case, where the defence is twelve years adverse possession the defendant must plead and make out the title he alleges and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. *Parmanand v Sahib Ali*, 11 A 438.

Where plaintiff who averred that defendant had been in possession for over 20 years of certain land and had regularly paid the government revenue thereon during that period as the registered holder of the land in the *thugyt's* books however stated that during this period defendant had only been in permissive occupation having rented the land from plaintiff without paying rent for it, the defendant on the other hand, while admitting that the land was originally owned by plaintiff, asserted that plaintiff had sold the land out and out to him and that he had been in adverse possession ever since for over 20 years, held that the burden of proof lay on plaintiff to establish her title and to show that defendant's occupation was permissive only and not adverse. *Ma Ba v Maung Keen* L B R (1872 1892) 474. Where the land in suit is in the possession of the defendant and the plaintiff alleges that it was mortgaged to the defendant's deceased husband and the defendant replies that the transaction was an absolute sale, held, that it is for the plaintiff to prove the mortgage which he alleges. *U Nyo v Ma Shue* L B R (1893 1900) 514. When a claimant under s 278 or the plaintiff in a suit under s 283 proves possession s 110 Evidence Act applies and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment debtor. *Maung Pan v Maung Yon* 1 U B R 1901 4th Qr Civ Pro 8. A person seeking to oust another out of the possession of the landed property, to which the latter has already succeeded and in whose favour mutation of names has also been effected, after regular enquiry by a Revenue Officer is bound in the first instance to prove that his right is superior to that of his adversary. *Nasibulhussa v Mansoor Ali* 120 P W R 1909=4 Ind Cas 965. Possession is *prima facie* evidence of title against any one claiming against the person in possession. *Krishna Iyer v Secretary of State* 6 M L T 306=5 Ind Cas 121=33 M 173. This section plainly lays down that the burden of proof



lies on the party who is out of possession. *Nga Aiyau v Nga Shue L B R (1872 1892)*, 107. In a suit for possession of land, where plaintiff's title and previous possession are both denied, the plaintiff should "lay the case R Haller v Anna Nam, 14 W R 478. Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him, who impugns this exclusive title, to show that the possession originated in a way not to affect his own right. *Krishna Chetty v Lingana, 20 B 270*, see also *Gobind Chunder v Gobind Chunder, 1 W R 244*. *Bungo Chunder v Hashie Chunder, 5 W R 218*, *Adjoobhuy v Sheass Wahan, 1 C P L R 3*, *Ma Si v Wang Ye U B R (1892 1896)* Vol II, 233. *Wahom Bue v Abdul Aweram, 20 W R 458*. *Laldas v Kashiam 4 B H C A C 60*, *Pu Bakh v Jhanda, 107 P R 1882*. *Itasan v Razal, 121 P R 1882*, *Lachho v Hart Saha, 12 A 46=A W N 1888* 43. *Wang Ya Bang v Ma Khym U B R (1892 1896)* Vol II, 234. *Nga Shue Lon v Nga Aiyau L B R (1872 1892)*, 133, *Ma Kym v Ram Pead, 6 But L T 185=21 Ind C P 333*, *Aslam v The Crown, 8 S L R 141=16 C L J 138=27 Ind C P 205*.

The presumption of continuance of possession. Possession or ownership of either realty or personally once proved to exist, is presumed to continue until the contrary is shown. If it is proved that at a given time B was seized of certain land, the presumption is that such seizure continues and the burden is on him who alleges a disclaimer. *Brown v King, 5 Meic 173*. Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession, until there is evidence that he has parted with the ownership or right of possession, and that the mere fact that the property is in the possession of another, with his consent, does not raise a legal presumption of change of title so as to shift the burden of proof upon the original owner to show that he retains his right of property and his right of possession therein. Whenever the possession of one person is shown to have been in subordination of the title of another it will not be adjudged afterwards adverse to such title without clear and positive proof of its having distinctly become so, for every presumption is in favour of the possession continuing in the same subordination of title. *Lanson Pte Ltd 210*

What constitutes possession. The acts of enjoyment from which the ownership of real property may be inferred are various, as for instance, the cutting of timber, the reaping of fences and banks, the perpetration of boundaries of a manner or parish the taking of wreck on the foreshore, and the granting of licenses or leases under which possession is taken and held, also the receipts of rents from tenants of the property, for all these acts are fractions of the sum total of enjoyment which characterizes dominion. *Wills De 60*. In cases of possession every act of enjoyment or possession is a rule against fact, since the right of land is instituted by an indefinite number of acts of user enjoyed by persons in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the plaintiff is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them. If they are so frequent and of such a character as to indicate that they were the exercises of one continuous open and unbroken title when it would be natural for the person claiming it to exercise it the jury will ordinarily infer the "general right" inasmuch as the more discontinuous of the evidence is not in itself any ground of suspicion. Acts of possession and enjoyment of land, as cutting timber, reaping, planting, &c., may be evidence of ownership not only of the particular piece or quantity of land with reference to which such acts are done but also of other land so situated or connected therewith by locality or similarity that what is true as to one piece of land is likely to be true of the other pieces of land. *Jones v Williams, 2 M A W 326*. Collision of real controversies of land. *Joylara v Mahomed, 8 C 972, 983*. In cases of jungle lands possession is presumed with the rightful owner. *Iceland v Britishers 16 W R 102*, *Noochie Kam v Bissambher Roy, 21 W R 110*, see also *Munshi*.

5 111 *Maharaj v. Beparaj Singh*, A W N 231=3 A L J 567, *Basanta Kumar Ray v. Secretary of State*, 11 C 858

111 Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence

Proof of good faith in transactions where one party is in relation of active confidence

### Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

**Principle** In the ordinary transactions of life fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears. *Burr Jones* Ev § 13. The allegation of bad faith is one which the plaintiff according to section 101 is bound to prove. To require the defendant to prove good faith is in contradiction to that section. The reason why this duty is imposed on the defendant is this: if it were not so the transaction could rarely be inquired into. The plaintiff having been entirely in the hands of the defendant would be destitute of the means of proving affirmatively the *mala fides* of the transaction whilst the defendant in such a transaction, may fairly be subjected to the duty not only of dealing honestly but of producing clear evidence that he has done so. *Mah* Ev 86. The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him the Court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. Per *Page* Wood V C in *Tate v. Williamson*, 1 Eq at p 536.

**Scope of the section** The rule is that the burden of proof is always upon the party alleging a fraud but there is one large class of cases which forms an important exception. When a question arises between a trustee and a beneficiary or between other parties who are in a fiduciary relation as to the good faith of transaction between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation the burden of proof is cast upon the trustee or other persons holding the relation of trust to show that the transaction is fair and reasonable and that all proper information has been given to the other party. To state the rule more broadly, when confidential relations exist between two persons, resulting in one having an influence over the other and a business transaction takes place between them resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least suspended and that it was as fairly conducted as if between strangers. In equity persons standing in certain relations to one another—such as parent and child, man and wife, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question and if a gift or contract, made in favour of him who holds the position of

influence, is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influences of the stronger, or the inexperienced over-reached by him of mature intelligence. *Per Lord Lushington in Taylor v. Lewis* L. R. 2 P. C. D. 162. One of the most important requisites of the validity of the transactions between persons acting under the influence of the confidential relation is, that the party presumably under the influence of the other should have been independent of advice for a lawyer who is devoid entirely to the interest of the party he is called upon to advise, and in whom that party has entire confidence. *Baron Jones v. 190 In Rhodes v. Dale* L. R. 1 Ch App. 257, *Lord Justice Turner* said, "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which others may have conferred upon them. Under the law, to the satisfaction of the Court, that the person by whom the benefits have been conferred had complete and independent advice in conferring them. In other words every contract entered into by persons standing in such a relation is treated as being *uberimae fidei*, and may be vitiated by silence as to matters which one of two independent parties making a simple contract would be in no way bound to communicate to the other. It does not matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence. *Watson v. Lerman*, 2 Dr. & War. p. 29. The mere fact that the mortgagee was a money lender and that the mortgage was executed for funds advanced during a litigation on behalf of the mortgagee, is not sufficient to create such a relation of active confidence between the mortgagee and mortgagee as to throw the burden of proof of good faith under section 111 of the Evidence Act, on the mortgagee. *Thakur v. Jang Singh*, 26 A. 130 (P. C.) = 31 A. 16 = 8 C. W. N. 569. Persons taking a beneficial interest over whom they stand in a position of commanding influence, must take upon themselves the whole proof that the thing is righteous. *Forbes Bahadur v. Sheoraj* 1 O. C. 63, *Phulchand v. Lalji*, 25 A. 358 = A. W. N. 1903 20. To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other it is certainly not necessary to prove that all the accounts on which the contract is based are correct. *Shanmullah Dutt v. Sushila Bala*, 12 C. W. N. 1102 = 36 C. 193.

Position of active confidence. The words 'active confidence' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other. This is the case between father and son, where the son is just come of age, and between legal practitioner and his client. *May v. Le p. 66* Sub sections (2) & (3) of section 16 of the Indian Contract Act run as follows:—(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—(1) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to other or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily infirmity. (3) Where a person who is in a position to dominate the will of another, enters into a contract with him and the transaction appears on the face of it or on the evidence adduced, to be unconscionable the burden of proving that such contract is not influenced by undue influence shall lie upon the person in a position to dominate the will of the other. Given a position of general and habitual influence, as in *Su Fidei Pollot*, the exercise in the particular case is presumed. But again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the party, though it be not actually proved that the one habitually acted as if under the domination of the other. There are many relations of common occurrence in life from which the Court presumes confidence put in the general course of affairs and influence exerted, in the particular transaction complained of. (*Per Lord Kingsdown in Smith v. Kay*, (1839) 2 H. L. C. 750, 779.) Persons may therefore not only be proved by direct evidence of conduct but presumed by reason of standing in any of these suspected relations, as they may be called, to be in a position of

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commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must take upon themselves the whole proof that the thing is righteous. [*Gibson v. Jessey*, (1801) 6 Ves 266, 276]. A stringent rule of evidence is imposed as safeguards against evasions of the substantive law. '*Pollock & Contract* p 581. The law is thus stated in *Fale v. Williamson*, (1866) L R 2 Ch 55 61 by Lord Chelmsford. 'Wherever two persons stand in such a relation that, while it continues confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused, or he influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed. So nothing can be more important than the jurisdiction long asserted and upheld by the Court in watching over and protecting, those who are placed in a situation to require protection as against acts of those who have influence over them by which acts the person having such influence obtains any benefit by himself. In such case the Court has always regarded the transaction with jealousy. [*Per Lord Hatherley in Turner v. Collins* (1871) L R 7 Ch 329 (338)]—a jealousy almost invariable, in Lord Emsw. words (*Hatch v. Hatch* 9 Ves at p 296) *Pollock & Contract* p 582.

'Position' implies lawful relation. See *Hortware v. Eberard*, 6 Ir Eq Rep N S 273 where the parties were paramour and mistress. *Whitley Stokes* Vol II, p 912. But the cases in which this jurisdiction has been actually exercised are considered as merely instances of the application of a principle 'applying to all the variety of relations in which dominion may be exercised by one person over another. *Per Sir S Romilly arg. Huguenin v. Baseley* 14 Ves 285 and adopted by Lord Cottenham in *Dent v. Bennett*, 4 My & Cr 269 (277). *Billage v. Southree* 2 H 534 540. *Pollock & contract* p 583. In *Parfitt v. Laules*, L R 2 P & D 462 Lord Penance laid down that such position includes the positions of a parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward. But the list is by no means exhaustive. His lordship added to the list of suspected relations that of promoters of a company to the company which is their creature. *Frlanger v. Neu Sombreno Phosphate Co* 3 App Ca at p 1230. But the soundness of this decision is doubted by Sir Frederic Pollock. He says 'But is not personal confidence essential to make the pre-ent doctrine applicable? And has any case gone the length of putting in a promoter the burden of proving in the first instance that a contract between them and the company was a fair one?' Cf *Fiden v. Ridsdale's Railway Lamp and Lighting Co* (1889) 23 Q B D 369=58 L J Q B 579, where the duty is put on the ground of agency. So this section refers to transactions between attorney and client, doctor and patient, guardian and ward, trustee and *ces que trust* spiritual advisers and those whom they advise, wherever in fact a real or apparent authority is calculated to give one party to the transaction the means of dictating terms to and robbing the other party of perfect freedom of will. *Huguenin v. Baseley*, 2 W & T L C 597. *Cum Contract* 68. As to certain well known relations indeed the Court is not bound by authority to presume influence. As to any other relation which the Court judges to be of a confidential kind it is free to presume that an influence founded on the confidence exists or to require such proof thereof as it may think fit. In the absence of any special relation from which such influence is presumed the burden of proof is on the person impeaching the transaction, and he must show affirmatively that pressure or undue influence was employed. *Blackie v. Carl* 15 Beav, 595. *Toler v. Toler*, 31 Beav 629. *Pollock on Contract* 584. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it is erroneous. That merely proves influence. It must be further established that a person in a position of domination has used the position

to obtain maintenance for himself and so as to cause injury to the person relying upon his authority or and *Ryan v Ryan* 10 Lrb 761 = 30 P L R 288 = 116 Ind C 19, 899 = V I R 1927 Lrb 309

**Relation of confidence** is presumed to continue Where a relation of confidence is once established either some positive act or some complete case of abandonment must be shown in order to determine it it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain *Fer Turner L J in Rhodes v Bate* (1866) 1 Ch 252 272 260 = 75 L J 267 *Holman v Loynes* 4 D M C 270 Where the influence has its inception in the legal authority of a parent or guardian it is presumed to continue for sometime after the termination of the legal authority, and there is what may be called a complete emancipation so that a free and unfettered judgment may be formed independent of any sort of control obvious that without this extension the rule would be practically meaningless It is said that is a general rule a person should elapse from the termination of the authority before the judgment can be supposed to be wholly emancipated this of course does not exclude actual proof of undue influence at any subsequent time

*Pollock v Conant* p 787

**Agent.** It is possible for an agent dealing directly with his principal to make a contract which the courts will uphold but such transactions to be maintained must be characterized by the utmost good faith There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent which might influence the principal, and the burden of establishing the perfect fairness of the contract in such cases, rests upon the agent Such transactions are never upheld unless it is clearly shown that there has been on the part of the person trusted that no material interest in the subject-matter, which removes all doubts respecting the fairness of the contract. *Condit v Blackwell*, 22 N J Lq 491 (Am), *Espartero Lacey* 6 Ves 625, *Brookman v Rothschild*, 3 Sm 153 *Rothschild v Brookman*, 3 D C 188, *Gillet v Lippincott*, 3 Brev 78, *Phil Chand v Laflia* 25 A 358 = 23 A W N 70 *Phil Chand v de Hosan*, 13 B L R 127 = 21 W R 940 11 A 193 (P C), *Kamata v Kamata Debi* 1 B L R O C 31, *Wagel Khan v Euzat Ali* 18 C 645 (P C) = 18 I A 144, *Pushong v Moonia*, 10 W R 128

**Parent and child** A similar rule is applied to the dealings of a parent with his child when the circumstances are such that undue influence may naturally be inferred, and to the dealings of a child with an old or infirm parent In the cases of a child's gift of its property to a parent the circumstances attending the transaction should be rigidly and carefully scrutinized by the Court in order to ascertain whether there has been undue influence in procuring it but it cannot be deemed *prima facie* void the presumption is in favour of its validity and, in order to set it aside, the Court must be satisfied that it was not the voluntary act of the donor *Burn Jones* § 190 In the case of a conveyance by a child to its parent just after attaining majority the burden is upon the parent to show, in the clearest and most satisfactory manner, that it is in every particular worthy of receiving the sanction of a Court of Equity *Burn Jones* § 190 *Braybridge v Brown* L R 18 Ch D 188 *Wright v Tanderplan*, 25 L J Ch 753, *Wattopp v Wattopp*, 25 L J Ch 471, *Dennis v Devereux* 35 L J Ch 806, *Bury v Coppenham*, 26 Brev 594, *Potts v Smith* 34 Brev 543 With regard to the evidence to be adduced to rebut the presumption in a transaction between a father and a son who has recently attained majority, the father is bound to show at all events that the son was really a free agent, that he had adequate independent advice, and that he understood the nature and extent of the transaction he was making, and that he was desirous of making it *Pollock v Conant* p 787 The same rule is applicable in cases of persons in loco parentis such as *Montland v Living* 15 Sm 437, step father in loco parentis and step daughter (*Keppison v Ishbee* 10 Ch 137)

**S 111.** 15, *Espey v Lale*, 10 H 260) As regards the fiduciary relationship between guardian and ward *Jude Hatch v Hatch*, 9 Ves 297, *Maitland v Irving*, 1 Sm 437. The equitable doctrine of undue influence applies to cases in which the position of the donor and donee has been such that it has been the duty of the donee (e.g. father to advise the donor (son), or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. *Lal Shmi v Roop Lal* 17 M L J 19 = 30 M 169 (F B)

**Husband and wife** From the confidential relations which exist between husband and wife a presumption of undue influence arises in relation to any transfer of property between them, and in order to sustain a conveyance or gift by the wife to the husband the burden of proof is upon him to show that the transaction was freely and deliberately made and that it was fair and proper. *Bair Jones Es* § 190, see also *Moonshe Butai v Sheemsoomssa* 11 M I A 751. *Abdul Ali v Kamunissa* 9 W R 153. *Ilum v Naplan* 20 A 447, see also *Lord Hardwicke's* remarks in *Grubb v Borch* 20 Bea 524 but see *Neddy v Neddy* 5 De G & Sm 377. There is fiduciary relation between persons engaged to be married. *Jage v Horne* 11 Bea 227 see also *Coulson v Allison*, 2 D I J 521 524. Where the husband stood in a position of active confidence to his wife and she entered into a transaction under his guidance the burden of proving good faith is on him. To uphold the transaction it must be shown she was given that care and advice which was due to her in her situation. *Dhanra Prosad v Nasir Ahmed* 11 O L J 219 = 78 Ind C 850 = 1925 Oudh 16. Where the vendor had been living separately and was not under the vendee's influence the rule as to burden of proof in section 11 does not apply. *Jur Lal v Sheo Chand* 6 Lah I J 403 = 85 Ind C 293 = A I R 1925 Lah 124.

**Spiritual adviser** According to the English law spiritual influence would be presumed between a clergyman and any person placing confidence in him. *Dent v Bennett* 7 Sm at p 516 see also *Nollidge v Prince* 29 L J Ch 857. *Lyon v Horne* 6 Eq 65. *Attwood v Skinner* 36 Ch D 145. *Morley v Longman* (1893) 1 Ch 776 = 62 L J Ch 515. The same rule is applicable in India where the transaction is between a guru and his disciple. (*Hanu Singh v Umada* 12 A 23) or a *pundit* and her family priest. *Kammi v Krishna* 16 C W N 649.

**Solicitor or pleader and client** Where a solicitor or a pleader purchases or obtains a benefit from a client, a Court of Equity expects him to be able to show that he has taken no advantage of his professional position that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger. *Sastry v Ayy*, 5 H I C at p 65. *Gibson v Jones* 6 Ves 266. *McPherson v Hill*, 3 App C 254 272 see also *Lushington v Moona* 1 B I R 95. *Kammi Sundari v Kabi Prasanna* 12 C 22. *Monohar v Komanath* 3 C 473. *Shanulldhone v Susila Bala* 76 C 49 = 12 C W N 1102. The Court does not hold that an attorney is incapable of purchasing from his client but watches such a transaction with jealousy and throws on the attorney the onus of showing that the bargain is speaking generally as good as any that could have been obtained by due diligence from any other purchaser. *Isam v I G for Gihalter*, I R P C 516 56 10. While the relation of solicitor and client subsists the solicitor cannot take the gift from his client. *Morgan v Minnet* 6 Ch D 638 but see *John Perishel v Prince Phoolpattee* 7 W R 99. The principle that, in the absence of competent independent advice a transaction between persons in the relation of solicitor and client or a confidential relationship of a similar character cannot be upheld if impugned unless the person seeking to enforce the contract can prove affirmatively that the person standing in such confidential position has disclosed all the information in his possession without reservation. It is further held that the transaction is itself *per se* one of general application and not a technical rule of English law. The same principle









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enforce a document executed by a *purdanashin* lady, all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing. *Bhagwati v Chohi*, 21 d L J 689=55 Ind Cas 698 see also *Motilal Das v The Eastern Mortgage and Agency Co Ltd*, 25 C W N 265=17 I A 265 (P C), *Kamauat v Dhybhai Singh*, 43 A 525=15 L W 1=18 I A 351 (P C). The Court when called upon to deal with a deed executed by a *purdanashin* lady, must satisfy itself upon the evidence, first that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do, secondly that she had full knowledge of the nature and effect of the transaction into which she is said to have entered and, thirdly, that she had independent and disinterested advice in the matter. These principles will be found to fall broadly into two groups, namely, first, cases when the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence and secondly cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases the Court will act with great caution and will presume confidence put and influence exerted, in the latter class of cases the Court will require the confidence and influence to be proved intrinsically. Independent and competent advice does not mean independent and competent approval, it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind free from that taint of interest and the party acting should know precisely the nature and consequences of the transaction. It is not an inflexible rule that a *purdanashin* lady must have independent legal advice. The Court should have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed of the lady concerned where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. *Satish Chandra Ghosh v Kaludasi Dasi* 34 C L J 529 see also *Krishna Kishore v Narendra Chandanani*, 34 C L J 33 *Hua Bibi v Ramdhon Lal* 6 Pat L J 465=2 Pat L 1 752=62 Ind Cas 540, *Sri Ram v Nand Keshore* 5 Lah 495=1925 Lah 196 (2), *Fardunnessa v Mulhtar Ahmad* 47 A 703=52 I A 312=89 Ind Cas 649=42 C L J 531=23 A L J 1000=49 M L J 758 (P C). The mere declaration by the transferor, a *purdanashin* lady, subsequently made that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the transferor, the nature of the transfer the circumstances under which it has been made and the whole history of the parties it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests on them. Of course fraud and undue and actual undue influence are separate matters. *Larfat Unnessa Begum v Debi Lal Sh*, 101 Ind Cas 29=51 C W N 693=25 A L J 514=8 Pat L 1 450=A I R 1927 P C 84. A person who takes a document from a *purdanashin* lady is bound to prove the validity of the document from every possible angle of attack, when the *bonafides* of the document is challenged. *Kalyani Bibi v Sahajan Bibi* 111 Ind Cas 716 see also *Rahulla v Hossain Ali* 32 C W N 929=A I R 1925 P C 303=48 C L J 412=55 M J J 84 (P C) see also *Beni Dun v Ham Naresb* A I R 1929 A 921 *Tajpuruddin v Kutabuddin*, 10 F 761=50 Pwaj L R 288=116 Ind Cas 799=A I R 1929 Lah 309 *Mahammed Ibrahim v Bidi Varman* 5 Pat 184=117 Ind Cas 658=A I R 1929 Pat 410, *Ananda Priya v Bejoy Krishna*, 91 Ind Cas 705=A I R 1926 C 613, *Phurathuan v Gunjeswari* 96 Ind Cas 571=A I R 1926 Pat 29 *Ham Sumran v Gobinda Das* 5 P 616=A I R 1926 P 552.

112

Birth during  
marriage conclusive  
proof of legitimacy

The fact that any person was born during the continuance of a valid marriage between his mother and my man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof



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charge of adultery rested on the bare fact that she gave birth to a child 330 days or 331 days after the date when petitioner had last access to her. *Held* that though under the circumstances very considerable doubt is thrown upon the honesty and truth of the wife's assertion that the petitioner was the father of the child Courts are not justified in the absence of any other evidence, in holding that the child is not the child of the petitioner and that, under s 112, Evidence Act, Courts are bound to assume that the child is legitimate unless it is proved that it could not have been begotten by him. *P v P* 77 P R 1911. The 280 days chosen in the section is no doubt the average period of gestation, but medical authorities show that it is only an average and that the period is often longer or shorter in individual cases. *Sri Datta Venkata v Gatham* 27 M L J 780=16 M L J 503. It may be regarded as proved that the period of gestation may be 296 days and most authorities agree that the interval may be as long as 308 days. The period fixed by the legislature for the purposes of s 112 is 280 days. Under section 60 of the Evidence Act the Court is entitled to consider and act upon the opinion of experts contained in treatises to which it is referred. *John Hone v Charlotte Hone* 2 M L J 391=11 M L J 447=1913 M W N 953 (F B). Where a boy was born about seven months after his father and mother were lawfully married and it was not disputed that they had opportunity of access to each other at a time when he could have been begotten of them. *Held* that the boy was the legitimate son of his parents. *Mahbub Ali v Py Khan* 26 Ind Cas 969. Where at the time of conception of a child its mother had been lawfully married to A and subsequently on divorce she remarried B and the child was born within three months of the marriage. *Held* that the child must be treated as the legitimate offspring of B in the absence of proof that B had no access to the mother at the time when child would have been begotten. S 112 of the Evidence Act refers to the point of time of the birth of a child and not to the time of its conception as the deciding fact in a case of disputed legitimacy. *Palani v Sethu* 20 L W 69=81 Ind Cas 456=A I R 1924 Mad 677=47 M I J 15; *Pal Singh v Jagu* 7 Lah 368=27 P L R 531=A I R 1926 Lah 529, *Sethu v Lalani*, 49 M 553=A I R 1926 M 628. Where the husband died on 7 10 1923 and the wife was living with him at that time and the child was born on 25 5 1924. *held*, that this section was applicable and that no evidence could be adduced, to disprove legitimacy. *Ponnamamy v Anna Kanoo*, 5 Mys L J 249.

**Had no access to each other now proved.** In this section it should be remembered that the words "access" and "non access" mean the existence or non-existence of opportunities for sexual intercourse. *Banbury Peerage* 1 Sm 2 Stu 159 5 Cl & J 250. In the above case *Lord Eldon* said *Lord Hale* in *Hopell v Collins* decided that the issue for the jury was as to the fact of access or as I understand him to mean sexual intercourse. For the access in question is of a peculiar nature not being access in the ordinary reception of the word but access between husband and wife viewed with reference to the result namely the procreation of children. By access I mean opportunities of having sexual intercourse. *Per Alderson* *Bin Cope v Cope* 1 M & Rob 275. Access is such access as affords an opportunity of sexual intercourse. *Binny v Thipot* 2 Myl & K 349. *Lord Longdale* in one case calls it "generating access", saying. The absence of sexual intercourse where there has been some society intercourse or vice has been called non generating access. *Hargrave v Hargrave* 9 Beav 225. In *R v Inhabitants of Mansfield*, 1 Q B 144 it appeared that a wife was deserted by her husband who went to live with another woman that the wife at the end of three or four years married another man and had two children that eleven years after the second marriage she again cohabited with her husband. It not appearing where the husband was between the time of his deserting and returning to his wife it was held that the evidence was insufficient to show non access when the children were begotten.

The question is said *Lord Denman* whether in this case there be any evidence of illegitimacy and to establish that it is necessary to show non access of the husband. That may be proved by circumstances one of which certainly is an adulterous intercourse between the husband or wife and another party. But here the whole proof consists only of that fact. We are not told what the

husband was doing or where residing at the time the children were begotten." In *Bury v Philpot*, 2 Myl & K 349, the wife of P left him and went to live with her father. Shortly after, her father dying, she formed a connection with one H, with whom she went to live. P took a house opposite where they resided and had frequent interviews with her. She had two children during this time. It was held that they must be declared legitimate. "Access" said the Master, 'if it is such access as affords an opportunity of sexual intercourse, and where the fact of such access between a husband and wife within a period capable of raising the legal inference as to the legitimacy of an after born child is not disputed, probabilities can have no weight, and a case ought never to be sent to a jury. There is nothing against the evidence of access except evidence of the adulterous intercourse of the wife with H, which does not affect the legal inference, for if it were proved that she slept every night with her paramour from the period of her separation from her husband I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law.' In *Van Iernam v Van Aennam*, 1 Barb Ch 575 the wife of the plaintiff was for several years living in the same town with him as the kept mistress of another person, the husband making no exertions to break up the intercourse. The Court held that in the absence of evidence of non access the husband would be presumed to be the father of children begotten upon the wife during that time. *Lawson Pre Est* pp 145 46 see also *Nga Fun v Chon*, 26 Ind Cts 996.

From proof of "access"—as this word is used in this connection—the presumption of sexual intercourse is very strong. *Ploues v Berry* 31 L J Ch 650. In that case B was married in 1829, became a lunatic in 1833 and was confined in a lunatic asylum until his death. His wife who lived twenty five miles away occasionally visited her husband, but the keepers of the asylum had strict orders not to allow them at any time to remain alone together. He was allowed freedom of the grounds, and the porter sometimes being absent it was possible for a person to enter without being seen. In March 1855, she visited the asylum, remaining alone for sometime with her husband. A child was born in December 1855. There were rumours at that time that Mr. B was living in adultery with one D. But the Court held that the child was legitimate. See the corrected report of the case in 33 L J Ch 315. In *King v Luffe*, 8 Fust 207 it was held that non access of the husband need not be proved during the whole period of the wife's pregnancy—it was sufficient if it was naturally impossible (as where he had access only a fortnight before the birth) that he could be the father.

That husband and wife slept together affords a strong and irresistible inference of sexual intercourse. *Tegge v Edmonds* 25 L J Ch 125 see also *Russell v Russell* (1924) P 1. "But in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that the husband and wife are living in the same town, and so had opportunities of meeting and, therefore, of sexual intercourse, would, in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or the same house together would be much stronger evidence of the fact, the strength of which however would vary with the circumstances, and is neither would be direct proof of sexual intercourse, but of facts from which, taken by themselves, sexual intercourse would be inferred. Such inferences must, as in all other cases be capable of being repelled by the proof of facts tending to raise a contrary inference." *Morris v Davis* 5 Cl & F 163 *Bahadur v Yun* 28 P L 1906.

But proof of access is not conclusive. *R v Inhabitants of Wimpell*, 1 Q B 111. *Cope v Cope* 1 M & Rob 273, *R v Shepherd*, 6 Binn 253, *Pantliffe v Pale* 1 M H C 178. It has, only proved that the opportunity for sexual intercourse had existed—that the parties lived in the same house—and the fact if not being proved evidence is admissible to disprove the presumption that it did take place. The parties may be allowed within the four walls and the fact of sexual intercourse not only disproved by direct testimony but by circumstantial evidence raising a strong presumption against it.

§ 112 the fact to state this principle briefly—the proof of sexual intercourse being conclusive, the presumption cannot be attacked, but the evidence by which such fact is to be established may be contradicted. The law is not so unreasonable as to deny proof of non access by witnesses, who were with her every minute of the time whenever she is supposed to have been begotten with a child. If such facts and circumstances are proved, as would induce a rational and well founded belief that the husband could have no access, it is sufficient. *Lawson v Pre E* p 118. The mere fact that the husband was, during the period within which the claimant must have been begotten, suffering from a serious carbuncle, does not in itself rebut the legal presumption under section 112. *Narendra Nath Pahari v Jagugobind Pahari*, 21 C 111 P C = 29 I A 17 = 6 C W N 116 = 1 Bom L R 243. One B died of small pox after a few days illness on the 16th May, 1895, and his widow gave birth to a son on the 4th January, 1896. In a suit by the reversionary heirs for a declaration that the child was not the son of B, *Held* that the suit was governed by s 112 Evidence Act and the burden of proof was on the plaintiff. *Urolok Nath v Lachman* 25 A 403 (P C) = 7 C W N 617 = 5 Bom L R 471 = 30 I A 152.

A sues B, his father, and C the adopted son of B, for partition. B disowned A's paternity, and stated that his mother D lived separate from him for a long time and that he had no access to D during the period when A could have been conceived by her. B married a first wife, and again married D as he had no son by the former. They both quarrelled subsequently. D sued B for maintenance and B met it by bringing one for restitution of conjugal rights, and became reconciled to each other. Though she lived in her mother's house she was constantly visiting B in his house without the knowledge of his first wife. When D was under the state of conception, B executed a deed of settlement in favour of C in which he did not disown the legitimacy of A. *Held* that (1) in those circumstances the *onus* lay on B to prove non access within the meaning of s 112 of the Evidence Act, and the fact that B believed D to be guilty of infidelity and produced witnesses to prove it, did not discharge the *onus*. A's legitimacy must in these circumstances be presumed. *Chegorapati v Chegorapati* (1911) 1 M W N 312 = 10 Ind C 389. In order to establish the illegitimacy of a person born during the continuance of a valid marriage between his mother and any man it is necessary to show conclusively that the parties to the marriage had no access to each other at any time when he could have been begotten. *Dalpa v Rela*, 19 P L R 1914 = 22 Ind C 409. The presumption created by s 112 of the Evidence Act can only be rebutted by proof of non access, and to prove non access, the evidence must be such as to exclude all doubt. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy. Proof of impotence would be equivalent to proof of non access. *Nga Tun E v M Chon* 4 U B R (1914) 3rd Q 23 = 26 Ind C 396 = 16 Cr I J 81 see *Bhogwant Singh v Ananyan Singh* 56 P W R 1917 = 39 Ind C 29. *Kahan Singh v Natha* 7 Lab 181 = 90 Ind C 123.

**Conduct of supposed father and mother.** On the question of access the conduct of the supposed father or mother towards the child is relevant. *Cope v Cope* 1 M & Rob 275. In the case of *Morris v Davis* 5 Cl & F 163, the wife concealed the birth of a child from her husband and declared to him that she never had such a child. The husband disclaimed all knowledge of it and acted up to his death as if no such child was in existence. The wife's paramour aided in concealing the child, reared and educated it as his own and left it all his property by Will. This repelled the presumption that the child was legitimate. Any evidence of the conduct of husband and wife towards each other is relevant. *Goss v Froman* 89 Ky 318. In the *Banbury Peerage Case*, 1 Sm & S 155 Lord Redesdale said: "I admit that the law presumes the child of the wife of A born when A might have had sexual intercourse with her or in due time after to be the legitimate child of A but this was merely considered a ground of presumption and might be met by opposing circumstances. The fact indeed, that any child is the child of any man is not capable of direct proof and can only be the result of presumption drawn from facts either certain or proved by credible testimony, by which may be determined the proof of a fact."

alleged, but of which there was no direct proof. It is, therefore, of high importance to consider in a question of legitimacy whether the fact of such knowledge as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of a child, and that the fact of his birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such a child. When a father brings up a child as legitimate it amounts as he is well been said to a duly assertion that he is legitimate. *Berkeley Peerage Case*, 4 Camp 409. So, the fact of the wife living in open adultery coupled with other facts e.g., that the husband had only on one single occasion an opportunity for access, and that the wife concealed the birth of the child from her husband, is sufficient to rebut the presumption of intercourse. *Cope v Cope*, 1 M & Rob 275. And the illegitimacy of a child of a married woman is established beyond dispute when it is shown that she was living in adultery at the time it was begotten, and that her husband was residing in a part of the country which made access impossible. *The Barony of Sale* 1 H L Cas 507, *Gurley v Gurley*, 32 L J Ch 456. The presumption still holds where the parties are living apart from each other by mutual consent (*St George v St Margarets*, 1 Silk 123, *Sidney v Sidney*, 3 P Wms 275, *Morris v Davies* 5 Cl & F 163), but it is otherwise where they are separated by a decree of the Court, for in such a case the presumption is that they obey the decree. But the presumption, in the first case, is, of course, rebuttable by proof of non access. *Law Pre* p 150.

There is, of course, a presumption that children born of a married woman during the life time of her husband are the legitimate offspring of that woman and her husband; but this is, after all, a mere presumption, and as such rebuttable. So where such a woman had admittedly lived for years together with another person and they both had admitted and asserted such children to have been born of them, held, the above presumption must be regarded as having been completely rebutted and the children being the illegitimate sons of such other person, he was bound to maintain them, and persons, therefore, who have come into possession of his properties on his death, are liable to give the children maintenance to the extent of the property that has so come into their hands. *Bahadur Singh v Irit*, 28 P R 1906. Where parentage of the plaintiff is challenged, though the burden is initially on him to show that he was the son of his parents, it is shifted on to the defendants as soon as he showed that he has been acknowledged by his parents to be their son and that he has been accepted as such by repute and habit for the last 34, 40 years, and it would require much clearer and stronger and more reliable evidence on the defendants' part to justify a finding against the plaintiffs' paternity. *Krishna Rao v Raja of Pottapur*, 102 Ind Cas 715 = A I R 1927 Mad 733.

**Declarations of husband and wife.** Neither the declarations of the wife nor her testimony that the child was the child of a man other than her husband are admissible (*Stegall v Stegall*, 2 Brock 257, *Pendell v Pendell* 2 Strange 925, *Cope v Cope*, 1 M & Rob 275, *Stehley v Sprigg* 33 L J Ch 345, *Stevens v Moss*, 2 Cowp 591), nor of the wife that the husband had not access or opportunities for access (*R v Hca*, 11 E & L 15, *Goodwright v Moss*, Cowp 591, *Cross v Cross* 3 Paige, 159), nor of the husband that he was not father of the child or had not access or opportunities for access. *Wright v Holdgate* 3 Cook, 158. *King v Inhabitants of Somerton* 5 Ad & Ell 180. Sir James Fitzjames Stephen says "Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders when proof has been given of the non access of the husband at any time when his wife's child could have been begotten the wife may give evidence as to the person by whom it was begotten." *Steph Dig* E & Cr 98, see also *R v Luffe*, 8 E & L 207, *Cope v Cope*, 1 M & R

S 112. 272 L. *Jeffer v Edmonds*, 25 L. J. 149, 125 (135) R. v. Mansfield 1 Q. B. 111, *Morris v Davies* 1 C. & P. 21; *Huace v Dragger*, L. L. 23 Ch D 172. But a deposition of the husband is admissible to prove that he had never sexual intercourse with his wife before the marriage. *The Poullett Terrace*, (1903) 1 C. 39. In that case *Ford Hillsbury* 1 C. and I shall submit to your lordships that the evidence tendered is properly admissible. There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and like every other question of fact when you are answering a presumption it may be answered by any evidence that is appropriate to the issue. My lords that is not exactly the question which arises upon the objection taken here. The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife. I confess I shall be startled if I thought that that which appears to have been in the mind of Sir John Romilly (*Vide Inou v Inou* 22 B. & W. 181, 23 B. & W. 273) at the time he gave the decision referred to could be held to be the law of England. Is it conceivable that a man taking to wife a person whom he imagined to be a pure virgin and finding out that he had been deceived and that the woman was pregnant when he married her should not be at liberty to say afterwards that, so far as he was concerned, he had every reason to believe that he was not a virgin, having spurious issues put upon him, he should not be at liberty to say 'I never had intercourse with my wife before marriage'? The testimony of the parents, that they have or have not had connection here, on the same grounds of decency, morality, and policy,—been, until recent times uniformly rejected by the Judges. *Taylor* § 950. But the rule is otherwise under this section. So in India a married woman can be examined as to non access of her husband during her married life without independent evidence being first offered to prove the legitimacy of her children. *Loario v Ingles* 18 B. 168, see also *John Hauc v Charlotte Hauc* 38 M. 166, *Bai Kamla v Babu Lhari*, 95 Ind. C. 834=28 Bom. L. R. 607, *Parbati v Maharaj*, 10 Ind. C. 188. In *Premchand Hira v Bai Galah*, A. I. R. 1927 Bom. 591, *Blackwell J.* said:—  
 Having regard to s. 7 Indian Divorce Act IV of 1869, I think that the rule laid down by the House of Lords in *Russell v Russell* (1924) A. C. 687, to the effect that neither a husband nor a wife is permitted to give evidence of non intercourse after marriage to bastardize a child born in wedlock applies to divorce suits in India. But such statement should be corroborated. *Vedanta Char v Marie* 97 Ind. C. 359=1926 Mad. 1150, see also *Parbati v Maharaj* 10 Ind. C. 188, but see *John Hauc v Charlotte Hauc* 38 M. L. J. 591 (F. B.). The law of England is that the declarations of a father or mother cannot be admitted to bastardize the issue born after the marriage. The Evidence Act does not contain any such rule. *Bai Kamla v Babu Lhari*, 28 Bom. L. R. 607=A. I. R. 1926 Bom. 318.

**Proof of marriage.** It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage. In such case no certain inference can be drawn from the evidence as to the conduct of relations and friends. *Thalw Amjal v Nauab Ali Khan*, 9 Bom. L. R. 261=5 C. L. J. 1=17 M. L. J. 56. It is a well recognised rule of law that when a particular relationship is shown to exist such as marriage then its continuance must *prima facie* be presumed. For the purpose of s. 112 of the Evidence Act, the burden of proving that the divorce of the plaintiff's mother took place at a time which disentitles him from relying on the action lies on the defendants. It is not the plaintiff's duty to show when the divorce took place. If the defendants are unable to show that the divorce took place at a time which excludes the plaintiff from the operation of s. 112 then the conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother. *Bhuma v Dhulappa* 7 Bom. L. R. 95. This section cannot be applicable in any way to a marriage which is neither void *ab initio* (batil) nor also



lately void but is *fasid*, i.e. irregular, inasmuch as this section is based on a division of marriages merely into two categories (valid and invalid) and cannot be applicable to Mahomedan Law which divides marriages into the categories void *ab initio*, *fasid* and valid. In any case if s 112 is held applicable, the word 'valid' in that section should be construed as 'lawless' so that the presumption would not apply to *fasid* marriages. *Kamza v Hasan Ahmad*, A I R 1926 Oudh 231=92 Ind Cas 82.

**Hindu Law** Under Hindu Law, it is not necessary in order to render a child legitimate that the procreation as well as the birth should take place after marriage. *Oolagappa Chetty v Collector of Pudukopoly* 14 B L R 115 (1973) P C.

**Question of legitimacy is question of evidence** The question of a child's paternity is not one of succession inheritance marriage or caste of any religious institution or usage within the meaning of s 13 of the Burma Laws Act. *Nya Tun v Michon*, U B R (1914) 3rd Q. 23=26 Ind Cas 996=16 Cr L J 81. Where the point of decision is one of evidence (e.g. paternity) only the case would be governed by s 112 and not by the personal law of the parties. *Ibid*.

**Mahomedan Law** The section proceeds upon adopting the period of birth as distinguished from conception as the turning point of legitimacy but under the Mahomedan law questions of legitimacy are referred to the date of the conception of the child and not to the period of his birth. *Muhammad Ullahdad v Muhammad Ismail* 10 A 259. The ordinary period of *iddat* for Mahomedan women is three months from the date of her divorce or from death of her husband. But if she be in the family way at the time of happening of either of these two events the period of *iddat* extends to the date of delivery of a fully or partly formed child whether it takes place before or after expiry of three months. A remarriage before expiry of *iddat* is void, but it is irregular and not void if it takes place after the *iddat* period is over but before delivery. In the last mentioned case a child born more than 250 days after the divorce by her first husband or his death but less than six months after her remarriage with the second husband is to be considered legitimate under s 112 of the Indian Evidence Act and is entitled to inherit her mother's second husband's property particularly where he admits the child to be his. *Aurul Hasan v Muhammad Hasan* 107 P W R 1910=78 P R 1910. According to the Mahomedan law a child, born six months after marriage or within two years after divorce, or the death of the husband is presumed to be his legitimate offspring. But, if the question to be determined is one of evidence it will be governed by this Act. *Ma har Ali v Budh Singh* 7 A 297. Neither paternity nor legitimacy can be obtained by adoption and a child begotten by *Zina* cannot be made legitimate by the subsequent marriage of its parents before its birth, section 112 of the Evidence Act being inapplicable to Muhammadans. *Zainabi v Sograb* 15 N L R 1=13 Ind Cas 883. But it has been held by the Allahabad High Court that the rule as to legitimacy contained in this section is a rule of procedure and not of substantive law and as such applicable to Muhammadans. *Hayra v Imma* 73 Ind Cas 783=1923 All 570, see also *Ma-har Ali v Budh Singh*, 7 A 297 (P B), *Manay v Abdul* 63 Ind Cas 286=43 A 673=19 A L J 713. *Sibt Mahomed v Mahomed*, 48 A 625=96 Ind Cas 782=24 A L J 723. The rule of Mahomedan law regarding gestation is a rule of evidence within the meaning of s 21. Evidence Act and the Courts are not bound by the rule of Mahomedan law in this respect. To such case this section applies. *Lahim Lubi v Chough Dm*, A I R 1930 Lah 97, see also *Muhammad v Ali Bahsh*, 76 P R 1891. *Hayra v Imma*, A I R 1923 All 570.

**Presumption of legitimacy** Where a party admits the paternity of the other party but pleads that he is of illegitimate descent the legal presumption being in favour of legitimacy, the *onus* lies on the party alleging illegitimacy to prove it. *Dulay Singh v Suray Devi* 13 Ind Cas 178. In the Buddhist law there is no such thing as judicial separation, but an order under s 183 of the Criminal Procedure Code, until it is rescinded, is for all practical purposes the same thing as an order for judicial separation and if, while the order is

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in force a child is born to the wife the *onus* is shifted on to her of proving *accusatio*. *Ma Mpa v. Ma Shue Bin* 16 Ind. Cas. 629. Before a presumption of legitimacy can arise under this section all the facts specified in the section must be proved. *Maroti v. Bhapp* 69 Ind. Cas. 165. Where plaintiff claims to recover property as the son of B by his lawfully married wife D and defendant denies that D ever gave birth to a child and sets up that plaintiff is the son of one S the *onus* of proof is on the plaintiff to show that D gave birth to him or to any child before invoking the presumption under s 112. *Lato Vir Singh v. Batumthi* 11 A 170-20 A I J 274 66 Ind. Cas. 902. There is no presumption in favour of legitimacy without laying the foundation for it under s 112 of the Evidence Act or a presumption that a valid marriage had taken place between the parents. *Chokalingam v. Sueni Battar* 79 Ind. Cas. 623. In order to disprove legitimacy it must be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Where the evidence showed that the father was living in another place and nothing more was proved the presumption under this section applied and there was no question of divorce under those circumstances. *Kannaphan v. Kullammal* 1929 M. W. N. 696. The presumption that a particular woman has passed the age of child bearing is one of fact to be determined partly by the light of general knowledge and partly by the life history of the person in question. It has several times been held to apply where the age of fifty three years has been passed but each case must depend on its particular circumstances. *Haynas v. Haynas* 35 I. J. Ch. 303. *He White* (1901) 1 Ch. 570. *Wills v. F. 2nd Ed.* 7. *Widow's Trust* I R 11 Eq. 408. *In re Milner's Estate* L. R. 11 Eq. 21. *Druidson v. Kimpton* 18 Ch. D. 213. *Lyllion Ellison* 19 Beav. 565. *Corton v. May* 9 Ch. D. 388. *In re Hooling* (1898) 2 Ch. 567. Where divorce in the sense of a legal dissolution of marriage, has not taken place a child born must be taken to be born during the continuance of a valid marriage between a woman and her husband. *Kannaphan v. Kullammal* A. I. R. 1930 Mad. 194.

### 113 A notification in the Gazette of India that any portion

Proof of cession of of British territory has been ceded to any  
territory Native State, Prince or Ruler, shall be con-  
clusive proof that a valid cession of such territory took place at  
the date mentioned in such notification

**Scope of the section** St. 24 & 2 Vict. c. 67, s. 25 does not protect s. 113 of the Evidence Act though it does not disallow it. This section has provided that a notification in the Gazette that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The value of this section depends on the constitutional question of prerogative. If the crown alone has power to cede territory then this provision of the law is valid and binding so long as it is not disallowed but if on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative council exceeds its powers, and that section 113 was and must continue to be bad law. *Damodar Gardham v. Ganesh Deoram*, 10 B. H. C. 37. In this case on appeal to the Privy Council (1 B. 367 at p. 461) Lord Shelborne said: "Nothing in their judgments, turns in this case upon the Indian Evidence Act of 1872, section 113. The Governor General in Council being precluded by the Act 24 & 25 Vict. chap. 67, section 22, from legislating directly as to the sovereignty or dominion of the crown over any part of its territories in India, or as to the allegiance of British subjects, could not by any legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory exclude inquiry as to the nature and lawfulness of that cession. The British Crown has the power without the intervention of the Indian Parliament to make a cession of territory within British India to a foreign prince or feudatory. *Lachmiamaram v. Partab Singh*, 2 A. 1. *Damodar v. Deoram* 1 B. 367 (P. C.)=3 I. A. 102. This section was an attempt, for

political reasons, to exclude enquiry by Courts of justice, into the validity of the acts of the Government. But it has been decided by the Privy Council in *Daniadai v. Deoram* 1 B 367 (P. C.) that the Indian Legislature had no power to do this and the section is, therefore, a dead letter. *Markby Ev* 87

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**114** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case

Court may pre-sume  
existence of certain  
facts

### Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession,

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars,

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence

(e) that judicial and official acts have been regularly performed,

(f) that the common course of business has been followed in particular cases,

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it

(h) that, if a man refuses to answer a question which he is not compelled to answer by law the answer, if given, would be unfavourable to him,

(i) that when a document creating an obligation is in the hands of the obligor the obligation has been discharged

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it —

as to illustration (a)—a shop keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business

as to illustration (b)—A a person of the highest character, is tried for causing a man's death or an act of negligence in arranging certain machinery B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself

as to illustration (b)—a crime is committed by several persons A, B and C three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable

as to illustration (c)—A, the drawer of a bill of exchange was a man of business B the acceptor, was a young and ignorant person, completely under A's influence

as to illustration (d)—it is proved that a river ran in a certain course five years ago but it is known that there have been floods since that time which might change its course

as to illustration (e)—a judicial act the regularity of which is in question, was performed under exceptional circumstances

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as to illustration (f)—the question is, whether a letter was received. It is shown to have been posted but the usual course of the post was interrupted by disturbances.

as to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

is to illustration (h)—a man refuses to answer a question which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked.

is to illustration (i)—a bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it.

**Scope of the section.** The effect of this section coupled with the general repealing clause at the beginning of the Act, is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subjected to technical rules whatever on the subject. Vide the Speech of Honble Mr Stephen in the Legislative Council. As regards relation of presumption to law of evidence Vide p 65 *Supra*. The illustrations given are for the most part cases of what in English law are called presumptions of law artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. *Ibid*. A 'presumption' is a rule of law that Courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. *Lawson Pre Lw* 639. Presumptions are of two kinds natural and legal or artificial. The natural presumption is when a fact is proved wherefrom by reason of the connection founded on inference, the existence of another fact is directly inferred. The legal or artificial presumption is where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved the law raises an artificial presumption of the existence of the other. *Quibick v Loder*, 13 N J (L) 72. The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives to a greater or less extent an artificial value. Nine of the most important of them are given by way of illustration. *Steph Intro* p 177. Presumptions of law are in reality, rules of law and part of the law itself, and the Court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise while all other presumptions, however obvious being only inferences of facts, cannot be made without the intervention of a jury. *Best on Presumptions* 18. *Lawson Pre Lw* 641. *Justice v Lang* 52 N Y 523. When certain facts are admitted or proven the Court takes notice without further proof of all such presumptions and inferences arising from them as are warranted by uniform experience and also all such consequences as are known to flow from the laws which govern the matter and which are applicable to the proven or admitted facts. *Heils v Sullivan*, 93 Ill 261 (Am). A presumption must be based upon a fact and not upon inference or upon another presumption. *Lawson Pre Lw* 641. Rule 118. A presumption cannot contradict facts or overcome facts proved. *Ibid* Rule 119. The principle laid down by s 114 of the Evidence Act is one of a very wide application which covers not merely the particular instances given in the illustrations to the said section, but all sorts of analogous cases in which the actual facts are distinguishable from the facts presumed by any one of the illustrations but are equally amenable to the general principle enunciated by the section itself. *Rustom Singh v Emperor*, 15 Cr L J 410=21 Ind Cas 146. Where the fact giving rise to such a presumption as may be drawn under this section is undisputed and no explanation negating the presumption is offered, the Court is justified in laying the onus proper where, but for the presumption the onus could not be laid. But where explanation negating the presumption is forthcoming the Court is not in a position to draw the presumption until it has heard the evidence in support of the explanation and therefore, must ignore the presumption for the purpose

of determining where the *onus* proper lies on the principle "when conflicting evidences in a point covered by a presumption of law is to be gone into, the presumption of law is *functus officio* is a presumption of law." Such a presumption therefore, cannot shift 'the burden of proof' in the strict sense of that term and the most that it can effect is a shifting of "the burden of evidence"—the burden of going forward with new evidentiary matter—and s 4 of the Act indicates that it is for the Court, which is taking evidence to decide whether such a presumption is strong enough to produce even that limited effect *Pakkoo v Dayali*, 1 N L R 169. The course of conduct which this section calls 'common' can only be that which is most common in the experience of the Judge who has to decide the point. *Secretary of State v Nandlal* 24 N L R 87=107 Ind Cas 206=A I R 1923 Nag 52. The distinction between a mere inference and a presumption of fact is that a presumption of fact is an inference drawn under section 114 of the Evidence Act and will include a presumption of the nature described in the illustration *Sita Ram v Nanhu*, 25 A L J 833.

The illustrations appended to this section are not statements of the law qualified only by particular exceptions. They are merely what they call them selves illustrations or instances of the application of certain maxims out of many possible instances. *Gorunda v Emperor*, 69 Ind Cas 957=23 Cr L J 673.

### ILLUSTRATION (A)

**Recent possession of stolen property** In a criminal case the burden of proof always lies in the first instance on the prosecution, for the accused is presumed to be innocent. As the case proceeds however the burden of proof may shift to the prisoner. *R v Stoddard* 23 J P 340. Thus, as soon as it has been established that the prisoner was found in possession of stolen goods shortly after they were stolen, it lies upon him to satisfy the jury that he came into the possession of them honestly. *Pouell Es* 155. So the possession of stolen property recently after the commission of a theft, is *prima facie* evidence that the possessor was either the thief or the receiver according to the other circumstances of the case. *R v Langmead*, 1 L & C 427. *Taylor* § 140, *Russell Law of Crimes* p 1182. In *R v Langmead* 1 L & C 427, *Pollock, C B* said 'If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence no doubt points to a case of stealing rather than a case of receiving' but in every case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence the jury will probably consider, with reason, that the prisoner stole the property but if there is other evidence which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution. In the same case *Blackburn J* said 'When it has been shown that property has been stolen, and has been found recently after its loss in the possession of the prisoner he is called upon to account for having it, and on his failing to do so the jury may well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances. If he had been seen near the place where the property was kept before it was stolen they may fairly infer that he was the thief. If other circumstances show that it is more probable that he was not the thief the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving unless they are satisfied that he is not the actual thief. See also *R v Smith Ry & M* 295, *Bayu v King Emperor*, 11 A L J 94=18 Ind Cas, 684=14 Cr L J 124, *In re Puthemthil & Weir* 777. This presumption when unexplained (*R v Exall* 4 F & F 922) either by direct evidence, or by the character and habit of the possessor, or otherwise, is usually regarded by the jury as conclusive. 2 East P C 656, *R v —*, 2 C & P 459, *State v Adams*, 1 Hyw 463, *Taylor* § 140. By 'conclusive' is meant merely that, like other presumptions, it requires

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th it the fact presumed be taken as true if no evidence to the contrary is offered, if such evidence is offered, then the presumption as such ceases and all the evidence goes to the jury with no rule of presumption to find them, the fact on which the presumption is based being then merely evidence along with the other facts *Greenl Ev* § 34 The following considerations have been emphasized, from the point of view of a definite rule (1) The possession must be unexplained by any innocent origin (2) possession must be fairly recent, (3) and the possession must be exclusive *Wigmore* § 2513 Illustration (a) to the section is merely an example and it cannot be read as limiting the presumptions which may be drawn from recent possession of stolen property *Husein v Emperor* 17 Cr L J 32=32 Ind Cas 160 The possession by the accused of the jewels of a person who has been murdered for the sake of her jewels, if unexplained, is presumptive evidence that the accused was the murderer as well as that he committed theft *In Namamalai Konan* 14 L W 418, but see *Azamuadin v Emperor*, 32 C L J 19=59 Ind Cas 204 Before a presumption under this illustration can arise, it must be proved that the goods found in the possession of the accused have been stolen The presumption can not arise when it may reasonably be presumed that the property in question is stolen property In a criminal case the *onus* is on the prosecution to prove beyond reasonable doubt the guilt of the accused and the burden never changes *Satya Charan v Emperor* 52 C 223=88 Ind Cas 515 *Rey v Isaac*, (1914) Cr App R 45 49 The presumption does not arise until it is clearly proved that the article belongs to the complainant and that it was stolen *Maung v Emperor*, 1 Rang 520 see also *Bhoses v Emperor*, 21 A L J 836=L R 4 A 245 Cr Where accused persons are found in possession of stolen property soon after the theft and they are unable to explain their possession they can be held guilty of receiving stolen property knowing it to be stolen under s 411 I P Code *Yamin v Emperor* L R 5 A 81

**Possession unexplained** The reasons on which this presumption is founded are well stated in a learned note to the report of *Cockin's case*, 2 *Leuin*, 254 "As a general proposition, where a person is in possession of property it is reasonable to suppose that he is able to give an account of how he came by it, and when the property in question has belonged to another it is generally not unreasonable to call upon him to do so If the change of possession has been recent he will not be likely to have forgotten, still less if it be an article of bulk or value If then, it be reasonable under such circumstances to call upon the party in possession to account for such possession it can not be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account or is unable to give a probable reason why he cannot Now there is no reason in general why an honest person should be unwilling, and therefore the law presumes that such person is not honest and that he is the thief The property must have been taken by some one He is in possession and might have taken it and he refuses to give such information upon the matter as an honest man ought C is indicted for stealing a piece of wood the property of H It is found in the possession of C five days after it was taken from Hs On the trial C states that he bought it from a neighbour This is a reasonable explanation and overthrows the presumption C must be acquitted unless the prosecution produce the neighbour and contradict C *R v Crouchurst* 1 C & K 370 In that case Alderson B observed 'In cases of this nature you should take it as a general principle that when a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is to be a real person it is incumbent on the prosecutor to show that that account is false, but if the account given by the prisoner is unreasonable or improbable on the face of it, the *onus* of proving its truth lies on him Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account and I ought not to be convicted of felony unless it is shown that that account is a false one See also *R v Smith* 2 C & K 206 see *R v Schama*, 86 L J K B 396 *L v Norris* 86 L J K B 810, *R v Granbery* 33 F L L 128

Explanation not inconsistent with the identity of the property The explanation to be given by the accused of his possession of the stolen property must not be inconsistent with the identity of the property A beetle head is stolen from the house of W Fifteen months thereafter it is found in E's house and identified by W as his E is called on to explain his possession If E says "I cannot remember where I got it," This will be sufficient and he must be acquitted But if E says, "I bought this beetle head at a sale eight years ago, this contradicts the identity, which remains a question on which E's guilt or innocence depends" *Queen v Evans*, 2 Cox C C 270, *Lauson Pre Er* 605 In that case Alderson B said to the jury "If the prisoner said in the first instance, 'why, really I cannot tell where or how I got this beetle,' I should have said that this was a reasonable statement and that he ought not to have been indicted for stealing it, in that case it being assumed that the prisoner does not deny that the article found might once have been the property of the prosecutor Where however, the prisoner is shown to have claimed the thing so found in his possession and sworn by the prosecutor, to be his own property by right of a purchase made eight years ago, and a continued possession up to the present time, I should say that that was not so reasonable an account of his possession as to exempt him from the necessity of accounting for it to the satisfaction of the jury, for if it be true the prosecutor is wrong and the identity of the thing found with that is disputed If the prosecutor should satisfy the jury that the beetle in question was his, then the statement of the prisoner accounting for his possession of it must be false, and he must be presumed to have stolen it, although it was not found in his possession until fifteen months after the loss The question therefore is simply one of identity Is that beetle the thing which was bought by the prisoner at the sale of his mother's goods eight years ago or it is another and different beetle which was in the possession of the prosecutor within fifteen months when it was lost? If the latter be the case, the prisoner is guilty

Possession must be recent It is clearly established that, in order to put the accused on his defence his possession of the stolen property must be recent although what shall be deemed recent possession must be determined by the nature of the articles stolen and whether they are of a nature likely to pass from hand to hand, or of which the accused would be likely from his mode of life, or vocation, to become possessed innocently *Best* § 211. So that it is not recent, within this rule depends upon the cost, bulk or immobility of the thing stolen Suppose the Pitt Diamond or the Crown Jewel were stolen, and after the lapse of one or two years, found in the possession of a person in a comparatively humble station of life, who refused to give any account of where he got them would there be anything harsh or unreasonable in presuming that he had not come by them honestly? But suppose the goods were merely a pair of shoes or a coat such as in his station of life would be natural and proper for the prisoner to wear and that these were found in his possession until after a few months from the time of the commission of making a violent presumption as to deem him to have obtained them dishonestly? Even if the point were not settled of necessity it should come by a simple process of reasoning to the conclusion that there can be no absolute rule for drawing, from recent possession, a presumption of guilt without reference to the nature of the property, a presumption of a metallic or paper piece of small value and small denomination, after it was stolen might last some time in circulation than an elephant five years after the commission of the property It would be more probable that the property would be sold or otherwise disposed of testimony how he obtained it It is equally clear, upon the same principle, that a recent possession of the stolen property, if it be the property of the prosecutor, is not sufficient to establish guilt unless it be shown that the property was not lawfully acquired afterwards they cannot raise a presumption of guilt from the fact that it was found in his possession 235 The rule is that the possession must be recent and must be such as to put the accused on his defence

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note to this case, by the author "If the property" says the writer "has not recently changed hands, if the time since it passed from the possession of the rightful owner is considerable, then the likelihood of his having forgotten (where he obtained it and thus explain his possession) is increased, and with it the difficulty of giving an account. After an interval of time the means of proof are lessened. People move away from place to place, they die and little circumstances are confounded together, those of the time with those subsequent or antecedent. The memory of two persons equally honest and intending the truth may not be equally strong, they may differ from each other in the recollection of facts, or enmities may have grown up, and the occasion may be laid hold of to gratify a vindictive feeling. Again the circumstances in life of the party may be a material point in the question. A man engaged in important daily vocations in which his mind is employed will take less notice of transactions of a different nature, his memory will be less strongly impressed with particulars regarding them he will perhaps never recur to them. Of course therefore, the impression will be less lasting. It will become overlaid with new and more interesting matter till the traces of it are lost, and this effect will be likely to happen more or less soon as the object is of less or more value or of less or greater bulk, and as it may happen to be an article that is more or less frequently brought under the party's view. Judges, therefore, hold and most reasonably hold, that a person is not to be called upon to give an account at a distant period after the theft. The question, however, of distance of time or recent possession must be at all times one of fact under the circumstances and a jury under the Judge's direction must ultimately decide. In *Coltins Case* 2 Lew 235, *Coleridge J* said to the jury "If I was now to lose my watch and in a few minutes it was to be found on the person of one of you it would afford the strongest ground for presuming that you had stolen it, but if a month hence it were to be found in your possession, the presumption of your having stolen it would be greatly weakened, because stolen property usually passes through many hands."

Two bolts of woollen cloth were stolen from M. Two months after they are found in the possession of P. The presumption is that P stole them. *R v Patridge*, 7 C & P 551. In that case *Patteson J* said "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily two months would be a long time but here that is not so." An axe and a saw were stolen on March 1st. On June 1st they are found in A's possession. This raises no presumption against A. *R v Adams* 3 C & P 600, *R v Heulett*, 2 Russ on Cr 728 (note) *R v Deukerst*, 2 Starl Ev 449 note. *R v —*, 2 C & P 459. A horse disappears from the possession of its owner on December 17 1849. On June 20 1850 it was found in the possession of C. This does not raise a presumption that C is the thief. *R v Cooper*, 3 C & K 315. In that case *Maule J* said he thought there was no case to go to the jury—the possession was not sufficiently recent. Where a man is found in possession of a horse six or seven months after it is lost and there is no other evidence against him but that possession, he ought not to be called to account for it.

A shovel is stolen from A in August, 1841. In March 1842 it is found in C's house. This raises no presumption that C stole it. *R v Cutendon* 6 Jur 267. In that case *Gurney B* said to the jury "I have frequently had occasion to tell you gentlemen, that when property proved to be stolen is found shortly after the theft in the possession of a party, that person is to be presumed to be the thief, unless he can explain satisfactorily how he came by it. But in this case I do not think the possession of this shovel sufficiently recent to raise that presumption against the prisoner. A period of six months has elapsed since the property was lost in which time it might have passed through several hands. A beetle head is stolen from W. Fifteen months afterwards it is found in the possession of F. This does not raise an inference that F is the thief. *Queen v Ears* 2 Cox C C 270. In that case it was said "In cases where property of such insignificant value as that laid in this indictment is shown to have been stolen so long as fifteen months before it was discovered in the possession of a stranger, that person ought not to be called on to answer for that possession on



a charge of felony for it might reasonably be inferred that he had come honestly by it, in that long interval reference being always had to the character and value of the thing itself." From the possession of stolen property soon after the theft the Court may presume that the person in possession is either the thief or the receiver of the goods knowing them to be stolen. An important, if not the most important circumstance to be considered in dealing with the presumption, is the length of time which has elapsed between the loss of the property and the finding of it. No definite rule can be laid down as to the precise time which is too great to make it necessary for the prisoner to account for his possession. *In re Puthenattil*, 2 Weir 777. A bullock was stolen from a pen underneath a house during the night. On the following day, the accused offered to find it, if he were given Rs. 8. On receipt of the money, the accused told the complainant where the bullock was to be found. The bullock was just tied up in the place indicated by the accused. *Held* that it must, from the circumstances spoken to, be presumed that the accused was in possession of the bullock when it was tied up in the jungle, from which possession, it might undoubtedly be presumed that he was the person who stole the animal. *Don Be v Crown*, 1 L B R 332. An accused cannot be convicted for the possession of stolen cooking utensils fourteen months after theft. *Empress v Keshub Dutt*, A W N 1881, 150. But when stolen property is traced to the possession of an accused person three weeks after the theft took place, the proper presumption is, not that he was one of those who committed the theft, but that he received the stolen property knowing or having reason to believe it to be such. Whether a presumption of theft or of receipt of stolen property should be drawn would depend on the circumstances, the length of time that has elapsed after the theft, how much of the stolen property is found in the possession of the person in question, the circumstances which led to the recovery and other facts connected with the discovery of the property. *Sessions Judge v Gorle*, 1913 M W N 97=13 Ind Crs 828=13 Cr L J 140. The presumption under this illustration would not arise by the fact that the stolen property was found in the possession of the accused more than a month after the death of the thief. *Queen Empress v Burke* 6 A W N 1884, 55 see also *Empress v Dallna* A W N 1887 281. Possession of Currency Notes of not large value a year and half after their theft is not by itself evidence of any guilty knowledge on the part of the possessor, so as to support a conviction for dishonest retention of stolen property. In such a case the fact that the accused gave a false explanation of his possession is not sufficient to warrant his conviction. *Vellai Ocha Thevar v Emperor*, (1912) M W N 362=15 Ind Crs 315=13 Cr L J 475. But the presumption would arise where the accused is in possession of the stolen property three weeks after it was stolen. *Sen Raja v Public Prosecutor* 3 M L J 30=7 Cr L J 30. *Empress v Bisnath* 12 C P L R Cr 5 see also *Comyan v Emperor*, 1914 M W N 84=25 Ind Crs 330, *R v Partidge*, 7 C & P 511.

No fixed time can be laid down to determine whether possession of articles is recent or otherwise. But every case must be judged on its own facts. If a few stolen articles are found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly sometime after the theft the presumption under the law might not arise against him. *Emperor v Fkabbai* 27 Cr L J 617=94 Ind Crs 361=A I R 1926 Cal 925, *Necha v Emperor* A I R 1928 Nag 213=109 Ind Crs 801. Where, more than six months after the dacoity, some ornaments consisting of a pair of bangles, a bracelet and ear rings were found in the possession of the accused, *held* that having regard to the nature of the ornaments which were of common description and were likely to pass from hand to hand the case was not covered by s 114 illustration (a) and the accused should not have been called upon to explain their possession. *Emperor v Sughor*, 3 A L J 803=4 Cr L J 436=29 A 138. Where the possession of property stolen some years before, reasonably and circumstantially explained, such explanation should not be rejected merely because it is unproved. *Talu v Empress*, 15 P R 1591 Cr see also *In re Bhami Luzmun Sheribaga* 8 M L T 418=8 Ind Crs 145=1910 M W N 419, *Smith v Emperor*, 19 Cr L J 189=43 Ind Crs 605. In view of the plain terms of ill (a), by which the Courts of this country must

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be guided the possession of stolen property, sufficiently soon after theft permits one of the presumptions set out therein being drawn and the question, which of the two presumptions indicated in the illustration should be drawn, must depend on the facts in each particular case irrespective of any rule of English law *Raja Kiyet v Queen Empress*, 1 L B R 39 The presumption concerning stolen goods in this illustration arises only when the stolen goods are found 'soon after the theft' 13 months after the occurrence cannot be regarded as soon after the theft *Jamnullahdin In re* 26 M L 1 389=11 L W 43=53 Ind Cas 819, *Jorenullah v Emperor*, 22 C W N 597=16 Ind Cas 158=19 Cr L J 702 *Hamlet v Emperor* 20 A L J 178=65 Ind Cas 819=23 Cr L J 193 *Chhotey Lal v Emperor* 80 Ind Cas 722=26 Cr L J 578=A I R 1925 All 220, *Mangal v Emperor* 96 Ind Cas 670=27 Cr L J 986, *Naghi v Emperor*, 27 Cr L J 807=95 Ind Cas 471=A I R 1926 Lah 528 *Alia v Emperor* 27 Cr L J 112=91 Ind Cas 544=A I R 1926 Lah 272

**Possession must be exclusive** In order to give rise to the presumption in this illustration the possession must be exclusive The possession of a watch by the wife of the accused is not sufficient *Stenson v U S* 8th C C A 168 Fed 785 It is not sufficient that the stolen goods were found in the house of the wife of the accused where he does not live *People v Kubulis* 298 Ill 523, *Wignmore* § 2513, *Lawson Pre Et* p 599 The two accused in this case were husband and wife and both were in possession of the stolen property within such a short time of the theft as to raise the usual *prima facie* presumption against them of being concerned in such theft, held that the general presumption that a wife acts under the influence and control of her husband was applicable to the present case and consequently the guilt of the wife must be confined to the offence of assisting her husband by dishonest possession or dishonest disposal of the stolen property under s 411 I P Code *Mh Myit v Queen Empress* U B R (1897 1901) Vol I, 171 Where stolen property was found in the camp of a party of refugees it was held that it was not proved in whose possession it was to justify the conviction of any one of them for theft *Nga Shue v Queen Empress* L B R (1872 1892) 397 Where it was proved that some ghee was stolen from the lines in a train and the stolen ghee was found in a wagon in that train in which there were five porters and a policeman Held that the possession of the stolen ghee could not be attributed to the porters and therefore, the presumption arising out of possession of stolen ghee did not arise in the case *Natarao v Emperor*, 111 Ind Cas 732=29 Cr L J 924

### ILLUSTRATION (B)

**Corroboration of evidence of accomplice** Although as a matter of law, corroboration is not necessary to convict an accused person on the evidence of an accomplice an accomplice should as a rule be presumed to be unworthy of credit unless he is corroborated in material particulars, except where there are special circumstances in a particular case to disregard the rule *Rahi Balsh v Empress*, 16 P R 1886 Cr The general rule under which the evidence of an accomplice is discredited must, as the illustration given in the Evidence Act shows be subject to the qualification that the less heinous the offence disclosed, the less liable would the evidence of the accomplice be to suspicion and discredit. *Emperor v Lalshmi* 6 Bom L R 1091=29 B 264 For further discussion on this topic *Vide* notes under s 133 *infra*

### ILLUSTRATION (C)

**Presumption as regards Bills of Exchange** Bills of exchange and promissory notes enjoy the privilege of being presumed *prima facie* to be founded on a valuable consideration *Collins v Martin* 1 B & P 651 *Holliday v Morris* 5 B & C 501 The law raises this presumption in favour of these instruments, partly, because it is important to preserve their negotiability in fact, and partly, because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate

mode in which they are executed *Story Bills* §§ 16 178, *Taylor* § 118 These and other special rules of evidence have also been incorporated in the Negotiable Instruments Act (XXVI of 1881), vide ss 118 122 So the legal presumption is that a note is of the value of the sum promised thereby to be paid *Lawson, Pre Ev* 94 "The law was thus framed and has been so administered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value, and this principle is so comprehensive in respect to bills of exchange and promissory notes which pass by delivery, that title and possession are considered as one and inseparable and in the absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear and the burden of proof is on the party attempting to impeach the title These principles are certainly in accordance with the general current of authorities and are believed to correspond with the general understanding of those engaged in mercantile pursuits" *Goodman v Simonds*, 20 How 343, *Lawson, Pre sumptive Ev* 95 But where fraud or illegality or duress is shown in its inception the burden is on the holder to show regularity *Baily v Biduell*, 13 M & W 76, *Fitch v Jones*, 5 El & B 239 In *Bailey v Biduell*, 13 M & W 74 *Baron Parke B* said "It certainly has been the universal understanding that if the note were proven to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of illegality would dispose of it and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a bona fide indorsee for value" In certain states of America want of consideration, like fraud, casts the burden on the holder *Wallace v Banl* 1 Ala 567 But the English rule is that where there is 'no fraud nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance the plaintiff is not called upon to prove that he gave value for the bill" *Whitaker v Edmonds*, 1 Ad & Lll 638 overruling *Thomas v Newton*, 2 C & P 666 and *Heath v Sanson* 2 B & Ald 291 see also *Robinson v Reynolds*, 2 Q B 634 *Bailey v Biduell* 13 M & W 72, *Berry v Alderham* 14 C B 91, *Smith v Brane* 16 Q B 241, *Moti v Mahomed* 20 B 267 *Sulharam v Gulab* 16 Bom L R 743 *Mudhoram v Nanda* 58 Ind Cas 982 But this presumption does not arise where the endorsement is forged or the consideration is unlawful *Banla v Secy of State* 36 C 239 *Ramdas v Lal Chand*, 101 Ind Cas 325=1927 1 Ch 137

### ILLUSIATION (D)

**Continuance of things or state of things** When the existence of an object, condition quality or tendency at a given time is in issue the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand So far then, as the interval of time is concerned no fixed rule can be laid down the nature of the thing and the circumstances of the particular case must control *Wymore* § 137 These presumptions are founded on the experienced continuance or immutability, for a longer or shorter period of human affairs When therefore the existence of a person or personal relation or state of things is once established by proof the law presumes that the person relation or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised from the nature of the subject in question *Price v Price* 16 M & W 232 When things in once proved to have existed in a particular state, they are presumed to have continued in that state until the contrary is established by evidence either direct or presumptive *Best Fr* § 165 Although this rule has long held the sanction of the highest authority, it will be observed that it is laid in very general terms, and it must have a reason in its interpretation It is a presumption always disputable, sometimes entitled to considerable weight but frequently liable to be rebutted by very slight circumstances The rule has

**S. 114.** been held to apply to the continuance of minority, a given state of health, a state of war and to other cases where obviously, after a limited time, the presumption could have very little weight *Burr Jones* § 58 (n). Thus, where a jury found that a certain custom existed up to the year 1689, the Court held, that, in the absence of all evidence of its abolition, this was in legal effect a verdict finding that the custom still subsisted at the time of the trial in 1810 *Scales v Key*, 11 A 1 819, *Taylor* § 196. In this way, continuance of ownership of property, of residence (*R v Palmer*, 1 Esp 304) of an agent's authority, and the like, may be presumed *Green Ev* § 11. So, in the absence of evidence to the contrary, the settlement of a paper, or the appointment of a party to an official situation, will at least for a reasonable time, be presumed to remain in force. So a partnership, agency, tenancy, or other similar relation, once shown to exist, is presumed to continue till it is proved to have been dissolved *Taylor* § 196. So, if a debt be shown to have once existed its continuance will be presumed in the absence of proof of payment, or some other discharge *Jackson v Tim*, 2 Camp 50. Thus all the members of a Christian community being presumed to enter upon the common faith, no man is supposed to disbelieve the existence and moral government of God till it is shown from his own declaration *State v Stenson*, 7 L R 383, *Taylor* § 197. The ordinary legal presumption is that things remain in their original state *Jiratlulla v Hussain Begam* 11 M I A 194. So the presumption is in favour of the existing state of the thing and not against it *Secy of State v Jyoti*, 53 C 533 P C = 30 C W N 745 = 24 A L J 761. Presumption should not be made against but in favour of the existing state of things *Secretary of State v Raja Jyoti Prasad*, 30 C W N 745 = 24 A L J 761 = 53 C 533 = 53 I A 100. The presumption under this section relates to the existence of certain facts and not their probative value *Nanda Kumar v Emdad Ali* 44 C L J 265 = A I R 1927 Cal 49. Where in a suit for arrears of rent the right of the plaintiffs to claim rent is proved up to the time immediately preceding the suit then it is for the defendants to show how the plaintiff lost that right *Sardan v Bal*, 7 L R 406. Rev. Proof of the existence at a particular time of a fact of a continuous nature give rise to a rebuttable presumption within local limits that it existed at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant must obviously vary with each case—always strongest in the beginning the inference steadily diminishes in force with the lapse of time at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplemented by a directly opposite presumption. To put the matter shortly, it will be inferred that a given set of facts or sets of facts whose existence at a particular time is once established in evidence continue to exist as long as such facts usually exist. The inference of continuance whether backwards or forwards whether onwards or downwards is an inference of fact and may therefore be rebutted *Secretary of State v Upendra Narain Roy* 71 Ind Cas 849 = 1923 Cal 247 = 36 C I J 336. If a person is shown at one time to be a member of a joint Hindu family it must be held under s. 114 illustration (d) of the Evidence Act that he never separated at all unless the contrary is proved *Sula v Ralho* 57 Ind Cas 339. Where evidence about acts of ownership does not exist and can not reasonably be expected it is usual to presume that the owner's possession once proved continued till it is shown to have been interrupted *Secretary of State v Mushtal Singh* 7 S L R 169 = 24 Ind Cas 813. This illustration does not compel but certainly permits the Court to make a presumption as to the continuance of the state of things *Huanmoy v Ranjan*, 29 Ind Cas 694 = 20 C W N 48. see also *Soudamini v Secy of State* 38 C L J 47. Under this illustration a person who is once proved to be a profligate is presumed to continue as such during his lifetime. But the presumption is rebuttable *Mussammat Shahal v Allah Bachayo* 9 S L R 196 = 34 Ind Cas 504.

**Subsequent existence.** Similar considerations affect the use of subsequent existence as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will

depend on the likelihood of such intervening circumstances having occurred and been the true origin. This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, and has ever been spoken of as a presumption. *Wignore* § 437. In *R v Biddell*, 1 B & Ald 124, *Best J* said 'I am to presume a thing always (to have been) in the state in which it is found unless I have evidence that at some previous time it was in a different state.' But a future continuance is never presumed. *Lanson Pre Et* 235.

### ILLUSTRATION (E)

**Presumption as regards Judicial and Official Acts.** The general experience that a rule of official duty on requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise occasionally to a presumption of due performance. This presumption is more often mentioned than enforced, and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions, first that the matter is more or less in the past and is incapable of easily procured evidence, secondly that it involves a mere formality or detail of required procedure, in the routine of a litigation or of a public officer's action, next, that it involves to some extent the security of apparently vested rights so that the presumption will serve to prevent in unwholesome uncertainty and finally that the circumstances of the particular case add some element of probability. *Wignore* § 2531. There is a well known maxim of law *omnia praesumuntur rite esse acta*, this is an inference of reasonable probability arising out of the experience of mankind. The law assumes that any act done in public or any formal act privately done will be performed in due form by the person authorized to do it. *Pouell* *Ev* 391. In *Benniman v Wise*, 11 R 366, *Buller J* said that in the case of all peace officers, Justices of the peace constables etc., it was sufficient to prove that they acted in those characters without producing their appointment. Where successive decisions are inconsistent with a general order of the Court a reversal of that order ought to be presumed. *Bohun v Delessert* 1 Coop 21, *Man v Ricketts* 2 Coop 8 21. Again, on an indictment of bigamy, proof of the solemnization of the first marriage in a Wesleyan Chapel in the presence of the Registrar, and of entry of such marriage in his book has been held to raise a *prima facie* presumption that the marriage was duly registered. *R v Mannoring* 26 L J M C 10=7 Cox 192. This illustration authorises the presumption that a particular judicial or official act has been performed regularly but it does not authorize the presumption without any evidence that the act has been performed. *Deputy Legal Membrancer v Sarwarjan*, 6 C W N 845, *Hira v Jagat*, A I R 1928 Pat 600=9 Pat L T 523, *Hutanain v Rambharai Rai* 7 Pat 733=A I R 1928 Pat 459. From the mere fact that the warrant for the arrest of a judgment debtor bore the signatures of the *sheristadar*, it cannot be presumed under s 114 (a) that the *sheristadar* had been duly appointed to sign warrants. *Deputy Legal Membrancer v Sarwarjan* 6 C W N 845 see also *Gudhai v Harish* 27 C W N 1042=37 C L J 331, *Khudu v Emperor* 3 Pat L J 636. While sanctioning the prosecution of accused for an offence under Penal Code s 294 A the name of the accused was shown on the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side. *held* that the initial presumption was that all the official acts were done in a regular manner and hence the sanction was valid. *Emperor v Duan Chaud* A I R 1930 Lah 81. Where a committing Magistrate writes at the foot of the deposition that the cross examination is being reserved by him and that the accused has not been given an opportunity for cross examination. All official acts must be presumed to have been done properly and it is difficult to suppose that the Magistrate who must be presumed to have known the law did not give the accused an opportunity of cross examination to which he was entitled by s 208, Criminal Procedure Code. *Emperor v Mahrab*, A I, R 1930 Sind 54.

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**Regularity of Judicial Acts** Where a Court having general jurisdiction acts in a case its jurisdiction to so act will be presumed. *Lauson Pre Li* Rule 5 Nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so and nothing will be presumed to be within the jurisdiction of inferior Courts but that which is expressly alleged. *Peacock v Bell*, 1 Saund 74 'It is a general rule' said *Hightman J* that all judicial acts exercised by persons whose judicial authority is limited to locality must appear to be done within the locality to which the authority is limited. *R v Lotness* 11 Q B 80, *Dempster v Parnell* 1 Scott N R 30, *R v Bloomsbury* 4 Ll & S 20 The rule, said *Holroyd J* in *King v Inhabitants of All Saints*, 7 B & C 785 that in inferior Courts and proceedings by Magistrates the maxim *omnia præsumentur rite esse acta* does not apply to give jurisdiction has never been questioned. Here then the jurisdiction should at all events have appeared on the face of the examination, supposing proof of it *aliunde* not to have been necessary. But where the proceedings are under a special authority granted to any tribunal in a special case or for special purposes the jurisdiction is not presumed but must be shown. *Lauson Pre Ev* Rule 9

The regularity of the proceedings of Courts of general powers is presumed, and so of the proceedings of inferior Courts jurisdiction being once shown to exist. The maxim of *omnia præsumentur rite esse acta* finds perhaps, its best application in restraining the validity of judicial proceedings. They are presumed to be regular. *Baynath v Sri Bhogwan* 96 Ind Crs 591 = A I R 1926 All 691 So too after verdict a Court of review will assume that the necessary facts to sustain it were proved. On the same principle the regularity of the proceedings of a military Court and the correctness of acts of legislative bodies are presumed. *Lauson Pre Ev* 52 *Ishad v Kanto* 21 C 335 *Hash Behary v Nabay* 3 B L R A C 99 = 11 W R 465

A judgment is produced which was confessed before a Justice of the peace. The law requires that the confession should be entered on the minutes of a docket and the judgment made thereon. The docket is lost. The presumption is that the entry was properly made. *Slicer v Bank of Pittsburg* 16 How 571. It appearing that a probate Court had jurisdiction to render a certain judgment, the question arises whether all the proceedings were regular. The presumption is that they were. *State v Hinchman* 27 Pt St 479, *Lauson Pre Ev* 56. The presumption that judicial acts have been regularly performed applies to the acts of the Court alone. *Jamesuar v Judith Kuer* 87 Ind Crs 235 = A I R 1925 Oudh 633. Every Court is furnished with a machinery for giving effect to its orders and it would be unjust to think that the subordinate staff attached to such Court failed in its duty of carrying out the orders of the Court. *Bhanon Prasad v Laxmi Naram* 1924 Nig 385. Where in appellate judgment is silent on a point which is specifically mentioned in the grounds of appeal inference can be drawn that it was given up. To hold otherwise would be to contravene s. 114 and to presume that the Court failed to do so. *Ibtul Karim v Thalwaram*, 1923 Lah 124 = 68 Ind Crs 710. After a guardian appointed by Court has filed his accounts and they have been accepted by the Court as correct, a presumption as to their accuracy does certainly arise and it is open to parties to rely on them in subsequent proceedings between the guardian and ward. *Gopal v Sarje* 21 O C 74 = 44 Ind Crs 599. The presumption arising under this section as to the legitimacy and correctness of a Court's proceedings can only be overturned by exceptionally strong evidence. *Sheo Dhan Singh v Assessor Singh*, 5 O L J 179 = 46 Ind Crs 52. But when an applicant before the Court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. *Sohagbat v Surendra Mohan* 1 Pt L W 296 = 44 Ind Crs 661. Before the deposition of a medical witness given before a committing Magistrate can be admitted in the sessions trial it must either appear in the Magistrate's record or must be proved by the evidence of witnesses to have been taken and attested in the prisoner's presence. It should not be merely presumed under s. 114 illustration (e) to have been so taken and attested. *Queen Empress v Ruding*

9A 720=A W N 1887 228 Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment it must still be presumed to have performed the judicial act of writing a judgment regularly and properly *Har Charan v Lochman* A I R 1928 Lah 91

**Regularity of Official Acts** The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper capacity and authority *Lauson Pie Et* Rule 13 *Butler v Lrod* 1 Cr & M 663 In *the Murphy* 8 C & P 310 *Coleridge J* said 'With regard to the last objection these trustees are public officers. They all acted as such before the signing of this rate, and I cannot say that there is no evidence that they are trustees. If the proof of their once acting is not enough would proof of the times be so? Where is the line to be drawn? I think it is evidence to go to the jury that they were trustees'. The presumption is that public officers do as the law and their duty requires them *Lauson Pie Et* Rule 14 The production of a bond with the certificate of due registration endorsed thereon raises a strong presumption in favour of the due registration of the bond and in the absence of clear proof that the requirements of law are not complied with the Court is bound to admit the document in evidence. The onus does not lie upon the plaintiff that the requirements of the Act were complied with *Lamchandra v Farand* 3 A L J 158 If the proceedings under section 61 of the *Chauludari* Act are conducted in compliance with the provisions of Regulation VII of 1822 which are applicable to the proceedings under the *Chauludari* Act and after full notice to all the parties concerned, then the order under section 61 is final and binding upon the Civil Court. If it was found that there was an order under section 61, the presumption under section 114 illustration (e) that official acts have been regularly performed would arise *Bairuntha Nath v Bulhu Bhutan*, 9 Ind Cas 322 A document purporting to be a copy of a deposition in a suit in Court in Cutch was certified to be a true copy by an officer higher than the trial Judge but not by the Political Agent of Cutch in a manner which fully satisfied the requirements of ss 76 (1) and 56 of the Evidence Act. Held that under s 114 of the Evidence Act a presumption arose that the document was a correct copy of the record of that deposition as recorded by or under the supervision of the Judge who tried the suit *Vallabh Das v Pran Sankar*, 30 Bom L R 1519=113 Ind Cas 313 It must be assumed that a process issued by the Court which has been accepted by the Court as having been duly served was served in the manner provided by law and with all the formalities laid down there *Parya Ram v Sohaua* 109 Ind Cas 561=A I R 1928 Lah 910 The meaning of this section, illustration (e) is that, if an official act is proved to have been done it will be presumed to have been regularly done *Wahelal v Emperor*, 53 C 718=96 Ind Cas 264=30 C W N 713=A I R 1926 Cal 968 An order issued under s 31 may be a writ order by a police constable issued during the control of the public at any place of public resort. There is a presumption that the Magistrate's order to levy tolls was legal and even apart from it a police constable is entitled to assume that a toll collector was acting rightfully *Shamundar v Emperor* 91 Ind Cas 56=27 Cr L J 24=A I R 1926 All 261 Entry in *Wanbulaz* being an official act is presumed to be correct *Ganga Ram v Lachman*, 55 Ind Cas 613=1925 All 176 The presumption is that official acts are legally performed and where the jurisdiction of a settlement officer has not been questioned in the trial Court it must be presumed that he acted regularly and within his jurisdiction *Babu Balgobind v Beharwal* 1923 P 96 (3)=66 Ind Cas 471 The presumption in favour of survey records of rights cannot be displaced by *Balwara* for irrigation maps *Sita Ram v Gaya Prasad*, 1923 P 37 Under this illustration it is presumed that official acts have been regularly performed. Regularly performed means performed with due regard to form and procedure. The regular performance of official acts does not imply that the representation made to them must be correct *Jagdeo Narain v Balak Gope*, (1921) Pat 343=63 Ind Cas 226 The action of a Deputy Commissioner under Regulation XVII of 1836, is purely ministerial. His acts therefore, are official acts and the presumption contained in s 114 illustration (e) of the Evidence Act applies to them *Juala Baksh v Nawa Azish Ali*, 49 Ind Cas 402 Regard should be had to the presumption in favour

- S. 114 of the due performance of official acts *Prosunno Coomarr v Secretary of Salt*, 26 C 792—1 C W N 69,

### ILLUSTRATION (I)

**Presumption as regards common course of business.** In commercial transactions the presumption is that the usual course of business was followed by the parties thereto *Furson Pie Ev Rule 15*. "Where the maxim of *omnia rite acta presumuntur* applies there indeed if the event ought probably to have taken place on Tue day, evidence that it did take place on Tue day, or Wednesday is strong evidence that it took place on Tue day *Ferry v Bouden* 69 E & B 773, see also section 16 *supra*. Where the name of the accused was printed on the title page of a seditious booklet and the lower Court convicted him under s 124 I P Code relying on s 114 ill (f) and there was no other evidence on record to attribute the authorship to him *Held* the presumption could be made if there were anything to show that the accused had no name-sake or that his name could not have been adopted by any other person. In the absence of ill evidence the mere fact that the title page bears his name does not justify the conclusion that he and nobody else could be the author thereof *Ranjit Singh v The Crown*, 26 P L R 103—58 Ind Cas 346—26 Cr L J 1124. Where letter is duly posted there may be a presumption that it reaches the addressee in the ordinary course of business *Habib v Samuel* 59 Ind Cas 22—23 A L J 961, *Paan v Mun*, 1901 Ind Rul Oudh 59. Where the facts of a particular case can form a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made *Mutchand v Jamambi* 27 Bom L R 671—59 Ind Cas 228—A I R 192, Bom 113. Where upon the evidence a presumption of fact under section 111 illustration (f) of the Evidence Act is drawn by an Appellate Court, such presumption is binding upon Court of Second Appeal *Ram Chandra v Kanwar* 53 Ind Cas 62. Where sums are paid before the presiding officer of the Court at the time when a receipt is given for them the presumption under this section is that the ordinary course of business was followed in the case in question. The mere statement by appellants counsel that these sums are not always paid at the time when the receipts are given is sufficient to throw the onus on the prosecution of proving that the plea was wrong *Emperor v Ahmedsha*, 1923 Lah 566. This illustration is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business *Laxmi Pathya v Ram Chandra* 2 M W N 133—20 M L F 228—31 M L J 311—35 Ind Cas 421.

### ILLUSTRATION (G)

**Withholding evidence—presumption from.** The omission of a party to an action to testify to facts or to produce evidence in explanation of or to contradict adverse testimony raises a presumption against his claims except where the evidence is not peculiarly within his power or is merely cumulative or is privileged or incompetent or its necessity could not have been reasonably anticipated by the party *Lauson Pie Ev Rule 22*. It is certainly a maxim said *Lord Mansfield* in *Blatch v Archer* Cowp 63 that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted. The omission of a party to testify to facts within his knowledge in explanation of or to contradict adverse testimony is proper subject of consideration both in the Courts of Equity and in the Courts of law *Lauson Pie Ev* 154. A refuses to produce a deed which is part of a title which he claims. The presumption is that if produced, the deed would injure his claim *Haldane v Harley* 4 Burr 2486. In cases like this it is laid down that the case of written evidence presents the strongest illustration of the extent of the rule. The non production of documentary evidence within the party's power raises, it is said, in several cases a very strong presumption that if produced it would militate against him who withholds it. Therefore in an action of trespass where the plaintiff relied upon bare possession although it appeared that he had taken the premises under an



agreement in writing which was not produced the Judge charged the jury that having proved that he was in possession of the close at the time of the trespass, the plaintiff must have a verdict, but that to entitle him to more than nominal damages he should have shown the duration of the term. In affirming this direction *Maule J* pointed out that the plaintiff had the means of showing the quantum of his interest and that "the non production of the lease raised a presumption that the production of it would do the plaintiff no good." *Tryman v Knowles*, 13 C B 222. In *All Gen v Dean of Windsor* 24 Beav 679, the Master of the Rolls said "Evidence is always to be taken most strongly against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle although it exonerates the present members from blame in that respect. It is true it is argued, that this deed is lost, and that nothing of wilful suppression is to be presumed against the predecessors of the present Corporation, and yet the circumstances undoubtedly require an explanation which they cannot now receive." It is well observed by *Mr Erans* in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the Court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and that it may well be presumed if a more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal. 2 *Erans* *loc. cit.*, 149.

In *Braithurte v Coleman*, 1 Hurl & Well 229 which was an action by the indorsee against the drawer of a note, the only evidence of notice of dishonour was the statement of the defendant to a witness "I have good defence to the action in the first place the letter was not sent to me in time." The defendant had been notified to produce his letter but did not do so. *Lord Lyndhurst* directed the jury that they might presume that the letter if produced, would be found to have contained a notice in proper time. On appeal *Denman CJ* thought the direction right. "The defendant admits" said he, "he received the letter and as he does not produce it it might be fairly inferred by the jury that it was in time." But the other members of the Court were of a contrary opinion and a new trial was ordered. But in the case of *Carlewis v Corfield*, 1 Q B 814, which six years later came before the same Court and nearly before the same Judges, a different conclusion was reached. In *Bell v Franks*, 4 Mon & Gr., 447, also an action by the indorsee against the drawer of a bill of exchange it appeared that the defendant had told a witness that he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, requesting him to negotiate a renewal of the bill, but the letter, which had found its way into the defendant's hands was not produced at the trial. It was ruled that the jury was warranted in inferring that no notice of dishonour had been given. See also *Lobb v Stanley* 5 Q B 574. When a party does not produce a document in his possession the Court may presume that its production will damage his case. *Raghunath v Hotilal* 1 A L J 121. Where Government had to prove that certain service *nam* lands were excluded from the *Zamin dari* but failed to produce the record of the original settlement it cannot be suggested that it was withheld because it was against the Government. *Lal Shm v Secretary of State* 117 Ind Cas 292=A I R 1929 Mad 399. Where certain account books the production of which would have thrown considerable light upon some of the issues of the case were not produced in Court by a company carrying on business and the non production was not sought to be explained *held* that the Court was entitled to draw an inference under s 114 (g) of the Evidence Act. *Gujarat v Motilal*, 31 Bom L R 1310 see also *Kanshi Ram v Sanhar Das* 111 Ind Cas 596=10 Lah L J 93. The non production of account books by a party when such account books would throw much light on the case raises adverse presumption. *Jag Prasad v Mt Singari*, 23 A L J 97=86 Ind Cas 123=29 C W N 941=A I R 1929 (P C) 93 see also *Syed Hasan v Sheonarayan* 3 O W N 25. *Gulzar Singh v Madho Ram*, A I R Oudh 11. *The Firm of Jowala Das v Ullam Chand* 1923 Lah 585, *Datta Ram v Basanta Kumar*, (1922) P C 378. *Padmanav v Gopi Kishore* 56 Ind Cas

**S 114** 129 *Debendra v Narendra*, 24 C W N 110=30 C L J 417, *Sanlara Linga v Com of Income Tax*, A I R 1930 M, 209 (F B)

Every deed being the best evidence of its own contents, its non production raises the presumption that it contains some defeasance, in other words, there is some endorsement on the document which the plaintiff does not like. *Mohammad v Zalu*, 24 A L J 964=97 Ind Cns 82=A I R 1926 All 741, *Ahmed v Ali Ebrahim*, 27 Bom L R 746=1925 P C 177, *Seenath Roy v Secretary of State*, 50 C 276=70 Ind Cns 510=1923 Cal 233=36 C L J 345, *Secretary of State v Upendra Nath Roy* 36 C L J 346 *Harendra v Durga* 62 Ind Cns 697 Where a document is a very old one the possibility of its having been lost and being no longer in existence is naturally much brighter than in the case of a document of recent date. Consequently the presumption arising from non production of the document is not quite as strong in the case of an old document as in the case of a recent one. *Rampj Das v Mihar Lal*, 71 Ind Cns 654=A I R 1923 A 441 Where a party does not produce certain books saying that they have been destroyed and the matter dealt with by the books could be easily proved by secondary evidence which is admittedly in the possession or power of the party and which it does not attempt to place on the record the opposite party is entitled to the presumption that these books if produced would have gone against the contentions of the party not producing them. *Secretary of State v G T Sami*, A I R 1930 Lah 364

**Exception** A does not produce one of his muniments of title. He proves that it is in the possession of B from whom he cannot obtain it. There is no presumption against A. *Gilbert v Ross*, 7 M & W 121 *Winston v Doune* 1 Ad & El 32 In the first case it has been ruled that where the evidence alleged to be withheld is unattainable the presumption does not arise. Therefore if a deed be in the possession of an adverse party and not produced or if it be lost and destroyed no matter whether by adverse party or not, secondary evidence is clearly admissible and if the deed be in the possession of a third person who is not by law compellible to produce it and he refuses to do so the result is the same. *Lauson Pre Et* 169

**Necessary witnesses not called.** Where a witness is not called by the prosecution which it was the duty of the prosecution to call what happens is that at the most there arises a presumption that if the witnesses had been called he would not have supported the prosecution. *Krishna Mahanava v Emperor*, A I R 1929 Pat 651 The failure to examine a material witness justifies the inference that the witness, if examined would have deposed against the prosecution. *Mian Fay Mahammad v Emperor*, 29 Punj L R 11=107 Ind Cns 100=29 Cr L J 212=A I R 1928 Lah 12 This section says that a Court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The Court may presume this but it cannot be taken as a principle of law that the Court must presume it. *Iditja v Emperor* 11 Luck C 195=103 Ind Cns 560 see also *Mahlaung v King Emperor* 86 Ind Cns 47=26 Cr L J 427=1 Bur I J 2 The presumption indicated in this illustration arising from non production of evidence cannot displace the contrary inference supported by adequate evidence. *Dennisetti v Dennisetti* 13 F W 293=63 Ind Cns 710 (P C) Where in a suit for profits of land the recorded collections are suspiciously low, and the defendant neither produces nor gives any evidence to show what was collected the Court would be justified in presuming that the full amount of the rents had been collected and is included in the profits in the book of the gross rental. *Ingthamathi v Hon Dayil* 55 Ind Cns 751

Where the plaintiffs are the best persons to give evidence as to the interest possessed by them in a religious institution to prove the *locus standi* for the purposes of s 92 Civil Procedure Code and they merely put the defendants into the witness box their failure to go into the witness box goes strongly against them. *Karpi Singh v Gupat Singh* A I R 1930 Lah 1 see also *Gurabish Singh v Gurabish Singh* A I R 1927 P C 230, *Ilth Datta v Bhajum*, A I R 1930 Lah 101 But non production of witnesses called by prosecution when their evidence was unnecessary cannot justify

adverse inference when there is nothing else on record to justify it. *Jowaya v Emperor* A I R 1930 Lah 163, see also *Krishna Mithana v Emperor* 1930 Ind Rul 173

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## ILLUSTRATION (H)

**Refusal to answer—presumption for** This illustration does not contemplate the testimony of a party in a civil or criminal suit because 'every person in the kingdom except the sovereign may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's Courts' unless he can show that he is exempted by some exception in his favour. *Per Willes J in Baird v Fernand*, 12 C B N S 339. So in such a case he is compellable by law to give answer. So also this illustration does not contemplate the cases of witness who is not compelled to answer on the grounds of privilege. (*vide ss 121-129*) To make adverse presumption for not answering in those cases would be extremely inequitable. This illustration contemplates cases where a person is not bound to answer but can answer if he so desire, e.g. the case of an accused under s 342 Cr Pro Code. Sub-section (2) of that section runs thus: 'The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them, but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.' So the practice of refusing to answer questions in the Sessions Court and of putting in a written statement may be attended with great risk to the accused for the Court may draw from such refusal an inference adverse to the accused. *King Emperor v Durgendra*, 19 C W N 1013. This presumption rests on the following principle, namely, If a person by his very existence in civilized society owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth, this duty includes equally the mental impressions preserved in his brain the documents preserved in his hands the corporal facts existing on his body, and the chattels and premises within his control. *Wigmore* § 2194.

## ILLUSTRATION (I)

**Documents in the hands of obligor—Presumption from** When in the course of dealing, a debtor gives security to his creditor for the payment of the debt in the shape of documentary evidence either alone or accompanying muniments of title, it follows that on the payment of debt the document should no longer be allowed to remain in the creditor's custody, and hence has arisen the rule that possession by the debtor of the evidence of a debt, as a note, bond, bill or draft raises the presumption of payment. *Burr Jones* § 70(a) *Ibdu Karim v Manji Hansraj* 1 B 295 *Shearman v Fleming*, 5 B L R 619 *Ganesh v Kheloo*, 22 W R 263, *Bunayal v Dunken* 20 Ind C 15305. So the obligor's possession of the instrument after maturity is usually said to raise a presumption of payment, the inference being based on the principle already stated. *Wigmore* § 2518, *Gibbon v Heatherstonhaugh* 1 Stark 225, *Lucmbridge v Osborne*, 1 Stark 371, *Shepherd v Currie*, 1 Stark 451. So the possession of an uncancelled note by the debtor under circumstances free from suspicion is a strong circumstance in favour of payment, and should turn the scale if the other testimony on the issue of payment is conflicting and evenly balanced. *Burr Jones* § 70 (a). But there are various limitations laid down in particular concerning the obligor's opportunity of surreptitious access to the obligee's papers. *Wigmore* § 2518. *Figg v Barnett* 3 Esp 196. So counter explanations may be shown by circumstances explaining the possession otherwise, as where the debtor has access to the place of custody of the instrument. *Wigmore* § 156, *Law on Pre* *Pl* Rule 76. So also in running such a presumption the Court has to take into regard any facts or circumstances indicating that it might have been stolen. *Ram Nath v Roggha*, 25 O C 125, see also *Ganesh v Kheloo* 22 W R 263. A father held the note of his son for £125. On the father's death his representatives sue on the note but the son produces it cancelled. It appears that he had means of access to his father's papers. There is no presumption that the note

**S 114** has been paid *Grey v Grey* 17 N Y 552 In that case the Court said 'Is the production of this note by the defendant, under the facts of this case, evidence of its discharge when it is proved not to have been paid or still held? I think it is not' *Pothier* (Obligations, 73) says that *Borsen* holds that possession of the note affords a presumption of its payment but if he alleges a release he must prove it, for a release is a donation and a donation ought not to be presumed *Pothier* differs and thinks it should be presumed unless the creditor shows the contrary But *Pothier* agrees with *Borsen*, that if the debtor was the general agent or clerk of the creditor, having access to his papers, possession alone might not be a sufficient presumption of payment or release—so if he was a neighbour into whose house the effects of the creditor had been removed on account of a fire The latter presumption seems applicable in this case Here the case shows without contradiction that the defendant, living at home with his father, had a key that fitted his father's desk where the note was kept The presumption under s 114 of the Evidence Act, ill, (1) that, when a document creating an obligation is in the hands of the obligor, the obligation has been discharged is subject to the qualification that, when the bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it, these circumstances are to be considered by the Court in deciding whether the maxim would apply or not *Kali Prasad v Narayan* 103 Ind Cas 158 In a suit to enforce a mortgage the defendant's case was that the mortgage debt had been discharged and that the mortgage deed had been returned to him The plaintiff denied these allegations and pleaded that the deed had been stolen from him It was found that at the time of executing the mortgage the defendant had deposited with the plaintiff the title deeds of the mortgaged property and that they were still in the possession of the plaintiff Held that the fact that the defendant did not get back the title deeds at the time of the alleged discharge considerably weakened the presumption in his (defendant's) favour arising from the possession by him of the mortgage deed *Attoor Naidu v Kothandaram* 46 C L J 292=29 Bom L R 1355 The presumption of discharge would not arise where the defendant did not produce the document and the onus is on him to prove the discharge *Dhuan Singh v Gurdit Singh* 6 Lah 297=26 P L R 491=89 Ind Cas 234 Under s 114 (1) of the Evidence Act, it is open to the Court to presume that if a document creating an obligation is in the hands of the obligor the obligation is discharged But in raising such a presumption the Court has to take into regard any facts or circumstances indicating that it might have been stolen The burden shifts as the evidence is developed and when both the parties produce their evidence, the question on whom the initial onus lies ceases to be of much importance *Hani Nath v Raggha* 2 O C 125=68 Ind Cas 892=1922 Oudh 211 If the promisor is in the hands of a maker there is a presumption that it has been paid off If the drawee alleges that the milder came into possession of the note un lawfully, the onus is on him to prove it *Hung Myat v Hla May*, 12 Bur L T 116=52 Ind Cas 650 (*haudhur Mahamed v Mandi Das* 17 C W N 49=39 I A 184 (P C) *Bunayal v Dinal* 20 Ind Cas 308 Illustration (1) only refers to presumption that may be raised It does not follow that such presumptions would shift the onus of proof Where in a suit on a usufructuary mortgage bond, the defendant pleaded discharge and produced the bond but there was no endorsement of discharge written thereon and the person through whom the money was said to have been paid was not examined, held that the lower Courts were right in holding that the mere production of the bond was not enough to shift the burden of proving the discharge which lay on the defendant *In re Para Thurunge* 2 L W 604=18 M L T 94=(1915) M W N 638

## OTHER PRESUMPTIONS

**Acceptance** An estate is devised to, or a gift is made to A The law presumes that it is beneficial to A and that he accepts it He may disclaim it, but to work thus a disclaimer must be proved *Tousson v Fielnell* 3 B & Ald 31, *Thompson v Leach* 2 Salk 618 In the first case it was said 'I think that an estate cannot be forced on a man A devise, however, being *prima facie*

for the devisee's benefit, he is supposed to assent to it until he does some act to show his dissent. The law presumes that he will assent until the contrary is proved when the contrary however, is proved it shows that he did never assent to the devise and consequently that the estate never was in him" '*Prima facie*' said *Ibbott, C J*, "every estate whether given by Will or otherwise is supposed to be beneficial to the party to whom it is given" And *Bayley J* added 'The law indeed, presumes that the estate devised will be beneficial to the devisee and that he will accept of it until there is proof to the contrary

**Advancement** The English doctrine of advancement is applicable in this country as between a father and daughter, both of English extraction and living under English law *Hurrooondary Debi v M S Stevenson* 2 W R 141, see also *Kerwick v Kerwick* 32 C L J 490 (P C). According to the law prevailing in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit *Motulahu v Purshotam* 6 Bom L R 975=29 B 306. There is no presumption of an advancement by the name of a son being used as purchaser, other than in the case of a 'stranger' being used *Sayyad v Ullap*, 13 M 1 A 232, *Gopee Krist v Ganga Proshad*, 6 M I A 53.

**Adultery** A married man enters a house of prostitution and remains there all night. The presumption is that he committed adultery while there *Eians v Eians* 41 Cal 103 (Am), *Istley v Astley*, 1 Hagg Ecc 720, *Lawson Pie Ev* 323.

**Alteration** Alterations, erasures and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execution or completion *Lawson Pie Ev* 452. In the early history of the common law the Judges examined the question themselves and if the deed or other instrument appeared to be interlined they refused to admit it, subsequently this practice was altered and the question whether the alteration was made before or after the delivery of the deed was left to the jury. And finally the presumption of law was varied that the alteration had been made before the delivery, on the ground that any other view would be presumption in favour of fraud and forgery *Tatum v Catamore*, 16 Q B 745. But in India in an ordinary case the party who presents an instrument which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the state of the document. But this wholesome rule admits of exceptions if there be, independently of the instrument, corroborative proof strong enough to revert the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which could prove the original condition and import of the suspected document. Though the onus of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it yet the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified and tampered with, after execution, by the party claiming under it *Musamut Khoob Koomoor v Baboo Moodnaram*, 1 W R P C 36=9 M I A 1. It lies upon the parties who seek to enforce an altered instrument to show the circumstances under which the alteration took place *Ramasamy v Bhapani Iyyar* 3 M H C R 247. An alteration made while the instrument is in the custody of one party, although not made with his knowledge or consent, has the same effect in voiding the instrument as if made by him on the principle that he who has the custody of an instrument made for his benefit, is bound to preserve it in its original state *Kanhayalal v Sitaram* 81 Ind Cis 847. An action is brought on a contract to indemnify A on certain notes made on March 16th. The contract is also dated March 16th, but when produced it is seen that the figures '16' describing the notes have been written over the figures '15' and in the date of the instrument the figures '16' have been written over the figures '17'. The presumption is that these alterations were made at the time of its execution and the contract, is

**S. 114** admissible *Beaman v. Russell* 20 A.L.J. 207-249 Vm. Pr. 775. In that case it was said: "Amidst the conflict of authorities in the country and with the little mind that can be derived from the modern English law, I should be disposed to fall back upon the ancient common law rule—that an alteration of a written instrument if nothing appear to the contrary should be presumed to have been made at the time of its execution. I think this rule is demanded by the usual condition of the business transactions of this country and especially of this State—where a great portion of the contracts made are drawn by the parties to them and without great care in regard to interlineations and alterations. To establish an invariable rule such as is claimed in behalf of the defendant, that the party producing the paper should in all cases be bound to explain any alteration by extrinsic evidence would I apprehend do injustice in a very majority of the instances in which it should be applied. Such a rule might be tolerated—might perhaps be beneficially adopted—in a highly commercial country like that of Great Britain in regard to a negotiable paper, which is upon stamped paper, the very cost of which would induce special care in the drawing of it, but I am persuaded its application here could not be otherwise than injurious. It is not often that an alteration can be accounted for by extraneous evidence and to hold that in all cases such evidence must be given, without regard to any suspicious appearance of the alteration, would, I think, in many instances be doing such manifest injustice as to shock the common sense of most men. In this conflict of opinion," says *Woodruff* *J* in *Maylie v. Sniffen*, 2 I. D. Smith 1 (Am.) after an exhaustive review of all the authorities "it appears to me the sensible rule and the rule most in accordance with the decisions of our own State is that the instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effect upon the parties respectively ought to be submitted to the jury, and that the Court cannot presume from the mere fact that an alteration appears on the face of the instrument whether under seal or otherwise it was made after the signing. Some alterations may be greatly to the disadvantage of the holder or party setting up the instrument. Shall it be presumed that he made them unlawful against his own interest? Others may be indifferent to him and favourable to some other. No presumption in such a case can exist against him." But where the alteration is in a different handwriting from the rest of the instrument, or in a different ink, or is in the interest of the party setting it up, or is suspicious on its face, or the execution of the instrument is denied under oath, the burden of proof rests on the party producing the instrument to explain it to the satisfaction of the tribunal. *Tanison* *Pr. Ex.* Rule 84.

**Assent.** A statement is proved to have been made in the presence of H it will be presumed that H heard it. *Hochrieter v. People*, 2 Abb. App. Dec. 363.

**Attestation.** Mere attestation of a deed does not necessarily impart an assent to all the recitals contained therein. *Imam Ali v. Bay Nath*, 10 C. W. N. 551=3 C. L. J. 576=33 C. 613. *Mena Singh v. Bhagwant* 5 Ind. Crs. 252, *Lalhyah v. Ramibodh* 37 A. 350. *Langa v. Jagathashore*, 21 C. W. N. 225 (231)=14 C. 187. An attesting witness is a witness who has seen the deed executed and who signs it as a witness. *Ramu v. Laxmanao* 10 Bom. L. R. 943=35 B. 44.

**Benami.** The mere fact that the deeds are in the possession of the mortgagee does not of itself prove that the mortgagee was a mere benamidar for the mortgagor. *Huaji v. Vishnu*, 1923 Bom. 429. Property purchased by the father of a joint Hindu family in the name of his minor son is presumed to be benamie and on the father's death becomes the property of the family. *Bhaghat Chandra Dey v. Huro Gobind Pal* 29 W. R. 269. *Sayyid v. Ullap* 13 M. I. A. 232. *Meechappa v. Maning Ba Bu* 8 Ind. Crs. 450, *Bludbanmohani Dasi v. Annulbala* 23 C. W. N. 131. *Devan Bai Brijay Bahadur v. Indrapal* 26 I. A. 254=26 C. 871=1 C. W. N. 1, *Seth Manoj Lal v. Brijay Singh*, 2, C. W. N. 419 (P. C.) *Sreman v. Gopal* 11 M. I. A. 29. *Narain v. Krishna* 8 M. 214. *Narasimha v. Srimitasha*, 33 M. 112.

**Best evidence** Best evidence not produced though available raises adverse presumption *Kameshwar v. Jagat Lal*, 33 C W N 430 = 27 A L J 261 = 49 C L J 104 = 31 Bom L R 721

**Bond** Independently of a statute of limitation or in the absence of one after a lapse of twenty years the law raises a presumption of the payment of a bond. *Law Pte Ev* 370 'These presumptions to be drawn by the Court in the case of stale demands, says *Chancellor Kent* are founded on substantial justice and the clearest policy. If the party having knowledge of his rights will sit still and without asserting them permit persons to act as if they did not exist, and to acquire interests and to consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is therefore well settled that the presumption that a demand has been satisfied prevails as much in this Court as it does at law.' *Giles v. Barendse*, 5 Johns Ch 515. Every presumption says the *Master of the Rolls in Pulering v. Stamford*, 2 Ves Ir 583, that can fairly be made, shall be made against a stale demand. It may arise from the acts of the parties or the very forbearance to make the demand affords a presumption either that the claimant was conscious it was satisfied or intended to relinquish it' *Lawson Pte Ev* 371. But in India this presumption is of little value as a bond becomes time barred after a lapse of the time mentioned in the Indian Limitation Act (IX of 1908).

**Character** The character habits and personal appearance of a person are presumed to continue as proved to be at the time of the past. *Law Pte Ev Rule* 32. It might be too much to say that a character when once formed is presumed to remain unchanged for life. Still the law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as the mental and social condition of man. It is not looking to common experience in human conduct generally found to be true that a thorough change from a bad to a good character is brought about within four years. It may and it is to be hoped often does occur but such is not the common course of life. On the contrary there is strong probability that one whose general character was bad four years since is still of doubtful or dispraised fame' *Sleeper v. Van Middles Worth Denton*, 431 *Law Pte Fr* 230.

**Child bearing age** The presumption that a particular woman has passed the age of child bearing is one of fact to be determined partly by the light of general knowledge and partly by the life history of the person in question. It has several times been held to apply where the age of fifty three years has been passed, but each case must depend on its particular circumstances. *Haynes v. Haynes*, 35 L J Ch 303. *Re White* (1901) 1 Ch 570, *Wills Ev 2nd Ed* 57. *In re Thornhill*, (1904) W N 112 C A. A widow, aged fifty six years and three months who had never had but one child (born when she was between twenty one and twenty two years of age) and lived afterwards with her husband for twenty four years until his death is presumed to be past child bearing. *In re White*, (1901) 1 Ch 570. In delivering the judgment *Buckley J* said. A number of cases have been cited but the material ones to my mind are these. *Haynes v. Haynes*, 35 L J Ch 303 where it was held that a spinster aged fifty three years and two months must be presumed to be past the age of child bearing, and the head note adds a query whether this limit of age is not too low. *In re Widdow's Trust* L R 11 Eq 403 where *Mallins V C* made the presumption in the case of a widow of the age of fifty five years and four months who had never had any children, and in the case of a spinster of the age of fifty three years and nine months. *In re Jullner's Estate* L R 14 Eq, where the age of the lady was forty nine years and nine months. She was married and had never had a child. The marriage had taken place in 1846 and the decision was pronounced in 1872, so that there had been twenty six years of married life no issue, and the husband was living. *Dandoon v. Kimplon* 18 Ch D 213 where the lady was a spinster of the age of fifty four, and *Hydson v. Ellison* 19 Berr 565 where she was a spinster and aged fifty six. It will be observed that in all the cases to which I have referred the ages were less than that of the lady in the present case, but it will also be remarked that

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I have not mentioned any case of a widow who had no children. In re *Widow's Trust*, L R 11 Eq 109. In these circumstances I have to consider whether the rules relating to spinisters do not equally apply to widows who have had children. The only difference that occurs to me is that there is nothing to show in the case of spinisters whether they are or have been capable of child bearing, which in the case of a widow who has had a child there is. On the other hand, if there has been a long lapse of time since the birth of a child—as in this case twenty four years—the presumption will be that the capacity of child bearing has ceased. See also *Payne v Long*, 19 Ves 571, *Groves v Groves* 12 W R 15, *Levy v Hodges*, Jac 585, *Miles v Knight*, 12 Jur 666, *Dodd v Hale*, 5 D & Sm 226, *Brandon v Woodthorpe* 10 B & W 163, *Brown v Pringle*, 1 H & W, 121, *Edward v Fuel*, 23 Beav 271, *Davis v Bush* 8 Jur 114.

**Conflicting presumption.** In the case of conflicting presumptions the presumption of payment is stronger than, and will prevail against, the presumption of continuance, the presumption of innocence is stronger than and will prevail against, the presumption of payment, of the continuance of life, of the continuance of things generally, of marriage and of chastity, the presumption of knowledge of the law is stronger than, and will prevail against the presumption of innocence, and the presumption of sanity is stronger than, and will prevail against the presumption of innocence. *Law Pre Ev Rule 122* 'Nothing can be clearer than this,' says Mr Justice Heath in an old case (*Jayne v Price*, 5 Lunt 326) 'a presumption may be rebutted by a contrary and stronger presumption. Mary B married W who afterwards enlisted and went on a foreign service and was never heard of afterwards, twelve months after his departure she married B. Held, that the issue of B would be presumed legitimate. *King v Inhabitants of Gloucestershire*, 2 Barn & Ald 356. In this case the conflicting presumptions were the presumption of innocence and the presumption of the continuance of life. If, said the Court, 'W was alive at the time of the second marriage, it was illegal and she was guilty of bigamy. If she had been indicted for bigamy it would clearly not be sufficient. In that case W must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a criminal act.' But 'when it is recognized that a presumption is merely a direction of law that when certain facts are presented in an invariable formula the finding thereon shall always be the same way the logical impossibility of a conflict of presumptions becomes apparent. What really happens in a case of so called conflicting presumptions, the legal conclusion or presumption which ordinarily attaches to certain facts is prevented from attaching either by facts or by a rule of law inconsistent therewith. It is a logical and legal impossibility for two rules of law to affix inconsistent conclusions to the same state of facts at the same time. 9 *Encyclop Ev 'Presumptions'* p 891. The market values so to speak, of the various presumptions have been sometimes sought to be established, but so far there is no recognized standard. Keeping, then, to the expression it is used, we may have the case of one party to a cause relying upon a given presumption and that of the other party upon another. Which party is to prevail? In every case it depends on the nature of the respective presumptions. *Burr Jones* § 101.

**Co sharer's possession.** Mere possession or occupation of the property by one co sharer does not constitute adverse possession against the other co sharer. There must be a disclaimer by the assertion of hostile title or other wise. *Uyalbi v Umalanta*, 31 C 970=9 C W N 32. Where property is owned by several co owners, the mere fact that one of them has not received the profits of the property is no proof that the possession of the other co owner was adverse. *Bharat v Ganga* 9 Ind Cas 425. The possession of joint property by one co sharer does not constitute adverse possession against any other co sharer, until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former. *Bhaji Shamsad v Hajimaya*, 14



Bom L R 314, see also *Sheikh Asud Ali v Sheikh Albar Ali* 1 C L R 364 S 114.  
*Baroda v Ananda* 3 C W N 771, *Udaram v Dugan*, 78 P L R 1909,  
*Debanda v Narendia*, 23 C W N 900

**Death** Where among some relations the evidence on the question who died first is quite evenly balanced, the Court is entitled to say the probabilities are in favour of the younger man surviving the elder *Kullarn v Laxmibai*, (1922) Bom 317

**Debts** Debts once proved to exist are presumed to continue until the contrary is shown *Law Pre Ev Rule 29* To prove a debt against a bankrupt an entry in his book some months before the bankruptcy showing that he was indebted to the claimant in a certain sense is proved The presumption is that the debt still continues *Jackson v Him* 2 Coup 48 Where it is found that a money lender has allowed a debt to remain outstanding for a long period without obtaining some document or security for it and without at any time demanding payment the presumption is that the debt has been paid *Narain v Durga Singh*, 22 O C 335=51 Ind Cis 95

**Delay in enforcing rights** Where the long delay of the plaintiff in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given *Big Ray Saran v Basanta Singh* 118 Ind Cis 154=A I R 1929 All 561 Under a possessory mortgage of 1876 it was found that possession was not transferred to the mortgagee and no steps had been taken by the latter or his heirs to recover the amount Held that under the circumstances it was reasonable to presume that the mortgage of 1876 had been satisfied and that the onus is on the plaintiff to prove that it was still in force in 1909 *Imitabai v Jabhanbai*, 46 Ind Cis 676 In a suit for mortgage where there was absence of demand for a period of 36 years the burden of proving existing liability is on the plaintiff *Meghraj v Mulundaram*, 16 Ind Cis 806, see also *Narain v Durga*, 51 Ind Cis 95=22 O C 335, *Raja Singh v Veer Singh* 9 P R 1866

**Documents** It is a general though not a conclusive presumption that a document was made on the day of the date it bears *Uma Kumari v Rajah Bijoy Singh*, 21 C W N 535 P C *Parshatan v Nar.*, 81 Ind Cis 516 *Davies v Loundes* 7 Scott N R at 211, *Owen v Waters*, M & W 95, *Hunt v Mursey*, 5 B & Ad 902 When a document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped unless it be shown to have remained unstamped for some times after its execution *Closmadene v Correl*, 18 C B 36, *Marine Invest Co v Hariside* L R 5 H L 624, *Steph Dig* 7th Ed Art. 86 p 95 There is a presumption as regards the regularity of the execution of a document, *Bell v Taylor* 1 C & P 117 *Lauson Pre Ev* 82, see also *Uttam v Hulam* 39 A 112, *Sitaram v Nanka*, 106 Ind Cis 210 Where a document is on plain paper unstamped and unregistered and such as has never seen the light of the day till it was filed and it has been shown that there were occasions when if genuine it should have been produced but was not produced the presumption is that the document is not genuine but a forged one *Deonath v Debandhanath*, A I R 1930 Pat 75

**Duty** All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law *Best Fr* § 345 *Lam v Kalab*, 36 Ind Cis 100

**Domicile** Domicile once shown to exist, is presumed to continue until the contrary is proved *Law Pre Ev Rule 30* It is necessary said *Lord Vestbury* in *Bell v Kennedy* L R 1 Sc App 320 "in the administration of the law, that the idea of domicile should exist, and the fact of domicile should be ascertained in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of the parties We know very well

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that succession and distribution depend upon the law of the domicile. Domicile, therefore is one idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult per on the law ascribes a domicile and that domicile remains his fixed attribute until a new and different attribute usurps its place. And Lord Cranworth added, 'It is necessary to bear in mind that a domicile, though intended to be abandoned, will continue until a new domicile is acquired and that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until it o this intention has been carried out by actual residence there.

**Encroachment by tenant** The true presumption is to encroachment made by a tenant during his tenancy upon the adjoining lands of his landlord is that the land so encroached upon are added to the tenure and form part thereof for the benefit of the tenant, so long as the original holding continues and afterwards for the benefit of his landlord unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law and it is a rule which is supported by reason and principle. *Guru Das v Issor Chunder* 22 W R 246 (247), see also *Nadhar v Mea Jan*, 10 C 820.

**Fraud** Fraud or breach of trust ought not to be lightly imputed to the living for the legal presumption is the other way and as to the dead who are not here to answer for them elves it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave unless the evidence of fraud be clear beyond a reasonable doubt. *Lau Pie Er* 119.

**Good faith** The normal presumption is in favour of good faith and not of bad faith on the part of the assessee. *Jambu Das v Income tax Com A* I R 1927 Nag 336=104 Ind Cas 336.

**Grant** The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained. When from a certain set of facts, a Court infers a lost grant the process is one of inference of fact and not of legal conclusion. *Kashunath v Muzari Chandra* 31 C L J 501=57 Ind Cas 350. Where certain persons had been in possession of lands under a claim of rent free *brahmottar* grant for nearly 62 years, a lost grant may be presumed in favour of the owner of *brahmottar*. *Rai Kuan Chandra v Simath Chakravarti* 31 C W N 135=100 Ind Cas 453. Whether a presumption of a lost grant should arise or not must depend upon the circumstances of each case. *Kuan Chandra v Chakravarti* 31 C W N 135=100 Ind Cas 453.

**Guilt** Where no motive for the commission of a crime is shown the presumption of the innocence of the suspected per on is strengthened. But the commission of the crime being proved and al o facts pointing to the pri oner as the perpetrator evidence that a motive existed is relevant, and is a circumstance in chain of evidence from which guilt may be inferred. *Lauson Pie Er* Rule 10.

**Hindu Law—Adoption** Where there is no express prohibition nor are there circumstances from which prohibition can be implied the mere fact that a widow and her husband did not live together does not render the adoption made by her invalid. The husband's consent is in the absence of prohibition, always to be implied. *Izzimbi v Saraswatibar* 1 Bom L J 420=23 B 789. Where an adoption has been acquie ced in for a period of 33 years it is presumed that the necessary consent of some person competent to give away the adopted son had been obtained. *Maundao v Ganesh* 7 B H C App 33. The Court when it is satisfied that permission to adopt exists, will exact slight proof of the performance of ceremonies but it cannot conversely from the observance of ritual forms infer that the husband's authority, which is essential in cases of adoption by a Hindu widow has been really obtained. *Rathnamadhab v Rudha* 11 Hy 311=2 Ind Jur O S 5.

**Hindu Law—applicability** The Hindu and Mohammedan Law can be applied to a person under the first part of section 21 of Act VI of 1871, only when he

is an orthodox believer in the Hindu or Mahomedan religion. The mere circumstance that he may call himself or be termed by others a Hindu or a Mahomedan is the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates a law for him. *Raj Bahadur v. Bishen Dayal*, 4 A. 343 = A. W. N. 1882-71. Where the parties are Hindus in the absence of any custom to the contrary or of any satisfactory evidence for showing what form of Hindu Law they have adopted it must be taken that they have adopted in its entirety one form or other of the Hindu Law and that it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevails in the locality in which they reside. *Ramdas v. Chandra Dass*, 20 C. 409. Where a family migrates from Guzerat where the *Majlis* law prevails, it must be assumed that that law still applies to the family unless it is shown that the family has abandoned it, and adopted the law of the country where it has settled. *MuleDas v. Manul*, 15 M. L. R. 181. See also *Parbati v. Jagadish*, 20 C. 433. *Chandel v. Mauna*, 4 B. N. L. R. 376.

**Hindu Law—Endowment** A person seeking to set aside in alienation on the ground that the property alienated is *debutter* or endowed property, must adduce proof that the same was endowed in perpetuity. Proof that the rents and profits have been utilized for the idol is insufficient. *Konuar Doorga Nath v. Ramchander* 2 C 341 (P C) = 41 A 52

Hindu Law—Joint Family Hindu families are ordinarily governed by the law of their origin not by that of their domicile *Lalla v Ganga*, W R 1864 36 Where parties, who are not Hindus reside in a Hindu country and adopt the customs of Hindus have lived as Hindu families do joint in fact and estate they will be governed by the Hindu law of co-partnership and the legal presumptions applicable to the position of a joint Hindu family are applied to them *Ripkan v Ishu Choroohay*, 3 C L R 97 In a divided Hindu family there is a presumption of continuance in jointness of every member *Mooney v Lomax* 2 W R 283 If brothers are found to be living together as a joint Hindu family they must be presumed to be so in property *Dhurum Chand v Ray Mohishee* 5 W R 153 See also *Kunze* 3 W L R 161 5 W R 82 *Lalhum v Mulay* 1 W L R 157 *Kane* 4 B H C A C 169, *Vinham v Choote* 1 B L R 157 A family is joint and there is a nucleus from which the presumption arises that the presumption is that property acquired by any member of the family on those who allege that it is self-acquired *Prasanna* 1 W R 153 See also *Shu Gol m v Bagan Singh*, 1 B L R 157 *Kanhyatal* 29 A 241 P C *Lal Das v Moh* 2 B L R 157 It is where a member of a joint Hindu family has separated himself for a profession or for the service of the State that the presumption in the absence of all evidence is that the property is the expense of the joint family property *P L R 1916=109 P W R 1916*

Hindu widow One who claims with the usual limited interest that title is not the owner not only the genuineness of the limited owner of the estate alienation was justified by reasonableness to satisfy Debts Dnyal 12 C W law that the requirement of a Hindu widow which the proper estate was (t)

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**Identity** Identity of name is a presumption of identity of person where there is similarity of residence or trade or circumstances or where the name is an unusual one but *after* which the name is common one and there are several persons known of the same name and of the same place *Law on Pre Ev Rule 57* In *Isden v Hoyle* 1 Q B 629 *Paul Duman* and *Factor*, where no particular circumstance tends to raise a question as to the party being the same even identity of name is something from which an inference may be drawn If the name were only John Smith which is of very frequent occurrence there might not be much ground for drawing the conclusion But *Harry Thomas Rhodes* are not so numerous and from that and the circumstances generally there is every reason to believe that the accuser and the defendant are identical

**Infancy** Infancy once shown to exist is presumed to continue until the contrary is proved *Law on Pre Ev Rule 30* In a statement etc, it is proved that a son is over age It is never the less presumed that he continues unemancipated in the days of infancy unless there is evidence to the contrary *Re Lilleshall*, 7 Q B 195

In *R v Smith* 1 Con 260 *Paul* said to the Jury 'Where the child is under the age of seven years the law presumes him to be incapable of committing a crime, after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty but between the ages of seven and fourteen no presumption of law arises at all and that which is termed a malicious intent—a guilty knowledge that he was doing wrong—must be proved by the evidence and cannot be presumed from the mere commission of the act The Indian Penal Code has fixed the age of 12 instead of 11 (Rule 83 I P Code)

An infant shall be *prima facie* deemed to be *doli incapax* and presumed to be unacquainted with guilt, yet this presumption will diminish with the advance of the offender's years and will depend upon the particular facts and circumstances of his case" 1 Russ 109, *Mayne Et Lau* 102

**Innocence** The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt *Law on Pre Ev Rule 90* 'It is greatly to be regretted that the so-called presumption of innocence in favour of the prisoner at the bar is a pretence a delusion an empty sound It ought not so to be but it is *Justice Chate* said that 'this presumption is not a mere phrase without meaning, that it is in the nature of evidence for the defendant that it is as irresistible as the heavens will overcome, that it hovers over the prisoner as a guardian angel throughout the trial, that it goes with every part and parcel of the evidence that it is equal to one witness That is just what it should be but just what is not Practically, it is of no avail whatever in the trial The jury tread it under foot, the Judge the same moment he admits it in theory forgets it in argument It is a dead letter Nay so far from being merely inoperative it is not hazardous to say that in the trial the presumption is reversed By Court and jury, by prosecution police, and by the public the accused is presumed guilty Let every one as he looks upon a prisoner in the dock carefully inquire of him self and answer if this be not so The reason is plain The whole course of criminal procedure, from inception to close, is designed to shut out presumptions of innocence and invite the presumptions of guilt The secrecy of complaint making at the magistrates' office the mysterious inquisition of the grand jury room the publicity of the arrest, the commitment to the lock up the demand of bail the delay of trial, the enforced silence of defence till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is permitted to open his mouth with a syllable of evidence to break the force of damaging array of circumstances to suppose that the presumption of innocence, which unbridled nature promptly is not before this time choked and strangled to death, is an absurdity too gross to dispute The treatment itself of the prisoner negatives the presumption If he is presumed innocent, why is he manacled? Why is he put in jail? Why is he let out only on bail? Why when he is put on trial, is he put in the dock? Why does he not have place with the bystanders, who are simply presumed innocent? The 'presumption,

in the presence of such thing, is a contradiction of terms. How can a person be presumed innocent who is pre-eminently guilty? The fact that he is restrained of his liberty presumes guilt. There is no other construction to be placed on the restraint. Human nature is not capable of any other. Yet human nature ought to presume innocence till the contrary is proved. *From ten years at Police Court Judge New York East and Wiggins 1884*

Professor Thayer says: 'To sum it up the substance of all this is, as I have said, that the presumption of innocence is a piece of evidence a part of the proof—i.e., a thing to be weighed as having probative quality. What appears to be true may be stated thus: (1) A presumption operates to relieve the party in whose favour it works from going forward in argument or evidence. (2) It serves therefore the purposes of a *prima facie* case and in that sense it is temporarily, the substitute or equivalent for evidence. (3) It serves this purpose until the adversary has gone forward with his evidence. How much evidence shall be required from the adversary to meet the presumption or, as it is variously expressed to overcome it or destroy it is determined by no fixed rule. It may be merely enough to make it reasonable to require the other side to answer it may be enough to make out a full *prima facie* case and it may be a great weight of evidence excluding all reasonable doubt. (4) A mere presumption involves no rule as to the weight of evidence necessary to meet it. When a presumption is called a strong one like the presumption of legitimacy, it means that it is accompanied by another rule relating to the weight of evidence to be brought in by him against whom it operates. (5) A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale, when the evidence is balanced. But, in truth, nothing tips the scale but evidence and a presumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts and these facts may be put in the scale. But that is not putting in the presumption itself. A presumption may be called 'an instrument of proof, in the sense that it determines from whom the evidence shall come, and it may be called something in the nature of evidence, on the same reason, for it may be called a substitute for evidence, and even evidence—in the sense that it counts at the outset for evidence enough to make a *prima facie* case. But the moment these conceptions give way to the perfectly distinct notion of evidence proper—i.e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms. Prof Thayer's article in Yale Law Journal of March, 1897

The rule underlying the presumption of innocence merely means that a person who is accused of a crime is not bound to make any statement, or to offer any explanation of circumstances which throw suspicion upon him. He stands before the Court as an innocent man till he is proved to be guilty. It is the business of the Crown to prove him to be guilty, and he need not do anything but stand by and see what case has been made out against him. *Mayne's Cr. Law* § 5, sec 10 *Inniss v. Emperor* 42 C. 957 *Emperor v. Kangaal*, 41 C. 601 (616). As far as the case for the Crown is concerned he cannot be called upon to take part in the proceeding except insofar as for his own protection the Court may question him under s. 342 of the Criminal Procedure Code. If there is a piece of evidence against the prisoner which might be cleared up one way or the other by a word from him, he is not bound to say that word. He is entitled to rely on the defence that the evidence as it stands, is inconclusive, and that the Crown is bound to make it conclusive without any help from him. Further, in making out this case, the prosecution is to get rid of every presumption in favour of innocence. The great majority of mankind manage to get through life without committing a crime, and those who ascertains that a particular person has committed a crime, are setting a fact against which there is a presumption which may range from something almost imperishable to something evanescent. Probably no amount of evidence would convince a jury that the Commander in

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**Identity** Identity of name raises a presumption of identity of person where there is similarity of residence or trade or custom (times or where the name is an unusual one but *id est* where the name is a common one and there are several persons known of the same name and of the same place *Law on Pre Ev Rule 7* In *Kaden v Ryle* 1 Q B 629 Lord Mansfield said 'In cases where no particular circumstance tends to raise a question as to the party being the same even identity of name is sufficient from which an inference may be drawn If the name were only John Smith which is of very frequent occurrence there might not be much ground for drawing the conclusion But Henry Thomas Rydies are not so numerous and from that and the circumstances generally there is every reason to believe that the acceptor and the defendant are identical'

**Infancy** Infancy once shown to exist is presumed to continue until the contrary is proved *Law on Pre Ev Rule 80* In a settlement case, it is proved that a son is over age It is never the less presumed that he continues unemancipated as in the days of infancy unless there is evidence to the contrary *He v Hiles'shall*, 7 Q B 135

In *R v Smith* 1 Con 260 Lord Mansfield said to the Jury 'Where the child is under the age of seven years the law presumes him to be incapable of committing a crime, after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty but between the age of seven and fourteen no presumption of law arises at all and that which is termed a malicious intent—a guilty knowledge that he was doing wrong—must be proved by the evidence and cannot be presumed from the mere commission of the act The Indian Penal Code has fixed the age of 12 instead of 11 (Rule 83 I P Code) 'An infant shall be *prima facie* deemed to be *doli incapax* and presumed to be unacquainted with guilt, yet this presumption will diminish with the advance of the offender's years and will depend upon the particular facts and circumstances of his case' 1 Russ 109 *Mayne Fr Lau* 102

**Innocence** The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt *Law on Pre Ev Rule 90* 'It is greatly to be regretted that the so-called presumption of innocence in favour of the prisoner at the bar is a pretence a delusion, an empty sound It ought not so to be but it is' *Rufus Choate* said that 'this presumption is not a mere phrase without meaning, that it is in the nature of evidence for the defendant that it is irresistible as the heavens will overcome' that it hovers over the prisoner as a guardian angel throughout the trial, that it goes with every part and parcel of the evidence that it is equal to one witness That is just what it should be but just what is not Practically it is of no avail whatever in the trial The jury tread it under foot, the Judge the same moment he admits it in theory forgets it in argument It is a dead letter Nay, so far from being merely inoperative it is not hazardous to say that in the trial the presumption is reversed By Court and jury, by prosecution police and by the public the accused is presumed guilty Let every one, as he looks upon a prisoner in the dock carefully inquire of him self and answer if this be not so The reason is plain The whole course of criminal procedure from inception to close, is designed to shut out presumptions of innocence and invite the presumption of guilt The secrecy of complaint making at the magistrates office the mysterious inquisition of the grand jury room the publicity of the arrest the commitment to the lock up, the demand of bail the delay of trial the enforced silence of defence till prosecution has done its worst are all so many steps and strokes to blacken the accused before he is permitted to open his mouth with a syllable of evidence to break the force of damaging array of circumstances To suppose that the presumption of innocence which unbraced nature prompts is not before this time choked and strangled to death is an absurdity too gross to dispute The treatment itself of the prisoner negatives the presumption If he is presumed innocent why is he manacled? Why is he put in jail? Why is he let out only on bail? Why, when he is put on trial, is he put in the dock? Why does he not have place with the bystanders, who are simply presumed innocent? The presumption,

in the presence of such thing, is a contradiction of terms. How can a person be presumed innocent who is presumably guilty? The fact that he is restrained of his liberty presumes guilt. There is no other construction to be placed on the restraint. Human nature is not capable of any other. Yet human nature ought to presume innocence till the contrary is proved. *From ten years a Police Court Judge. New York. Funk and Wagnalls, 1881.*

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In an action by A against B, A alleged that B, who had chartered a ship had put on board a dangerous commodity by which a loss happened, without due notice to the captain or any other person employed in the navigation. The burden of proving that B did not give the notice was on A. *Williams East India Co* 3 East 101. It was argued in that case that to compel A to prove the want of notice was compelling him to prove a negative which in civil action at least was against the general rule of evidence. But *Lord Ellenborough* said "That the declaration in imputing to the defendants having wrongfully put on board a ship an article of a highly dangerous, combustible nature imputes to the defendants a criminal negligence cannot be questioned. In order to make the putting on board wrongful the defendant must be cognizant of the dangerous quality of the article put on board, and being so they yet gave no notice considering the probable danger there occasioned to the lives of those on board it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board for which they are criminally liable and punishable as for a misdemeanor at least. We are, therefore of opinion upon principle and the authorities that the burden of proving that the dangerous article in question was put on board without notice rested upon the plaintiff alleging it to have been wrongfully put on board without notice of its nature and quality. Though the general presumption of law is, in favour of innocence, yet as men seldom do unlawful acts with innocent intentions the law presumes that every act which in itself is unlawful has been wrongfully intended till the contrary appears. *Taylor* § 118. *Lord Mansfield* has in clear language pointed out the distinction between these cases, where criminal intent must be proved and those where it will be presumed. "When an act in itself indifferent, if done with a particular intent becomes criminal there the intent must be proved and found but where the act is in itself unlawful the proof of justification or excuse lies on the defendant, and a failure thereof the law implies a criminal intent." *R v Woodfall*, 5 Burr 2667 see also *R v Harvey* 2 B & C 257, *R v Wallace* 3 Ir Law R 5 N 38. *R v Cruvey* 1 M & Sel 273. *Taylor* § 118.

"It seems well established that where in a criminal case there is a conflict between presumption of innocence and any other presumption the presumption of innocence prevails (*King v Inhabitants of Gloucestershire* 2 Binn & Ald 386). The strength of this presumption varies according to the seriousness of the charge upon which an accused person is put on his trial. It has been said that "the greater the crime the stronger is the proof required by conviction" (*Re Hobson* 1 Law C C 261). The same principle was laid down by *Pindal C J* in *Bland* 18 St T 1186. In this Court it was laid down in the case of *Nabai Chandra Roy v The King Emperor*, 11 C W N 1085, that the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired, may be strong circumstantial evidence against the accused but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. See also *Weston v Peary* 18 C W N 185 = 10 C 898.

**Reasonable doubt.** It would be a happy thing for the triers of criminal causes if somebody should succeed in defining a reasonable doubt. A great felicity it would be if only some one should portray a reasonable doubt beyond a reasonable doubt. Nothing is more libly poken of than this doubt yet there is nothing more doubtful. Lawyers roll it as a morsel under their tongues and roll it off at juries and justices as if it were a thing to be apprehended with as much certainty as a stark naked fact. But what a reasonable doubt is it is doubtful whether they stop to think or stopping form any but a very doubtful opinion. Should it be a matter of opinion at all? Should it not be a matter of conviction? Should not every one who is to enquire whether he has it have as absolute an idea of what a reasonable doubt is as he has of any other independent fact in the case? If the case is to turn on the matter of reasonable doubt how can it turn aright, unless the turning point be ascertained and fixed beyond a retros-



beyond all question \* The learning of the books on this subject is vast. It begins with the Bible—that is to say, the book writers make it begin there though it does not appear that the inspired writers were sufficiently inspired to hit upon the favourite expression. Its equivalent lawyers since the time of Moses find in the Mosaic provision, which forbade the death penalty till the crime be told thee, and thou hast heard of it, and enquired diligently and behold it to be true, and the thing certain (Deut. xxi 1). This is said to be the amplification of Moses as definer of the doubt. Modern authorities do not seem to have done much better. But it is not been so they have not tried. One author says that 'the persuasion of guilt ought to amount to such a moral certainty as convinces the minds of reasonable men beyond all reasonable doubt. But what is the reasonable doubt?' Another says that a reasonable doubt may be described by saying that all reasonable hesitation in the mind of the jurors respecting the truth of the hypothesis is attempted to be sustained must be removed by the proof. Another declares it is that degree of certainty upon which the jurors would act in their own grave and important concerns. This seems to approach nearer a solution and resembles a definition once heard in a charge to a jury. The Judge who gave it is admittedly one of the ablest and clearest headed jurists who ever sat upon the Bench. He is the man whom  *Rufus Choate* called one of the ablest minds of the state. As near as memory serves his words were as follows. 'Just what a reasonable doubt is, gentlemen, it is not quite easy to say, but you are practical men and I instruct you that you should be satisfied of the defendant's guilt to that degree of certainty which you would require for your guidance in acting decisively in any grave matter of your own within such time as is ordinarily given to a jury for deliberation in the case.' From ten years a *Police Court Judge*. *New York Print & Wiggins* 1884.

**Insanity** In sanity once proved to exist is presumed to continue. But *aliter*, is to temporary insanity produced by drunkenness violent disease or otherwise. *Lawson Pic Et* Rule 31. In 1837 H was inflicted with insanity, resulting from a violent disease. There is no presumption that H was insane in 1838. *Crouse v Holman* 19 Ind 30. In that case it was said. Every man being presumed to be sane till the contrary is proved the burden of proving certainly rests in the first instance on the party alleging the insanity. How far this burden is changed by the mere fact of proof of insanity at a particular period is the precise point of the present inquiry. A careful analysis of the principles upon which presumptions are allowed to have force and effect will show that the proof of the insanity of an individual at a particular period does not necessarily authorize the inference of his insanity at a remote subsequent period or even several months later. The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of their mental faculties. Such cases are usual and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore to be cited as an unqualified maxim of the law—once insane, presumed to be always insane; but reference must be had to the particular circumstances connected with the insanity of an individual, in deciding upon its effect upon the burden of proof or law for it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former once established would require proof from the other party to show a restoration or recovery and in the absence of such evidence insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy and not content himself merely with proof of insanity at an earlier period. *Lawson Pic Et* pp 227 228. Where insanity is proved it is presumed to continue. *Prinsep*

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v. *Dyce* 10 M I A 232 Where a person has been found to be a lunatic under Act XXXV of 1858 the presumption is that he continues to be of unsound mind until the contrary is shown, and if adoption is made by such a person, the onus is on those who assert it to prove that he was of sound mind when he made the adoption. *Imanah v Imanah* 33 Ind C 578=40 M 660, see also *Snool v. Watts* 11 Beav 105 *Hill v. Clifford* (1907) 2 Ch 236, *Van Guilder v. Foruett* (1897) A C 658=66 L J Q B 740.

**Intent and knowledge** Where a person does an act he is presumed to be doing to have intended that the natural and legal consequences of his act shall result. *Law Pre Et* Rule 64 W wrote and published of H that he had colluded with an insolvent tenant in setting up a fictitious distress. In an action for libel brought by H against W the Judge leaves it to the jury to say whether W intended to injure H by the publication. This is error because the tendency of the libel being injurious to H W is presumed to have intended to do so. *Hane v. Wilson* 9 B & C 643 'The Judge,' said *Truterchee C J* in that case 'ought not to have left a question to the jury whether the defendant intended to injure the plaintiff for every man must be presumed to intend the natural and ordinary consequences of his own act.' And *Littledale J* added 'If the tendency of the publication was injurious to the plaintiff then the law will presume that the defendant, by publishing it intended to produce the injury which it was calculated to effect. A baker is charged with delivering adulterated bread for the use of a public asylum. It is proved that A delivered the bread. The presumption is that he intended it to be eaten. *King v. Deson* 3 M & S 12. *Lord Ellenborough* said that it was a universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious, his intention is an inference of law resulting from the doing the act and here it was alleged that he delivered the loaves for the use and supply of the children which could only mean for the children to eat for otherwise they would not be for their use and supply. *Law Pre Et* 324. A debtor makes a fraudulent preference by assignment of his property. He makes also a conveyance of his property for the benefit of creditors. The law presumes that the intent of the conveyance was to delay or defraud his creditors. *Ex parte Williams*, L R 9 Ch App 443. *Lord Chancellor Cairns* said "It is true that under this as under previous statutes of bankruptcy, the act is specified which if done by the bankrupt are not only acts of bankruptcy but are also if followed by bankruptcy void. One is a conveyance or assignment of the bankrupt's property for the benefit of creditors, and the other is a conveyance or assignment fraudulent or by way of fraudulent preference. It is to be observed as to one of these acts namely a conveyance or assignment by way of fraudulent preference special provisions have always been made in bankruptcy legislation making such a conveyance or assignment void by express enactment and reducing it accordingly and as to the other, namely a conveyance in trust for all creditors it has been held from the earliest times of bankruptcy law, that as the effect of such a conveyance must be to delay or defeat creditors the law will presume an intention to delay or defeat creditors and the conveyance would therefore be invalid against and perhaps even without reference to the policy of the bankruptcy laws. B forges C's name to a cheque on the bank of D. C has no account there. The presumption is that B intended to defraud C. *R v. Ash*, 2 Den C C 498. The recorder in *Maule J* seems to have thought that in order to prove an intent to defraud there should have been some person defrauded or who might possibly have been defrauded. But I do not think that it is necessary. A man may have an intent to defraud and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his banker and a friend with his knowledge forges his name to a cheque either to try his credit or to imitate his handwriting, there would be no intent to defraud though there might be parties who might be defrauded, but where another person has no account at his banker but a man supposes that he has and on that supposition forges his name there would be an intent to defraud in that although no person could be defrauded. So also when an act is criminal *per se*, a criminal intent is presumed from the commission of the act. *Law on*

*Pie Et* Rule 65, see also *R v Dixon*, 3 M & S 15, *R v Munsell* 1 Q B 758, *R v Farrington* R & R 207, *R v Hill* 8 C & P 276 *R v Coole* 8 C & P 582, *R v Shifford*, K & R 169, *R v Beard*, 8 C & P 113. A 'same man' said Chief Justice Shaw in *Com v Yoil*, 9 Metc 93 (Am) "a voluntary agent, acting upon motives must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore one voluntarily or wilfully does an act which has a direct tendency to destroy another's life the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So if the direct tendency of the wilful act is to do another some great bodily harm and death in fact follows is a natural and probable consequence of the act it is presumed that he intended such consequence and he must stand legally responsible for it. So where a dangerous and deadly weapon is used with violence upon the person of another is this has a direct tendency to destroy life or do some great bodily harm to the person assailed the intention to take life or do him some great bodily harm is a necessary conclusion from the act. *Queen Empress v Tulsha* 20 A 143, *Emperor v Gulari* 31 A 148, *Ellen Molla v Emperor*, 37 C 317 *Reg v Gorachand Gope* B L R Sup Vol 443. It is practically impossible for the prosecution in cases of kidnapping and abduction to establish affirmatively the intention with which a woman is abducted. But it is fair and justifiable presumption that when any woman is kidnapped or abducted it is undoubtedly with one or other of the intents specified in s 366. The intention is more or less a matter of inference though there may be cases where the matter is capable of direct proof. It is for the accused to explain away incriminating circumstance. *Jouaya and others v Emperor*, A I R 1930 Lah 163.

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**Issues.** In a number of English cases the Courts have refused to presume impossibility of issue on account of old age in the case of men. *Fushington v Bobbica* 15 Beav 1. *Dixon v Prewer*, 2 M & K 675. The same presumption was also made in some cases in the case of women. *Fraser v Fraser*, Joe 586, *Condrict v Sonie* 24 L T N S 656, *Ier v Audly* 1 Cox 325, *Overhill's Trusts* 17 Jur 342, *Reynolds v Reynolds* 1 Dick 374. *Clinton v War*, 1 R 9 Ch D 385, but see child bearing age *supra*. There is no presumption that a person died without issue. *Re Jackson*, (1907) 2 Ch 311. See also *Pounatoori v Chela Iyapathi*, 33 M L J 295.

**Joint Property.** Where a piece of land is adjacent to a piece of joint property which is registered in the names of the joint owners of the joint property it is for those who a suit that it is joint property to prove the assertion. *Ull v Malhalom*, (1929) Rang 72.

**Knowledge of Law.** Every one is presumed to know the law when ignorance of it would relieve from the consequences of a wrongful act or from liability upon a contract. *Latson Pie Et Rule 1*. The presumption that every body knows the law is often spoken of, but it is clear that there is no such general presumption. When *Mr Dunning* in arguing before Lord Mansfield said 'The laws of this country are clear evident and certain all the Judges know the laws, and knowing them administer justice with uprightness and integrity.' That learned Judge replied 'As to the certainty of the law mentioned by Mr Dunning it would be very hard upon the profession if the law was so certain that every body knows it the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort. *Jones v Randall*, Cowp 39. Is it not a mockery' said *Livingston* in his report on the *Louisiana*, Penal Code 'to refer to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it he would smile at my ignorance and pointing to about 500 volumes on his shelves would tell me those contained a small part of it that the rest was either unwritten or might be found in London or New York or that it was shut up in the breast of the Judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many

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years could not be gratuitously imparted.' We may therefore, safely say with *M. Justice Maule* there is no presumption in this country that every person knows the law—it would be contrary to common sense and reason if it were, and still is he did with a qualified at his learned brother's. If everybody knew the law, there would be no need of Courts of appeal whose existence shows that Judges may be ignorant of law. *Mutunile v Tallon* 2 C B 715. 'Every doctor' said Lord Abthurn in *Queen v Mayor of Litchbury*, 1 R & Q B 629 'must have known that B was the mayor in every doctor who saw him presiding at the election must have known as a fact that he was the returning officer and every doctor who was a lawyer and who had read the case of *Leg v Queens* 2 L & J 85, would know that he was disqualified. From the knowledge of the fact that B was mayor in returning officer was every doctor bound to know as a matter of law that he was disqualified.' I think that the ignorance of law does not excuse. But I think that in *Mutunile v Tallon* 2 C B 715 *Maule J* correctly explains the law. And *Lush J* added 'A maxim has been cited which it has been argued imputes to every person a knowledge of the law. The maxim is *ignorantia legis neminem excusat* but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequence of his acts. The maxim properly understood is true, but it is a rule of presumption adopted from necessity and to avoid a civil that would otherwise constantly perplex the Courts in the administration of the criminal law—that is the plea of ignorance. Hence the maxim 'that ignorance of law excuses no one.' *Lauson Pie Et* 11.

**Legitimacy** It is well established that every reasonable presumption will be indulged in for the purpose of upholding a marriage and establishing the legitimacy of the offspring. *Lauson Pie Et* 139.

**Marriage** I think that having regard to the general rule which applies to all cases of presumption *omnia rite acta presumuntur* and to the particular force of the rule as applied to cases of presumption in favour of marriage and legitimacy and against the commission of any crime or offence, and having regard to the cases cited in the argument we are bound in this case to presume that the father was consenting to the marriage and that it was therefore valid. *Harrison v Mayor* 4 Deg & M & G 133. The presumption of marriage arises from long cohabitation. *Mung Nyue v Ma Gyi* 117 Ind Cas 64 = A I R 1929 Rang 64. The law presumes in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years. *Mohabbat Ali v Mahomed Ibrahim* 36 I A 201 = 51 Bom L R 846 = 6 C W N 517 = 117 Ind Cas 17. *Choralasingam Pillai v Suami Bhai* 79 Ind Cas 623. *Indor Singh v Thalai Singh* 3 Lah 207 = 3 Lah I J 317 = 63 Ind Cas 387.

But presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an *Ahir* and a *Brahmin* widow, who cannot *prima facie* contract a valid marriage. *Gulab Chand v Bhanyalal* 119 Ind Cas 698 = A I R 1929 Nag 543. A presumption of marriage may be drawn from long cohabitation but if it be known that the connection stated is mere concubinage this presumption cannot arise. As to the relationship of concubinage once found to exist is presumed under the law to continue until the contrary is proved. *M. Inli v Jaimal Singh*, 27 P L R 829 = 98 Ind Cas 887 = 5 Lah L J 332 = A I R 1927 Lah 48. Marriage is evidenced not constituted by habit and repute and in a case where no valid marriage is possible no amount of evidence as to habit and repute can establish it. *Campbell v Campbell*, L R 1 H L 182.

**Mahomedan Law** The Mahomedan Law is only the law of this country so far as the Legislature has adopted it is the law of British India and so far as there are clear authorities in it on a particular point. *Baya Kishore v Anti Chandra* 7 B L R 19 = 15 W R 247. The intimate connection between law and religion in the Mahomedan faith justifies the presumption that converts to that faith apart from any evidence of customs which the community may since their conversion have voluntarily imposed upon themselves would be governed by the Mahomedan Law. *Mahomed Sidel v Haji Ahmed*, 10 B L

There is no pre-umption of joint family in Mohamedan Law *Jale Ali v Raj Chandra*, 10 C L R 469=8 C 831 N, *Karim Baksh v Rahim* 21 P L R 1900 S 114

**Negligence** Negligence is not presumed, and the mere fact of injury to the plaintiff is not evidence of negligence on the part of the defendant *Lauson Pre Ev Rule 19* (a), see also *Chandrasekhar v Abid Ali* 80 Ind Cas 902 (N) But when the thing is under the management of the defendant and the accident is such as ordinarily does not happen if those who have its management use proper care, a presumption of negligence arises from the happening of the accident *Lauson Pre Ev Rule 19* (b) Where a person is under a duty either by law or by contract, the failure to discharge the duty raises a presumption of negligence against the person charged with such duty *Ibid Rule 19* (c), see also *Kush Kanit v Chandra Kanit*, 28 C W N 104, *Vishnu Digambar v B B & C I Ry Co*, 85 Ind Cas 116 A presumption of negligence arises against a common carrier of passengers where an injury is received by a passenger caused by the breaking down, or failure of the carrier's vehicle, roadway or other appliances for transportation, or by some error of his servants in operating them In other cases the mere fact of injury does not raise a presumption of negligence on the part of the carrier *Lauson Pre Ev 129*

**Personal appearance** Personal appearance of a person is presumed to continue as proved to be at a time past *Lauson Pre Ev Rule 32*

**Possession** Where little or no evidence of actual possession or title can be procured, it would be almost impossible to administer justice, without having recourse to legal presumptions *Mohamed v Poojany*, 4 C 206=2 C L R 416 When evidence of possession is conflicting the presumption is that possession follows title *Kisturi Singh v Raj Kumar Babu* 8 C W N, 876

**Religion** The opinions of individuals, once entertained and expressed and the state of mind, once found to exist, are presumed to remain unchanged, until the contrary appears Thus all the members of a Christian community being presumed to entertain the common faith no man is supposed to disbelieve the existence and moral government of God until it is shown from his own declarations *Greent Ev § 42* A child in India under ordinary circumstances must be presumed to have his father's religion and his corresponding civil and social status *Skinner v Orde*, 14 M I A 309 (329) But now the question is what is the effect of a declaration under Act III of 1872 According to *Mr Justice Greaves* such declaration does not amount to an abjuration of the status and law under which the parties are born *In the goods of Jnanendra Nath Roy* 26 C W N 799 But the sounder view seems to be that the declaration puts an end to the presumption that he still continues to be in his father's religion Where in consequence of the conversion of a person from one religion to another, the question arose before the passing of the Indian Succession Act, 1865, as to the law to be applied to such person, that question was to be determined not by ascertaining the law which was applicable to such person prior to his conversion, but by a certaining the law or custom of the classes to which such person attached himself after conversion and by which he preferred that the succession should be governed *Lastings v Gouslares* 23 B 539, see also *Bai Bai v Bai Santol*, 20 B 53 *Abraham v Abraham*, 9 M I A 195 *Barlow v Orde*, 13 M I A 277 But to acquire a new status the change of religion must be made honestly and without any intent to commit a fraud upon the law *Per Lord Watson in Skinner v Skinner* 25 I A 34 (41)=25 C 537 (516) *Skinner v Orde* 14 M I A 309 (324) Even where the conversion is *bonafide*, the convert is not allowed to cast off an obligation which he had previously contracted, and which, at the time of the contract, was indissoluble by any act of his own *Mayne & Co Law § 650*, *Emperor v Laxar* 30 M 551

**Sanity** Sanity once proved to exist is presumed to continue *Lauson Pre Ev Rule 31* Every man being presumed to be sane till the contrary is proved, the burden of proof certainly rests, in the first instance, on the party alleging the insanity *Crouse v Holman*, 19 Ind. 30, *Lauson Pre Ev p 227*

S 114

**Services** An agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relations. A and his wife board and lodge in the house of B the brother of A, and assist him in carrying on his business. There is no presumption that either the services on the one hand or the board and lodging on the other were paid for. *Davies v Davies* 9 C & P 87

**Solvency** Solvency once shown to exist, is presumed to continue until the contrary is proved. A is proved to be insolvent circumstances on a certain day. A is presumed to continue solvent until the contrary is proved. *Walsh v Bull* 9 Barb 271. *Tauson Pres* 1: 221

**Statutory Presumptions** There is no impropriety in referring to a thing as having been done when that thing is required to be done by a section in a statute. *Bundabon v G I P Railway Co* 21 A L J 825=96 Ind Cas 1039=A I R 1929 All 769 (I B)

**Tenancy, nature of—Presumption** The presumption in favour of permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always is hereditary or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes regularity. It cannot be made in favour of that which offends legal principle. *Satyajit v Karti* 15 C I J 237=16 C W N 227=13 Ind Cas 596

**Other presumptions** Where a wife alleging that her husband is dead fails to produce such evidence as she ought to know a presumption arises against her. *Kaurtabai v Umabai* 117 Ind Cas 209=A I R 1929 Nag 127. Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that the criminal Court acted according to law and the presumption is that the criminal case was withdrawn and not compounded. *Sadho v Jhura* 116 Ind Cas 749=A I R 1929 All 156. Where in a charge of misappropriation the accused pleaded that he was in ill health and that there was some shortage for which he could not account. Held that there was no conclusive presumption of dishonesty and that the conviction on the basis of the confession should be set aside. *Srinivasao v Emperor*, 109 Ind Cas 605=A I R 1928 M 493=54 M L J 607. The mere signing of a particular entry does not raise an irrebuttable presumption of law against which no evidence can be adduced by the maker of the signature. *Emperor v Ram Rang*, 109 Ind Cas 221=29 Cr L J 493=A I R 1928 Lah 820. The tendency of English Courts to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse. *Jam Bahadur v Lachoo Koor*, 11 C 301 P C=12 I A 23. Presumption regarding the continuance of the existing jurisdiction of a Court in the absence of express words to that effect is usually applicable only to the jurisdiction of a superior Court. *Prasad Das v Russell Lal* 7 C 157=8 C L R 329. There is no duty cast upon an accused person to disclose his defence in the course of a preliminary enquiry, and no inference can be drawn against the accused for non-disclosure of his defence at that stage. *Kumar Prasad v Emperor*, 8 Pat L T 636=A I R 1927 Pat 292. Where there is nothing to indicate that the Court had not satisfied itself of the service of notice it must be presumed that the Court was so satisfied. *Amor Singh v Rala Singh*, 102 Ind Cas 12=A I R 1927 Lah 506. Where the posting of a registered letter is proved but it was returned with a note of the postman that the addressee refused to receive it, the presumption arises that he refused to receive it. *Shri Afzal v Mohan Lal* 94 Ind Cas 103=A I R 1926 Lah 520, see also *Gurish Chandra v Kishore Mohan*, 23 C W N 319. A school leaving certificate issued by a public servant in a native state can be presumed under s 114, Evidence Act, to be of the same character as a school leaving certificate issued in British India. *Maharaj Bhanudas v Krishnabai*, 28 Bom L R 1225=50 B 716=A I R 1927 Bom 11. It is a violent presumption drawn from one's knowledge of human nature and of Indian village life which it is the duty of a tribunal in a case of *dhatwa* poisoning to apply, namely, that the food pertaken at the evening meal by a husband in an ordinarily constituted house is prepared for him and

served to him by his wife *Emperor v Har Puri*, A I R 1926 All 737=97 S. 114  
Ind Cis 14

The mere fact that in the Revenue Records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that the person was the owner of the land *Nath Singh v Mohan Singh* 8 Lah L J 485=27 P L R 721=97 Ind Cis 241=A I R 1926 Lu 659 By taking over the sale and paying the full price a co owner waived his own claim to sue held such action on the part of the co owner is presumptive evidence that the sale by another co owner was not bad for want of necessity *Basant v Chanda*, 1923 Lah 502 An entry in Revenue records raised a presumption as to joint family estate *Balbur v Gobind*, 1923 Lah 532 The mere mention of a common ancestor in a pedigree table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor *Kartar v Lodh Singh*, 5 Lah L J 190=74 Ind Cis 685= 1923 Lah 355 The making of a statement in the document after the suit had been launched and was pending is very different from stating on oath in the witness box and the Court will not attach much weight to the statement even if it is admissible *Fadepalli v Rud mamamma*, A I R 1923 Mad 225 When a person is at liberty to stop something done in his house and is found not to do so the presumption is that he is an accessory to the doing of that thing and he may be held to be in possession of the materials used in the doing of it *Mulla v Emperor*, 86 Ind Cis 907=26 Cr L J 851 When the vacant plot of land belonged to one party the natural inference would be that it was he who built on the land at his own expense and the onus lies heavily on the other party to prove that it was he that did so *Harnam v Hardevibai*, A I R 1925 Sind. 716 The fact that a man is arrested in the district where an offence has been committed many months after its commission does not in any way lead to any inference against him *Mansha v Emperor* 7 Lah L J 51=86 Ind Cis 347 An attempt to fabricate false evidence of *alibi* will be a strong evidence against a convict if his connection with such attempt is established *Majhi v Crown* 86 Ind Cis 344 The publication of notice as required by Cls (b) and (c) of s 64 A of the Bengal Court of Wards Act having been proved, and it being proved that Cl (a) had been complied with in part, the Court should under s 114 of the Evidence Act presume that notice had been published in the manner required by s 64 A of the Act *W Barrow v Gaya Prasad*, 9 A L J 558=15 Ind Cis 729 Where in a suit for the recovery of money due on a registered mortgage bond executed by the defendant in plaintiff's favour, plaintiff does not produce the original but files a certified copy alleging that the original was lost, and the defendant pleads payment, the question of loss is not of much importance except as rendering improbable or probable the correctness of a plea of payment The execution of the bond having been admitted, the onus lies on the defendant to prove payment either by the production of the bond or by other evidence or by both The question of the loss of the original is only material in so far as it may rule a presumption one way or the other under s 114 of the Evidence Act *Jogan Nath v Kanta Singh*, 32 Ind Cis 31 Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the hand writing of any particular person or persons, were written by the authorised accountants of the temple to which the accounts purport to relate, nor does s 114 of the Act any further help the matter *Nalun Pillai v Ramanathar*, 33 M L J 84 Courts would presume a legal origin where there has been a long continued enjoyment of a claim, if the claim, could have had a legal commencement *Suaramayya v Venkatagun*, A I R 1930 M 330 Courts can presume a contract to pay the higher rate and a legal origin and consideration therefor from long continued payment of higher rate *Ibid* see also *Pena Sasupha v Raja Jayaswar*, 42 M 175=50 Ind Cis 16 Concealment of motive gives rise to a presumption under section 111 that there is one which cannot be avowed *Aitcs v Dela Megha*, 1930 Sindh 135

## CHAPTER VIII.

## ESTOPPEL.

**115** When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing

*Illustration*

A intentionally and falsely leads B to believe that certain land belongs to A and then by induces B to buy and pay for it.

The land afterwards becomes the property of A and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

**Estoppel, meaning of** "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed yet, though it be to say the truth" *Co Litt 352(a)* cited in *Ishtpal v Byran* 3 B & S 171 (189), *Simon v Anglo American Telegraph Co.*, (1879) 5 Q B D 188 C. A per *Bramwell L J* at p 202, *Halsbury Vol 13* para 188. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel or conclusion, as it is frequently called by the older authorities may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. *Halsbury Vol 13*, para 148. The rule on the subject is thus laid down by Lord Denman in *Pickard v Sears*, 6 Ad & E 469 at p 474. But the rule is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The whole doctrine of estoppel of this kind, which is fictitious statement treated as true might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason and it is founded upon decision also. *Per Jessel M R* in *General Finance & Co v Liberator* L R 10 Ch D 15(20). So also in *Simon v Anglo American Telegraph Co.*, L R 5 Q B D 202 *Bramwell L J* said. An estoppel is said to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth.

"On the whole, an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, *Allegans contraria non est audiendus* (a party is not to be heard to allege the contrary) and is that species of *presumptio juris et de jure* (absolute or conclusive or irrebuttable presumptions) where the fact presumed is taken to be true, not as against all the world but against a particular party, and that only by reason of some act done it is in truth a kind of *argumentum ad hominem*. Hence it appears that estoppels must not be understood as synonymous with conclusive evidence—the former being conclusions drawn by law against parties from particular facts while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal or rendered conclusive on a party, either by common or statute law. *Best Ev* § 533. An estoppel may accordingly be taken to be



that which concludes the party against whom it is set up, from disputing his own averment, whether that averment be direct, as for example the statement of any given fact, or constructive as legally deducible from the circumstances, and the difference between a mere admission and an estoppel is that the former can be set up as evidence only, while the latter amounts to a legal conclusion. Some misconception has been introduced into the subject by an unhappy description of *Lord Coke*, in which he says—"An estoppel is where a man is concluded by his own act or acceptance to say the truth" (*Co Litt* 352) as though the doctrine were based on the principle of shutting out truth by a technicality. It is founded however, in fact, on no such absurdity. The whole principle of estoppel is, that what has once been affirmed, or represented to be truth or established to be so in a judicial controversy, shall not be contradicted by either the affirmant, the party against whom it has been established, or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it." *Goodale Ev* p 532

**Principle** "In our old law books," said *Mr Smith* in his notes to the *Duchess of Kingston's case*, "truth appears to have been frequently shut out by the intervention of an estoppel where reason and good policy required that it should be admitted."

However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act." The general principle is thus stated by *Lord Chancellor (Campbell)* with the full concurrence of *Lord Kingsdown*, in the case of *Cannecross v Iorimer*, 3 H L C 829. "The doctrine will apply, which is to be found, I believe in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn for his conduct."

I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." *Sarat Chandra v Gopal Chunder*, 20 C 296 (311)=19 I A 203.

The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases. The maxim is founded not so much on any positive law as on the broad and universally applicable principle of justice. *Shah Mahanlal v Srikrishna Singh*, 2 B L R P C 41=11 W R P C 19=12 M I A 157. It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it. *Maung Lee Gale v Maung Kyaw Yau*, L B R. (1893 1900), 158.

**Estoppel is a rule of evidence** "An estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself" *Per Lindley L J* in *Low v Bouena*, (1891) 3 Ch 52 at p 101. In the same case, at p 103, *Bouen L J* added "Estoppel is only a rule of evidence you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of

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Estoppel

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A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title

**Estoppel, meaning of** "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yet though it be to say the truth" *Co Litt* 352(a), cited in *Ashpitt v Byron* 3 B & S 174 (489) *Simon v Anglo American Telegraph Co.*, (1879) 5 Q. B. D. 188 C. A. per *Bramwell L J* at p. 202 *Halsbury Vol 13* para 488. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel or conclusion as it is frequently called by the older authorities may therefore be defined as a disability whereby a party is precluded from alleging, or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. *Halsbury Vol 13*, para 448. The rule on the subject is thus laid down by *Lord Denman* in *Pickard v Sears*, 6 Ad & E 469 at p. 474. "But the rule is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the same time." "The whole doctrine of estoppel of this kind, which is fictitious statement treated as true, might have been founded in reason but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason and it is founded upon decision also. *Per Jessel M R* in *General Finance & Co v Liberator*, L R 10 Ch D 15(20). So also in *Simon v Anglo American Telegraph Co.*, L R 5 Q. B. D. 202, *Bramwell L J* said "An estoppel is said to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth."

"On the whole an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim *Allegans contraria non est audiendus* (a party is not to be heard to allege the contrary) and is that species of *presumptio juris et de jure* (absolute or conclusive or irrebuttable presumptions) where the fact presumed is taken to be true not as against all the world but against a particular party, and that only by reason of some act done it is in truth a kind of *argumentum ad hominem*. Hence it appears that estoppels' must not be understood as synonymous with conclusive evidence—the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence sufficiently strong to generate conviction in the mind of a tribunal, or rendered conclusive on a party, either by common or statute law. *Best Ev* § 533. An estoppel may accordingly be taken to be

that which concludes the party against whom it is set up, from disputing his own averment, whether that averment be direct, as for example the statement of any given fact, or constructive as legally deducible from the circumstances, and the difference between a mere admission and an estoppel is that the former can be set up as evidence only, while the latter amounts to a legal conclusion. Some misconception has been introduced into the subject by an unhappy description of *Lord Coke*, in which he says—"An estoppel is where a man is concluded by his own act or acceptance to say the truth" (*Co Litt* 352), as though he doctrine were based on the principle of shutting out truth by a technicality. It is founded, however, in fact, on no such absurdity. The whole principle of estoppel is, that what has once been affirmed, or represented to be truth, or established to be so in a judicial controversy shall not be contradicted by either the affirmant, the party against whom it has been established or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it." *Goodere Ev* p 532

**Principle** "In our old law books," said *Mr Smith* in his notes to the *Duchess of Kingston's case*, "truth appears to have been frequently shut out by the intervention of an estoppel where reason and good policy required that it should be admitted. However, it is in no wise unjust or unreasonable, but

on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act." The general principle is thus stated by *Lord Chancellor (Campbell)* with the full concurrence of *Lord Kingsdown*, in the case of *Carrington v Lomax*, 3 H L C 829. "The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn for his conduct. I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." *Sarat Chandra v Gopal Chunder*, 20 C 296 (311)=19 I A 203.

The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases. The maxim is founded not so much on any positive law as on the broad and universally applicable principle of justice. *Shah Mahanlal v Srikrishna Singh*, 2 B L R P C 14=11 W R P C 19=12 M I A 157. It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it. *Maung Lee Gale v Maung Kyaw Lau*, L B R (1893 1900), 158.

**Estoppel is a rule of evidence** "An estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself" *Per Lindley L J in Low v Bouvier*, (1891) 3 Ch 82 at p 101. In the same case, at p 105 *Bouch L J* added "Estoppel is only a rule of evidence. You cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of

**S 115,** estoppel filling up the gap in the evidence which, when so filled up, would produce this right to relief, is found in the case of *In re Bahia and San Francisco Railway Company*, L R 3 Q B 581. So "no cause of action arises upon an estoppel it (if) *Per Bowen L J in In re Ottos Hoff's Diamond Mines Ltd* (1893) 1 Ch 618 at p 628. Similarly in *Hannan v Hannan* (1909) P 123, C A. *Jarrell L J* at p 111=78 L J D & A 71, said 'No consent or admission can justify a decree, it is the duty of the Court to protect the public by seeing that divorce is obtained only on proper evidence, and so fully is the interest of the public recognised in the matter that by the Act of 1860 (23 & 24 Vict C 111), s 7 any person may intervene between decree nisi and decree absolute to show cause why the decree should not be made absolute on the ground of collusion or the suppression of facts, and the King's Proctor may intervene at any time during the progress of the cause or before decree absolute. The grounds and the only grounds on which a decree for dissolution can be made are set forth in section 27 of the Act of 1857. It is sufficient to say that a decree for judicial separation is not made available by the Act as one of such grounds. If such a decree is available at all, it is by virtue of the ordinary rules of evidence. I do not doubt that, as between the parties, the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney v Finney*, 29 L J P 21=1 Sw Tr 502, but estoppel is only a rule of evidence and the duty imposed on the Judge by section 29, which emphasises by express enactment the necessity for the Court being satisfied as required by section 31, is not restricted by any such rule.' A rule of estoppel is hereby personal against the person estopped and does not create any substantive right *in rem* except against the person estopped or against his representative. No estoppel can ensue on a representation of a mere opinion or of a point of law. *Dharam Prakash v Kalauat Devi*, 26 A L J 1106=110 Ind Cas 665=A I R 1928 All 459. The plea of title by estoppel can be pleaded both by plaintiffs as well as defendants in suits. *Tej Bahadur v Aallo*, 99 Ind Cas 472=A I R 1927 Oudh 97. Estoppel is a rule of evidence which in certain circumstances precludes a person from establishing rival facts and compels him to abide by a certain conventional set of facts. *Meharally v Saler Khanubai*, 7 Bom L R 602, *Sita Ram v Amur Begam* 8 A 324=A W N 1886, 101. Rule of estoppel although primarily a rule of evidence affects substantive rights. *Wahdan v Nasir Khan*, A I R 1930 All 434.

**Basis of estoppel on equity** What the law and the Indian statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. *Per Lord Shand in Sarat Chander Dey v Gopal Chander Laha*, 20 C 296 (311)=19 I A 203.

**Rule of estoppel whether applicable in criminal cases** The principle of estoppel has no place in criminal law. *Mohoran v Emperor*, 40 A 393=16 A L J 414=19 Cr L J 615=45 Ind Cas 51.

**Estoppel is neither admission nor presumption** 'The branch of the law of Evidence of which that of estoppel forms part is referred to by text writers, sometimes under the head of presumption and sometimes under that of admission. It might, perhaps be ranged under either with almost equal propriety.' *Goodale Et* 530. But this is not true. An admission is nothing but a piece of evidence. It is therefore to be distinguished from those statements of the party which become in themselves the foundation of independent rights for other persons by virtue of some doctrine of substantive law—in other words from binding estoppel, etc. Thus if A claims that his boundary line runs to an oak tree and B admitted this, B's extrajudicial admission of the boundary's location is merely evidence for the truth of the other facts on which A rests his claim. But if B has made his statement to A under such circumstances that A was justified in acting on it and has built up to the line he claimed B's concession

may by estoppel become the foundation of a new right for A, wholly irrespective of the validity of the grounds of his original claim. Here the field of substantive law, not that of evidence, is concerned. The statement or representation of B may, however, have been precisely the same in both cases and it is A's reliance and action thereon that bring into effect the doctrine of substantive law. Thus the so-called 'admission' being a common feature in both instances there has been some tendency (*Vide Greent Ev* § 207) to confound in one treatment the two wholly distinct things. *Wigmore* § 1057. The subject of estoppels differs from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them. *Steph Introduction* p 175.

**Estoppel and Judicial admissions—nature of conclusiveness.** An estoppel that is a representation acted on by the other party by creating a substantive right does oblige the estopped party to make good his representation—in other words but inaccurately it is conclusive so too but for an entirely different reason, a Judicial Admission is conclusive, in the sense that it formally waives all right to deny for the purposes of the trial i.e. it removes the proposition in question from the field of disputed issues. But statements which are not estoppels or judicial admissions have no quality of conclusiveness and on principle cannot have. *Wigmore* § 1059. Estoppel like judicial admissions has the similar effect of concluding all dispute of the fact. But here the distinction is that the estoppel is an obligation made by a rule of law of the same general class as contracts and representation, that it requires some additional act of detriment on the part of the obligee, and that it is absolute as regards the permanent legal relations of the parties and not merely hypothetical or relative to the procedure of a particular litigation between them. *Wigmore* § 2089.

**Different kinds of estoppel according to English law.** Estoppels according to English law have been divided into three classes (1) By matter of record (2) By deed (3) *In pais*.

(1) **By matter of record.** A matter of record as its name would import is something part of the records of a Court. It is at once the narrative and proof of its proceedings. In modern times the more usual form in which a question of estoppel by record becomes matter of discussion in our Courts, when it occurs in the shape of a judgment, on some matter of disputed right. *Goode's Ev* 532. The law in India, on this subject is dealt with in Section of the Civil Procedure Code and sections 40 and 41 of the Evidence Act.

**Estoppel by deed.** An estoppel by deed is that which binds the party to the instrument, and those claiming through them to its statements and operation, as an admission of the truth, thus at least as to the matter intended to be affected by the instrument, and the facts recited in it. The solemnity the seal prohibits all subsequent dispute of the acknowledgment. A good illustration of the doctrine is to be found in the case of *Bowman v Taylor* 2 A & E 278, where the plaintiff or patentee, had granted to the defendant, a license to use his (the plaintiff's) invention, at a stipulated payment covenanted for by the deed, and the deed contained a recital of the plaintiff having invented the improvements in question, invention being of course of the essence of the validity of the patent. The defendant pleaded that the invention was not, in fact, a new one, setting up the defence as a ground why he should be relieved from the liability to payment, contracted on the faith of the patent's validity. The Court however, held him concluded, that is to say estopped by the recital. It was observed by Mr Justice Tammion "The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to say any matter which has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading. The doctrine of estoppel, however, assumes the legal validity of the deed. Where the instrument itself is open to impeachment on the ground

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of either fraud, illegality, or immoral purpose, it would not apply, and any of these grounds could be set up to displace the estoppel. "The meaning of estoppel" says *Baron Morton*, "is this—that the parties agree for the purpose of a particular transaction to state certain facts as true, and that so far as regards the transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract, for persons cannot be allowed to escape from the law by making a false statement." *Horton v Westminster Commissioner*, 7 Ench R 791. Indeed it is not necessary that there should be any actual statement at all. Suppression or omission of the real transaction would suffice. Thus a bond given to a woman securing to her a pecuniary payment in return for future cohabitation, would naturally be silent as to the consideration, but being in fact for an immoral purpose it would be bad and the obligor would not be estopped from showing the nature of the consideration. *Goodeve Ev* 535. So also a party may prove that he never executed the deed, or that it was obtained by fraud or duress or otherwise tainted with illegality. *Collins v Blanters* 1 Sun L C 369, *Priestman v Thomas*, 9 P D 70 210, *R v Hutchings*, 6 Q B D 300, *Poulton v Adjustable, etc Co*, (1908) 2 Ch 430.

In general however in order to conclude the party by his deed by way of estoppel, it should be pleaded for, if his adversary does not rely upon the estoppel, the Court and jury are not bound by it, but the jury may find the matter at large according to the fact, and the Court will give judgment accordingly. He asks them their opinion and they are bound to give it. Where however the title of the party is barred by estoppel, and he has no opportunity of pleading it the jury cannot find against the estoppel. *Starie on Ev* p 461. In India the recital of receipt of consideration in a deed does not operate as an estoppel. *Baz Bahadur v Raghubir*, 49 A 707=25 A L J 572=100 Ind Cis 1037=A I R 1937 All 385. The strict technical doctrine of the English law as to estoppels in the case of solemn deeds under seal rests upon peculiar grounds that have no application to written instruments ordinarily in use amongst natives in India. *Zamindar S G R Bomay Nayl v Vniappa Chellu*, 2 M H C L 174, *Donelle v Kedar*, 7 B L R 720, *Ram v Kanai*, 12 C 663. It would be inequitable to have anything in this country of the nature of the old English doctrine of estoppel by deed. A party giving a *labuliyat* nominally in favour of another is not estopped from pleading that he did not contract with that other at all, and knew nothing of her. *Kedarnath v Benjamm*, 20 W R 352, see also *Ramgopal v Blaquie* 1 B L R (O C) 37 *Gokul v Pawan Mal*, 10 C 1030. Where the plaintiff executed a deed of mortgage he cannot afterwards sue to cancel it, alleging that it was a fictitious one for the purpose of depriving the next reversionary heir of his right to the property. *Mutsaddi v Bhaguan*, 11 P R 1875.

**Estoppel in cases of recital in documents.** When a person with a limited interest in certain property styles himself the owner of it and mortgages it to another he would be estopped, if he subsequently acquires the property, from setting up his limited interest as against the claim of the mortgagee. And the auction purchaser of such proprietary interests of the mortgagor with notice of all the facts, being a person claiming from them, would be equally estopped from pleading in a suit against him by the mortgagee, that the mortgagor had no proprietary title at the time of the mortgage. *Sera Ram v Ali Baisah*, 3 A 80=A W N 1881, 77. But the doctrine that in *pari delicto portior est conditio possidentis*, or that the Court, finding a man embarrassed by a deceit to which he was himself a party, will not interfere to relieve him from its consequences, cannot be applied in this country without qualification. Where a party to a fraudulent agreement entered into for the purpose of defeating the claims of third parties, wants to be relieved from its effects by showing its real character, the claims of justice, equity and good conscience will be satisfied by safe-guarding the interests of third parties, who have prejudicially altered their position on the faith of the agreement. And no harm is done by allowing the real character of the agreement to be proved as between the parties to it or their representatives. *Param Singh v Laly Mal*, 1 A 103. In the case of a *benami* sale to a tenant, the landlord is not estopped from asserting the tenancy



*Subuktulla v Han*, 10 C L R 199 In a suit for possession of lands, a plaintiff is not bound down by the recital, as to his vendor's title to the lands, in the document of sale but is at liberty to prove such title differently. *Gour Monee v Krishna Chaudia* 1 C 397 The mere fact of a vendor declaring in her deed of sale of a moiety of a landed estate, that the other moiety did not belong to her was held not to be conclusive against her being the proprietor, *Nunhoo v Boodhoo*, 13 W R 2 The rule of estoppel by deed or by writing as now in force is this that if a distinct statement of a particular fact is made in a deed and a contract is made with reference to that statement then the party who makes that statement cannot deny the truth of it *Phalur Abdul v Alijan Aliud Ali*, 6 O C 357

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**Estoppel in pais** An estoppel in pais is that which though not existing as matter of record, or under the solemnity of a deed may nevertheless, under the circumstances, conclude equally with the higher species of averment. It may exist in writing not being under seal in oral statement or even in conduct. In ancient times, the recognized estoppels in pais were but few, and these existed only in connection with landed property and its ownership. It was said by Lord Mansfield in *Lyon v Reed* 13 M & W 235 'The acts of parties by way of estoppel are but few and are pointed out by Lord Coke, Co Litt 352 (a) They are all acts, which anciently, really were, and in contemplation of law have always continued to be acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed' Of that which has attracted the application of the doctrine there is perhaps nothing which has done so to a larger extent than matters involved in the relationship of landlord and tenant. It is on this doctrine that the maxim—(one applied under circumstances of great variety)—has grown up, that a tenant or those claiming under him, cannot dispute the title of the landlord under whom they came into possession. This has been applied to the case where the letting was by an agent, and the landlord unnamed, and the principle would extend to that of any party coming in under the permission of the owner as in the instance of a lodger, a servant, or any other licensee. Indeed, so far has the doctrine been carried in practice, that where the object is to try the title by one in the possession of a tenant, the only course to be pursued is, first to give up possession, and then bring ejectment. *Goodeve Eli* 517 A similar estoppel ordinarily arises from the acceptance of a bailment. *Standard v Dunham*, 2 Camp 344, *Gosling v Birnie* 7 Buz 339 *Biddle v Bond* 6 B & S 225, *Hunderson & Co v Williams*, (189.) 1 Q. B 521 And the signatory of a bill of exchange or promissory note is precluded as against subsequent holders from denying the truth and genuineness of various matters appearing, expressly or by implication, upon the bill at the time of his signature. *Halsbury* Vol 13, para 453 citing *Nash v De Fieville*, (1909) 2 Q. B 72 If A deliberately makes an assertion to B intending to be acted upon by B, and it is acted upon by B, A is estopped from saying that it was not true. If it turns out to be false, A is answerable for the damage which may have accrued to B from having acted upon it and B, is entitled in respect of anything done in the belief that it was true to object to denial of its truth by A. *Piggot v Stratton*, 1 D. G. F & J 33

**Extension of the doctrine in modern times** In modern times and in more complicated relationships of society which have been growing up the doctrine of estoppel has been considerably extended in application beyond its more ancient limit and especially in reference to the mercantile and more general transactions of mankind. It has been rested too, less upon technical grounds, than upon the broad basis of good faith and personal honesty—and the principle is to hold men to those representations whether written or unwritten,—whether by word of mouth or of conduct—whether intentional or unintentional,—upon the faith of which others have been induced to act to the change of any previous position. In a case which has always been regarded as a leading one on this subject, that of *Pickard v Sears*, 6 Ad & El, 496, the law

S 115 is thus laid down by Lord Denman C. J. 'But the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the same time.' In a somewhat later case of *Freeman v Cooke* 2 Ld & Bl 90 which may be cited as an appendix to *Pickard v Sears* Lord Denman added *Pickard v Sears* was in my mind at the time of the trial and the principle of that case may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and under misunderstanding of a fact which he in contradistinction cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving. The former case it will be observed might possibly seem by the expression 'wilfully cause' almost to imply a fraudulent representation only and to limit the application of the doctrine to that state of things, — while the latter extends it to cases of mere omission, silence or passive acquiescence, and that not culpably merely in the more obnoxious case of the term but even negligent — and a good deal of discussion has arisen as to the precise limit of the rule. It is now however established that the word 'wilful' is to be understood not in the sense of intentionally but practically deceptive. *Goodale* Ld 351.

The discussion of the proposition as laid down by Lord Denman came before the Court in the case of *Freeman v Cooke* 2 Ld & Bl 651, when Lord Wensleydale in delivering the judgment after adverting to the rule as laid down by Lord Denman thus commented on it — Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question but the proposition contained in the rule itself as above laid down in the case of *Pickard v Sears* must be considered as established. By the term 'wilfully' however in that rule we must understand, if not that the party represents that to be true which he knows to be untrue at least, that he means his representation to be acted upon, and that it is acted upon accordingly and if whatever a man's real intention may be he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true the party making the representation would be equally precluded from contesting its truth, and conduct, by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As for instance a retiring partner omitting to inform his customers of the fact in the usual mode that continuing partners were no longer authorised to act as his agents is bound by all contracts made by them with third persons, on the faith of their being so authorised. Lord Wensleydale's statement of the law was reviewed by Lord Campbell C. J. in *Houard v Hudson* 2 Ld & Bl 1, where he said 'Now I recede to the rule laid down in *Pickard v Sears*, and in *Freeman v Cooke*. If a party wilfully makes a representation to another, meaning it to be acted upon and it is so acted upon that gives rise to what is called an estoppel. It is not quite properly so called but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel this conclusion shuts out the truth, and is obious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show, both that there was a wilful intent to make him act on the faith of the representation, and that he did so act.'

Though Lord Campbell in enunciating the proposition he was laying down, makes use of the expression 'wilfully', it will be noticed that he adopts the exposition of the law given in the later case of *Freeman v Cooke*, which in effect expounds the word 'wilful' to mean simply intentional, — and this probably, accordingly, was what Lord Campbell intended to convey. In the same case of *Houard v Hudson* too, Mr Justice Crompton, in addressing himself to his particular expression, observes — The word 'wilfully' which is used in the judgment in *Pickard v Sears*, has been well commented upon, in the judgment in *Freeman v Cooke*. As the rule is there explained, it takes in all the important commercial cases, in which a representation is made, not wilfully in

any bad sense of the word not *maliciously*, or with the intent to defraud or deceive but so far wilfully, that the party making the representation on which the other acts, means it to be acted upon in that way. That is the true criterion.

Of course, the principle was equally applicable whether in a Court of law or one of equity. In *Money v Jorden*, 5 H L C 185, Lord Cranworth L C thus observed: "Well known in the law, founded upon good faith and equity, a principle equally of Law and of Equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of falsehood which has so misled the other. This is a principle of universal application and has been particularly applied to cases where representations have been made so as to state the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There, the person who has made the false representations has in a great many cases been held bound to make his representation good." And in a later part of his judgment, he thus adds:—"These principles are plainly and perfectly intelligible, and quite consistent with good sense and I should be in the last degree sorry that any opinion or decision to which I am a party, should add to a notion that I, in the slightest degree question their propriety. Nay, more I think that the principle has been carried, and may be carried much further, because I think it is not necessary that the party making the representation should know that it was false, no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good. The whole doctrine was very much considered at law, for it is a doctrine not confined to cases in equity, but one that prevails at law also, and there are, in fact more cases upon the subject at law than in equity."

The case of *Money v Jorden*, *supra*, was decided originally by the Master of the Rolls. An appeal was then preferred before the Lords Justice, and finally it came before the House of Lords. But up to this point,—(the doctrine as laid down by Lord Cranworth)—both in the lower appellate Court, and on the final appeal in the House of Lords, there was no difference of opinion among the Judges. Lord Cranworth however who on the original appeal to the Lords Justices, and before his promotion to the Chancellorship was sitting as one of them, both on that appeal and the one to the House of Lords, took up the point that the doctrine under discussion did not apply to a case where the representation was not a representation of a fact, but a statement of something which the party intends or does not intend to do. And Lord Brougham on the appeal before the Lords adopted that view of the case. She', said his Lordship (referring to the lady the effect of whose statement was the issue in the cause)—"simply stated what was her intention, she did not misrepresent her intention and I have no manner of doubt that, at the time she made that statement, she had the intention which it is stated she professed."

This distinction did not prevail in the original appeal before the Lords Justices because having been dissented from by Lord Cranworth's then coadjutor, the Lord Justice Knight Bruce and being opposed to the view taken of the case by the Master of the Rolls, Sir John Romilly on the original hearing before him, the first appeal that before the Lords Justices, only terminated in the upholding of the original decision and the negation accordingly of this distinction. When the case, however, got to the Lords, on its second and final appeal, Lord Cranworth then ruled from Lord Justice to be Chancellor found a supporter for his view in Lord Brougham, and, though he had at the same time an opponent to it in Lord St Leonards the late Chancellor these being the three Lords by whom the appeal was heard Lord St Leonards was in the minority, and the ultimate decision was accordingly in conformity with the opinions on the point of Lords Cranworth and Brougham. Had Lords Cranworth and Brougham simply meant to speak of that which a party held out

S 115. as a mere matter of intention reserving to himself the power to change his mind it would be difficult to dispute their contention. Both however, in the terms in which they state the proposition would appear to carry it further, and were this their real intention, it may be permitted in all humanity, to doubt the soundness of the view, and certainly in doing so we are in pretty good company, for if it be supported by *Lords Cranworth* and *Brougham* on the one side, on the other it was opposed to that taken by the Master of the Rolls, Sir John Romilly the Lord Justice Knight Bruce and Lord St Leonards, and with reference to all three of whom it may be said that none are more conversant with the great principles of equity. Indeed though the judgment of the Court of last resort the decision presented the somewhat anomalous state of things of being carried in a convolve of three Judges by a majority of one only, while had all the five Judges by whom it was consecutively heard, been there sitting together to decide, it would have been lost by a minority of two out of five, so that while the dissenting Judges as a body were certainly on such a question, not inferior to the assenting ones it was the numerical minority which ultimately prevailed over the majority. Moreover on the hearing in the Lords Lord St Leonards entered his protest most energetically against the doctrine *Goodell* 14 555. Your Lordships said Lord St Leonards "are asked to consider that a representation of an intention is not a binding act, and that you cannot misrepresent what you intend to do. But if you declare your intention with reference, for example to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that in point of law, that is a binding undertaking." And he goes to cite various well established authorities in support of his view. The case presented much conflict of evidence and can hardly be said to involve the decision of the question in the particular form assigned to it by the parties we have quoted, from the judgments of *Lords Cranworth* and *Brougham*, and it may it is submitted be considered, accordingly, to have been left as an open one. Indeed on a close analysis of the case, we think it will be found that applying the judgments of these two learned Lords on the legal point to the facts only which they (particularly *Lord Cranworth*) treated the evidence as establishing, the broader proposition apparently which, according to the report, was broached by them went beyond the exigency of the decision, and might accordingly be so far fairly treated as obiter, if indeed, it was the intention of the two learned Judges to carry that proposition quite so far as their language might ascribe to them. The case so far as it requires to be told to explain the discussion was simply this—A lady (a family friend at the time a spinster of some maturity of age), had in her possession and belonging to her a bond to which a young gentleman about to be married was a party as an obligor with others, but she had already often avowed, that under certain peculiar circumstances in which the bond was given, and her regard for the youth it was her intention never to enforce it against him. In this state of things she was applied to by the gentleman and his friends on the occasion of the marriage and with reference to the marriage arrangements more formally to release the obligation and give up the bond. This, however she declined to do saying that the document itself might be required should she wish to enforce it against the other parties but that she had no intention of ever doing this as against the gentleman in question. This was treated by the family as a practical release and the marriage took place accordingly. The lady subsequently got herself married and an action was afterwards brought, in the name of her husband and her self, to enforce the bond against the party who had under the circumstances detailed above, treated himself as released and married on its faith and a suit was thereupon preferred in equity to restrain the action at law being the suit to the proceedings in which we have been addressing ourselves. The judgments of *Lords Cranworth* and *Brougham* were necessarily founded on their own view of the evidence and it was this as stated by *Lord Cranworth* himself and adopted by *Lord Brougham*. "I repeat that I do believe that she often and often told this young man that she would never enforce this bond that I believe she said this over and over again knowing that it would come to his ears but that that was all that was said either expressly or impliedly, and said

with the qualification, I will not give up my right to the bond, you must trust to my honour." Now this would almost appear to have reserved to the lady the power of changing her mind and whether it were the correct view of the evidence or not, might possibly in itself be sufficient to warrant the judgment ultimately passed by *Lords Cranworth* and *Brougham*. At all events it falls, it is submitted somewhat short of invoking the broader proposition ascribed to them as the basis of their conclusion,—while, if so it would fail to disturb the general course of decision which has been pointed out. According to *Lord Cranworth*, what the lady intended to be acted on was not her intention, but the chance that she might never change it. If there were to be any thing to trust on it was her honour simply that she would not change, with the reservation that she might, if she chose, for she expressly reserved to herself, her right to the bond. It was a deed to learn on, which might be broken not a staff which would not. *Goodere v. 57*. But it has been held that in order that a representation may operate as an estoppel it must be a representation of an existing fact and of not mere intention or future promises. Also estoppel, does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment. *Hindustan Co-operative Society v. Secretary of State*, 56 C 989. A mere representation of an intention cannot amount to an estoppel. An estoppel must be a representation of an existing fact. If binding at all a representation *de futuro* must amount to a promise. *Dhundo v. Keshab*, 7 Bom L R 179.

**Estoppel in equity** The modern or equitable estoppel is founded upon representations and arises out of contract or relations analogous to contract. *Casper v. Estoppel* p 19. The general principle underlying equitable estoppel is thus laid down "No body ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong, to some other person who has been induced to do something, or to abstain from doing something, by reason of something said or done or omitted to say or do." *In re Collie*, L R 8 Ch D 807 (817). So "when a person makes to another the representation 'I take upon myself to say such things do exist and you may act upon this basis that they do exist' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that between those two parties their rights should be regulated by the conventional state of facts which the two parties agree to make the basis of their action." *Per Lord Blackburn in Burslem v. Nicholls*, L R 3 App Cas 1004 (1026), *Casper v. Estoppel* 19. It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon inquiry that if prosecuted would have led to a discovery of it." *Mallet v. Mawny Gyn Nyo* U B R (1892 1896) Vol II 376. Equitable estoppel is not applied in favour of a volunteer. *Loxell v. Loxell*, 67 L J Ch 20=(1898) 1 Ch 82.

The section whether exhaustive of all kinds of estoppels. In *Ganges Manufacturing Co v. Sowagmull* 5 C 669 at p 678, *Garth C J* said "It has been further contended by the appellants that ss. 115 to 117 contained in Chapter VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India, that those rules are treated by the Act as rules of evidence, and that by s 2 of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well founded the consequences would indeed be serious. The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of ss 115 to 117 however important these questions might be to the due administration of the law. The

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fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in s 115 is, no doubt, in one sense, a rule of evidence. It is founded upon the well known doctrine laid down in *Pickard v Sears* 6 Ad & L 109 and other cases, that where a man has made a representation to another of a particular fact or state of circumstances and has thereby willfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was not true. In such a case the rule of estoppel becomes so far a rule of evidence that evidence is not admissible to disprove the fact or state of circumstances which has been represented to exist. But "estoppels" in the sense in which the term is used in English legal phraseology, are matters of infinite variety and are by no means confined to the subjects which are dealt with in Chapter VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent him using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe v Oliver* 2 Smith's L C 5th Ed p 775, and whatever the true meaning of section 2 of the Evidence Act may be as regards estoppels which prevent persons from giving evidence we are clearly of opinion that it does not deprive the plaintiffs in this case from availing themselves of their present contention as against the defendants. Similarly in *Kupchand Ghosh v Sariswar Chandra* 33 C 915 at p 921=10 C W N 717=3 C L J 629 Mr Justice Woodroffe said "This is admittedly not a case of estoppel by misrepresentation, which is dealt with by section 115 of the Evidence Act. If it is an estoppel at all, it is an estoppel by agreement. Sections 116 and 117 of that Act mention certain well known cases of this kind of estoppel, viz that of the tenant, the licensee, the buyer and acceptor of a Bill of Exchange. The case does not come within any of these, though it has been argued in part on the analogy of the tenant's estoppel. It has however been correctly submitted that these sections are not exhaustive of the doctrine of estoppel by agreement." See also *Bharganta Beulah v Himmat Baidyakar*, 20 C W N 1335 (1340), *Golla v Sitaram* 23 M L J 335, but see *Asmutunnessa v Harendra Lal* 35 C 901=12 C W N 721=8 C L J 31 where none of the previous cases were considered. 'This equity differs essentially from the doctrine embodied in s 115 of the Indian Evidence Act 1872 which is not a rule of equity but is a rule of evidence that was formulated and applied in Courts of law. Whereas the former takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent fraud' *Municipal Corporation of Bombay v Secretary of State for India* 29 B 580=7 Bom L R 27. When the principles of the law of estoppel, by which the Courts in India are to be governed, are found in s 115 of the Act there is no need to fall back upon the analogies of the Mohammedan Law in a case of presumption arising between the Hindus *Ajudhia Chaudhuri v Chhatrapal*, 1 A L J 210=A W N 1907, 85.

**Requisites of section 115** To constitute an estoppel under this section, the following things are necessary namely—

(1) A false representation or concealment of material facts, (2) The representation must have been made with knowledge of the facts (3) The party to whom it was made must have been ignorant of the truth of the matter, (4) It must have been made with intention that the other party should act upon it (5) The other party must have been induced to act upon it *Brynm v Preston* 69 Fex 287=5 Am St Rep 49 (6) Or acts, conduct, or declarations of a person, by which he designately induces another to alter his position injuriously to himself but it must be executed and not merely executory *Camp Rul Cas* 101 104.

**Declaration, act or omission** This section deals with a case of estoppel by misrepresentation. *Rup Chand v Sariswar*, 33 C 915 (921). Under this section such misrepresentation may be made by declaration, act or omission. *Ichha bai v Natha bai*, 28 B 399 (407). 'It is a very old head of equity' said Lord Eldon in *Evans v Brednell* 6 Ves 183, that if a representation is made to

another person going to deal in a matter of interest upon the faith of that representation the former shall make the representation good if he knows it to be false.' But the misrepresentation need not be in express terms, and is frequently scarcely to be described as a misrepresentation at all but may be implied from the general conduct of the party making it, and it will be sufficient to show that under the circumstances, any reasonable man would be deceived. *Casper v Estoppel*, 20, see also *Pickard v Sears* 6 A & E 469, *Cornish v Cole*, 8 L J Ex 114, *Cornish v Abington*, 28 L J Ex 262 *Freeman v Cole*, 8 L J Ex 114, *Dixon v Kennaway Co*, (1900) 1 Ch 833 *Foster v Pyne Penloon Co*, 63 L J Q B 50, *Sarat Chandra v Gopal Chandra* 20 C, 296. The law on the subject is thus stated by *Brett J* in *Carr v London and North Western Railway Co*, L R 10 C P 347=44 L J C P 109—

"1 If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such a state of things and acts upon his belief he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist

"2 If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts

"3 If a man whatever his real meaning may be so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act on it in a particular way and he with such a belief does it in that way to his damage, the first is estopped from denying that the facts are as represented

"4 If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist. This case was approved of in the much later case of *Seton Laing & Co v Lapone* L R 19 Q B D 68, by a unanimous judgment of *Lord Esher* and *Lords Justices Fry and Lopes*. In that case *Lord Esher* said "An estoppel does not in itself give a cause of action it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement, negligently, though without fraud and another person acts upon it. And there may be circumstances under which where a misrepresentation is made without fraud and without negligence there may be an estoppel." See also *Coventry v G E Ry Co* 11 Q B D 776, *Sarat Chandra v Gopal Chandra*, 20 C 296 (P C), *Ex parte Adamson*, 8 Ch D 807

In *Carr v L & N W Railway*, L R 10 C P 68 *Brett J* classifies ordinary instances of estoppel by conduct under four heads. Fraud, Intentional but innocent misrepresentation, Foolish but misleading conduct, and culpable negligence. It must not be taken, however, that this classification is exhaustive, a man's conduct may give rise to estoppel in infinite number of ways. *Pouell* Ev 468. Estoppel, like acquiescence, is not a question of fact but of legal inference from the facts found. To create an estoppel it is not sufficient to find that it may well be doubted that the plaintiff would have acted in the way he did but for the way in which the defendant had acted. It must be found as a fact that the plaintiff would not have acted in the way he did, and that the defendant by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be that, and to act upon such belief. *Narsingdas v Rihmabhai*, 6 Bom L R 440=28 B 410

**Intentionally.** In *Pickard v Sears*, 6 A & E 469 at 474, *Lord Denman* said "The rule of law is clear that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position the former

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is concluded from averring against the latter a different state of things as exist at the same time." The rule is laid down in *Pickard v Sears*, *supra*, was explained by *Parle B* in *Freeman v Cooke*, 19 L J Ex 114 at p 119. "The rule was founded on previous authorities, on the cases of *Charies v Key*, 3 B Ad 313, and *Heane v Rogers*, 9 B & C 586, and has been acted upon in several cases since. The principle is stated more broadly by Lord Denman in the case of *Gregg v Wells* 10 A & E 90, where his Lordship says that if a party negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an act against the person whom he has himself assisted in deceiving. By the term 'wilfully' however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he makes his representation to be acted upon, and that it is acted upon accordingly, and whatever a man's real meaning may be he so conducts himself that a reasonable man could take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, the person making the representation would be equally precluded from contesting its truth and conduct by negligence or omission when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect—as, for instance a retiring partner omitting to inform the customers of the firm, in the usual mode that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorised. In *Houard v Hulst* 2 El & Bl 1, *Compton J* said 'The word 'wilfully' which is used in the judgment of *Pickard v Sears* has been well commented upon in the judgment of *Freeman v Cooke*. As the rule there explained, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word not *maliciously*, or with intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way. That is the true criterion.' See *Madhu Chunder v Law*, 13 B L R 391, *Corentin v Great Eastern Railway Co* 11 C B D 776, *Selon Lang & Co v Lafone* L R 19 Q B D 68, *Cornish v Abington & H & N* 519. So there is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention. *Sarat Chunder v Gopal Chunder*, 20 C 298. In the above case, commenting on the cases of *Ganga Sahai v Hara Singh*, 2 A 809 and that of *Vishnu v Krishnan* 7 M 3 Lord Shand said "In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. The latter case was one in which an adoption having taken place, the alleged adopted son claimed to be asked a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. (In that case also) the Court seems to have taken the view that in order to create estoppel the representation founded on must have been made with an intention to deceive, and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said (7 Mad 8). The term *intentionally* was, no doubt, adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard v Sears* 6 A & L 169 and explained in *Freeman v Cooke*, 2 Exch 651 and *Cornish v Abington & H & N* 519, it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts. Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by there substituting the word 'intentionally' in the rule established for the word 'wilfully' which had been previously used it seems to their Lordships that the term 'intentionally' was used in the Evidence Act for the purpose of declaring the law in India to be precisely that of the law of England. A person who by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so 'intentionally' within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect



was given in the case of *Comish v Abington*, *supra* and the later cases "Estoppels may arise on various grounds," says *Brett M R* in *Seton v Lafone*, L R 19 Q B D 68 "all of which the judgment in *Carri v North Western Railway Co*, L R 10 C P 307, endeavours to state and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others. An estoppel does not in itself give a cause of action it prevents a person from denying a certain state of facts. One ground of estoppel is when a man makes a fraudulent representation, and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently though without fraud, and another man acts upon it. And there may be circumstances under which where a misrepresentation is made without fraud and without negligence, there may be an estoppel. While it is not in all cases necessary to show actual knowledge of the facts on the part of the one against whom the estoppel is claimed, it should at least be shown that the declarations were made under such circumstances that he ought to have had such knowledge or that they were made negligently and recklessly. *Erans v Edwards* 13 Com B 777. He cannot urge as an excuse, that he had forgotten them. When a person through misapprehension ignorance or inadvertence, does acts or makes declarations which mislead another to his injury, but when at the same time there is no wilful deception or culpable negligence and no intention that the representation should be acted upon as true by the other party and when nothing accompanies it that is equivalent to a promise that the representation is true the person making the declarations or doing the acts is not estopped from proving the truth against the party thus misled. It follows that there is no estoppel when the declarations are made in good faith and in ignorance of the real facts—in other words, when made innocently and by mistake. *Burr Jones* § 277, *Muhammad v Golalehand*, 26 P L R 1903. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or abstain from acting, should have been fraudulent or that he should not have been under a mistake or misapprehension. *Helan Das v Durao Das Mundal*, 4 C L J 423. Under this section not merely may there be active inducement on the part of the declarant of a belief in the mind of another person but it is enough if declaration is such by which the declarant in the ordinary course permits some body else to believe in the truth of that declaration and to act on that belief. *Barkat Ali v Prosonna Kumar*, 33 C W N 873=A I R 1929 Cal 819. It is not necessary, according to law as at present received that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel. *Balbir v Jugat*, 3 Pat. L J 454=46 Ind Cas, 473.

**Who can take advantage of the representation.** Only the person to whom the representation was made or for whom it was designed can avail himself of it. A person who receives, statements at second hand, not intended for him, clearly has no right to act upon them. Indeed it is equally clear that a mere bystander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him, and so it has been decided. If however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it. This should be the limit of the law more than that would be to make a man responsible for an act not his own or that of his agent. *Bigelow on Estoppel*, 6th Ed page 708. Only such person can take advantage of a representation for whom it was meant. *Jogesh Chandra v Entaz Ali*, A I R 1927 Cal 34=97 Ind Cas 625. Estoppel applies not only in favour of the person induced to change his position but also in favour of a transferee of such a person. *Bhanya Lal v Shoo Gobind* 7 L R 213 (Rev.) *Jayamath v Syed Ibtullah*, 16 A L J 576=45 Ind Cas 770=22 C W N 891 (P C). When plea of estoppel is available to the decree-holder it is likewise available to the purchaser at the auction sale. *Swammatha Vallala v Darmalinga*, (1917) M W N 88. Parties who, by false representations, induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary may be compelled to make them good. W R 1864, 11.

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It is not necessary that the representation should be false to the knowledge of the party making it, though in the early cases this appears to have been the law provided that (1) it is intended to be acted upon in the manner in which it was acted upon or (2) the person who makes it so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it in the manner *Halsbury Vol 13 § 540*

**How a representation may be made** The form of representation may be oral or written *G I P Ry v Hanmandas* 11 B 57 Where there is no representation a party cannot be estopped *Damodar v Choudhury*, 69 Ind Cas 131=1922 P C 349=16 L W 692 A representation to form the basis of an estoppel may be made by statement or by conduct, and conduct includes negligence *Halsbury Vol 13 p 377, Ferman v Coole* 2 Ex. Ch 654

**Representation must be of existing facts** A mere representation of an intention cannot amount to an estoppel *White Church v McAnagh* (1902) A C 117 (130) An estoppel must be a representation of an existing fact *Dhondo Goring v Keshab Bhaskar* 7 Bom L R 179 (184) Section 115 of the Evidence Act requires that to create an estoppel there must be a representation by means of a declaration act or omission that a thing is true i.e. that the representation is as to some state of facts alleged to be at the time actually in existence If the representation relates to a promise *de futuro* it can be binding not as an estoppel but as a contract *Jethabhai v Nathabhai* 28 B 399 (407) This case followed the rule laid down by Lord Macnaghten in *George White Church Ltd v McAnagh* (1902) A C 117 (130) where His Lordship said 'That is not a representation of an existing fact If it is anything it is a promise *de futuro*, which cannot be an estoppel See also *Maddison v Alderson* 8 App Ca 467 (473) In *Alderson v Maddison* L R 5 Lx D Stephen J said

Besides these there is a class of false representations which have no legal effect. These are cases in which a person on excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him Though such conduct may inflict greater loss on the sufferer than almost any breach of the contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences unless the person making the representation not only excites the expectation that it will be fulfilled but legally binds himself to fulfil it in which case he must as it seems to me contract to fulfil it See also *Jorden v Money* 5 H L C 185 *Citizens Bank of Louisiana v First National Bank of New Orleans*, L R 6 L & I A 352 *Byrdlow 6th Ed* 637 *Saunders v Beach* 40 C L J 67 *In re Wickham* (1917) 34 1 L R 159 *Tanfield & Co v Gardner* 104 L F 238 (259) *Ma Pau v Ng Po* 39 Ind Cas 385, *Bayram v Bhagwan* 11 O C 301 *M Eroy v Diogheda Harbour Commissioner* 16 W R 31, *Chadwell v Manning* (1956) A C 231 The doctrine of estoppel by representation is applicable to some state of facts alleged at the time to be in existence and not to promises *de futuro* which if binding at all must be binding as a contract *Devdas v Dnyabhai* 89 Ind Cas 164, *Hindustan Co operative v Secy of State* A I R 1930 Cal. 238 The principle of estoppel in pais arising from a person's conduct has no application where the state of things which it was sought to conclude that person from denying was a future state of things *M Eroy v Diogheda Harbour Commissioners* 16 W R 31 In *Maddison v Alderson* 32 I J Q B 737=9 App Cas 473, Lord Shelborne said 'I have always understood it to have been decided that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence and not to promises *de futuro*, which if binding at all, must be binding as contracts' A representation as to a future course of conduct cannot create an estoppel *White Church (George) Ltd v McAnagh*, 71 L J K B 100=(1902) A C 117=85 L F 319, see also *Ma Pau v Ng Po Chet*, U B R (1916) 111 Qr 143=39 Ind Cas 385

**Estoppel, whether should be pleaded.** An estoppel *in pais* need not be pleaded in order to make it obligatory *Cut Rm v Petana Lau*, 2 M H C L 31 If a man were to represent another as his agent, in order to procure a person

to contract with him as such, and this person were so to contract, the contract would bind the principal equally with one made by himself, and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. *Freeman v Coole*, 2 Ex R 660, *Taylor* § 92, see also *Sanderson v Collman*, 4 M & Gr 209, *Fleming v Bank of New Zealand*, (1900) A C 557. The rule of estoppel is a rule of evidence and should be pleaded with sufficient clearness. *Abdul Rahim v Basura* 61 Ind Cts 807=6 P L J 273=2 P L R 556. A person invoking the plea of estoppel must clearly plead precise facts which led him to believe that his transferor was the real owner and must show the precise nature of the inquiries he relied on. *Ram Sarup v Maya Shanhar*, 43 Ind Cts 556=33 P W R 1918=46 P R 1918. Where plea of estoppel is not set up in the pleadings or issues it cannot be availed of later, because estoppel is eminently a matter of pleadings. *Pappannal v Alamelu* 119 Ind Cas 152=A I R 1929 Md 467. The question of estoppel is a mixed question of law and fact. *Agudias v Kara Jesang* 6 Bom L R 630. No question of estoppel by acquiescence can possibly arise where a person has built a house on another's land in the latter's absence and when the plea of estoppel is not raised in defence the Court can rightly reject that argument. *Duarla v Sanilatha* 94 Ind Cts 307, but see *Hivalal v Palsnam* 80 Ind Cas 946=1925 Nig 946. A question of estoppel can only be raised by pleading. *Purgan v Dhanpal*, 52 Ind Cts 739. *Shauh Abdul Rahim v Mt Banra* 6 P L J 273=2 P L R 556=61 Ind Cas 807, *Ram Sarup v Maya Shanhar* 46 P R 1918=45 P L R 1918=33 P W R 1918=43 Ind Cts 556, *Prasanna v Badulla*, 47 Ind Cts 935, *Chandi v Samila*, 22 C W N 179.

**Onus of proof.** To entitle a plaintiff to recover from a defendant, on the ground of estoppel a loss occasioned through culpable neglect on the part of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose and also that such negligence was the proximate, direct or real cause of the loss. *Longman v Bath Electric Tramways*, 74 L J Ch 424=(1905) 1 Ch 646. A person who relies on an estoppel by negligence must show that he was led into the belief on which he acted to his detriment. A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property. In the conveyance a small portion of the solicitor's property was confused but the client did not believe that he was buying the small portion in question. The client subsequently brought an action claiming the land. Held that the solicitor was not estopped from setting up the truth. *Bell v Marsh* 72 L J Ch 360=(1903) 1 Ch. 528=88 L R 605=51 W R 325. The estoppel must be strictly interpreted and any point in doubt must be decided against the estoppel. *Nihal Singh v Naram Singh*, 6 Lah L J 45=80 Ind Cts 525=1924 Lah 469. The onus of establishing facts giving rise to estoppel is upon the person who pleads it. *Mitra Sen v Jani*, 46 A 728, *Ahmed v Safizan*, 97 Ind Cts 597, *Buendra v Bauluntha* 46 Ind Cts 474.

**When truth of the matter known to both the parties no estoppel arises.** Where the party affected has received timely notice that the representation is not true he cannot enforce the estoppel. *Dunston v Paterson* 2 C B N S 495. *Sandy v Hodgson* 10 Ad & El 472. So the party claiming the estoppel must not himself have been negligent. 'Where the condition of the title is known to both parties or both have the same means of ascertaining the truth there can be no estoppel. *Brant v Virginia Coal & I Co* 93 U S 326 (Am). *Knouff v Thompson* 16 Penn State 361. He must show good faith and diligence to learn the truth. *Morgan v Farrel*, 58 Connecticut (Am). *Camp* Rul Cts Vol XI p 103. This section does not apply to a case where the statement relied upon is made to a person, who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation, made to person who knows it to be false is not such a fraud as to take away the privilege of infancy. *Mohrce Babee v Dhanmodas*, 30 C 339 P C=30 I A 114=7 C W N 441=5 Bom L R 121. Estoppel by conduct does not arise where the party misled had actual or constructive notice of the real state of facts. *Maung Sa v Ma Kyol*,

**S 115** L B R 1893-1900, 512 There can be no estoppel when the truth of the matter appears on the face of the proceeding *Jara Lal v Sorobor Singh*, 27 C 107 P C = 27 I A 33 = 1 C W N 233 = 2 Bom L R 5 When both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel *Suaminatha v Suaminatha* 18 M L J 32 = 99 Ind Cas 772 = A I R 1927 Mad 159, see also *Debi Prosad v Bijnath*, 95 Ind Cas 585 = A I R 1926 Oudh 506 It is a settled principle of law that if a person either knows a certain fact or is presumed in law to know a certain fact the principle of estoppel cannot apply *Lulloo v Indira*, 93 Ind Cas 873 = 13 O L J 151 = A I R 1926 Oudh 330 No estoppel exists where the other party knows the truth *Padayachi v Krishna Suami* 21 L W 336 = 85 Ind Cas 855 = A I R 1925 Mad 95 = 17 M L J 622 *Jagjit Prosad v Rajo Koer*, 2 Pat 585 = (1923) Pat 177 = 1 Pat L J 531 A misstatement of fact which is false within the knowledge of both parties will not act as estoppel *Poria v Kunuar* L R 1 A 185, see also *Janatachala v Iruthanathachari*, 1923 Mad 568 = 1923 M W N 225, *William Jael & Co v Joosab* 25 Bom L R 1170, *Rizambal v Shanmuga* (1922) M W N 481 Where A and B convey property to C making him believe that they are sole owners of the property and C acting on that representation takes the property for consideration A and B are estopped from asserting the title of a third person to the property even though C has transferred the property to D who was aware of the title of the parties *Saroda v Gosta*, 36 C L J 78 Where the plaintiff was fully cognisant of his own rights and position the admission of the defendants made in a previous suit between the parties which did nothing to influence either plaintiffs beliefs or actions could not operate as an estoppel in the present suit *Mehra v Dew Ditta*, 2 Lah 88 = 3 Lah L J 223 = 62 Ind Cas 665 There cannot be a case of estoppel where the person pleading the estoppel was put on notice and could by reasonable diligence have discovered what the true facts were *Sarada Prosad v Ananda Moy*, 46 Ind Cas 223 So this section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement *Jagannath v Jalkishen Prosad* 1 Pat L J 16 = 34 Ind Cas 375 Estoppel does not arise where both parties have equal means of knowledge both of the facts and of the law *Tel Chand v Gopal Devi* 13 Ind Cas 452 = 46 P R 1912 see also *Piasanna Kumar v Srilanto Raut*, 16 C L J 202 = 17 C W N 137 There can be no estoppel where the whole of the record deed or document, in which the statement relied on is contained, shows the truth *Menanj v Secretary of State* 14 Bom L R 634

**Estoppel by representation—change of position brought about by it** A, by word or conduct induces B to believe that a certain state of things exists, and B in that belief acts in a way in which he would not have acted unless he so believed and is thereby prejudiced then A cannot in any subsequent proceeding between himself and B or any one claiming under B be heard to deny that that state of things existed But A will not be estopped from averring the truth in any other proceeding The estoppel only arises in favour of some person whom A has induced by word or conduct to do or abstain from doing some particular thing *Pouell Ev 9th Ed* 468 Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time *Pickard v Sears*, 6 Ad & C 469 So it is clear that if a person so conducts himself that another reasonably draws a certain inference and acts thereon the person so conducting himself cannot gainsay such inference *Cornish v Abington* 4 H & N 549 *Carr v L & N W Railway Co* L R 10 C P 307 *In re Blackley Ordnance Co.*, (1867) L R 3 Ch 154 *Hollins v Fowler* L R 7 H L 757, *Neuton v Luddard* 12 Q B 925 *In re Collie* 8 Ch D 817 *Horsfall v Halford and Haddersfield Union Banking Co* 32 L J Ch 599 *Couldrey v Burtrum*, 19 Ch D 394 The other party must have acted upon the act or conduct *Daniels v Er Ins Co* 48 Connecticut, 105, *Earl v Stevens* 57 Vermont 474 Before an estoppel can take place it would be necessary for the party relying on the

same to establish that he had been led to do something detrimental to his own interest owing to the action of the other person *Nisar Ali v Muhammad Ali*, 119 Ind C 337=A I R. 1929 Oudh 491=6 O W N 349 What this section mainly regards is the position of the person who has been induced to act, and the principle on which the law rests is that it would be most inequitable and unjust to him that if another by a representation made or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*, it may in the result be unfortunate for him, but it would be unjust even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended that he should do. The main question, in determining whether an estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it *Sarat Chandra Dey v Gopal Chandra Laha*, 20 C 296 (P C)=19 I A 203. In determining whether an estoppel has been created, the main question is whether the representation has caused the person to whom it has been made, to act on the faith of it *Helan Das v Durga Das*, 4 C L J 323. Where a person negligently allows another to contract on the faith of a fact which he can, but does not contradict he cannot afterwards question such fact in an action against the person whom he has assisted in deceiving. An estoppel of this kind is not created by a wilful, negligent and culpable misrepresentation, unless the person so deceived does an act in accordance with the misrepresentation *Anderson v Taylor*, 70 P R 1866. The meaning of this section is that no declaration, act or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position, and to do this he must both believe the facts stated or suggested by it and act upon such belief *Durga v Jhunjuri* 7 A 511=A W N 1885, 135, see also *Solano v Lalla Ram Lal*, 7 C L R 481, *Jhunjuri v Durga*, 7 A 878 (I B)=A W N 1885, 260, *Nanakchand v Chameli Kunwar*, 17 A L J 288. Statement by one of two persons that another is his partner, he not being so in fact will not be evidence to render the other liable as an ostensible partner, the statement not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shown that he has acted on the faith of such statement *Edmondson v Thompson*, 31 L J Ex. 207. It is a settled principle of the rule of estoppel that in order that a particular declaration, act or omission of a certain person may constitute estoppel against him, the person pleading estoppel in his favour must show that he in accepting the truth of his declaration and relying upon the truth thereof, has acted upon such belief and changed his position to his detriment *Ahmad v Safian*, 97 Ind C 387=A I R 1926 Oudh. 61. Person making a representation cannot subsequently deny what he represented when the person to whom it was made acted upon it *Bengal Nagpur Railway Co v Co Operative Hindustan Bank Ltd* 53 C 622=97 Ind C 387=A I R 1926 Cal. 1059. Where the plaintiffs made statements in a suit inconsistent with those made by their father in a previous suit against the same defendants but the plaintiffs did not claim the property in suit through their father and there had been no change in the position of the defendants by reason of the prior inconsistent statement the plaintiffs were not estopped *Nripendra Nath v Basanta Kumar* 29 C W N 861=89 Ind C 387=A I R 1925 Cal 1195. A tenant desiring to erect *pucca* structures on the leased land asked the permission of the landlord whose agent in reply wrote to say that the lease was a permanent lease and gave the tenant right to erect buildings, but it did not entitle him to hold at fixed rate and that the rent was liable to enhancement after proper legal notice and that pending consideration of a proposal to fix the rent permanently, the tenant might commence the house if he liked. Held that the statement of the latter was a statement of fact and not an expression of opinion, and the house having been erected, the landlord was estopped from ejecting the tenant by virtue of this section *A H Forbes v*

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Sir L E Ralli, 30 C W N 49=52 I A 178=41 C L J 513 (P C) In delivering the judgment Mr Justice Ralli said 'Estoppel prevents the plaintiff from evicting from their holding, the defendants, whom he, the plaintiff, induced by his representation and conduct to believe that they had a sixty of tenure, although not of rent in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did. In the case of *Ramsdin v Dyson*, L R 1 II L 129, the principle which governs this class of cases is stated by Lord Kingsdown in the following terms—'The rule of law applicable to the case appears to me to be this. If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v Mishall* 18 Ves, 328 and as I conceive open to no doubts. This principle has been accepted by this Board in the case of *Imad Ior Khan v The Secretary of State for India* 28 I A 211=5 C W N 634. The exposition of Lord Shand in *Sarat Chander Dey v Gopal Chander Laha* L R 19 I A 203 of the rule of equitable estoppel embodied in section 115 of the Indian Evidence Act has been quoted *in extenso* in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their Lordships desire to record full concurrence with the principle there laid down. Where the plaintiff was not induced to take any action, on the strength of misrepresentation by the defendant, and the interest of the plaintiff did not suffer by such misrepresentation estoppel does not arise. *Lalla Prosad v Jaghmanandan* L R 5 All 321. The phrase 'act on such belief' means that the party must have altered his position with reference to the subject matter of the representation. *William Jacobs & Co v Joorab Mahomed* 25 Bom L R 1170. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter to his own detriment his previous position. *Bhagwan Singh v Daulatram*, L R 3 A 173 (Rev), *Gusam v Ram Ralha* 50 Ind Cas 128, *Abdulla Fatch*, 62 Ind Cas 809.

Before advantage can be taken of the doctrine of estoppel the representation of the party sought to be estopped and the action of the party seeking to estop must be shown to be connected together as cause and effect. There must be proved first of all a declaration, act or omission on the part of the person sought to be estopped, and secondly that, by such a declaration, act or omission the person seeking to estop was led to believe a thing to be true and thirdly, that by such act or omission the party seeking to estop was not only led to believe a thing to be true which in fact was untrue but to act upon such belief to his prejudice. *Ram Boran v Ram Nihora*, 57 Ind Cas 263 see also *Gujabai v Sadasi* 22 Bom L R 974=58 Ind Cas 394. *Kannulal v Paul Saha* 5 P L J 521=1 P L T 546=57 Ind Cas 333. *Rajib Hussain v Zing Kayi* 54 Ind Cas 962, *Harlal v Basanta Singh* 75 P W R 1918.

Where by his admission of a compromise before the Revenue Court the plaintiff induced the defendant to withdraw his suit in that Court, he is estopped from bringing another suit in a Civil Court. *Gulab v Badhaua*, 45 Ind Cas 331. Before applying the rule of estoppel it must be shown that a previous inconsistent statement in some way affected the result of the litigation in which it was made. But if the defendants were never proper parties to the previous litigation they cannot in any way be estopped from pleading something inconsistent with their former statement. *Raghunath v Sheetal*, 13 N L R 69=39 Ind Cas 849. If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to be something under an expectation created and encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. The crown



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that of the purchaser by showing either that he had direct notice, or something which amounts to a constructive notice, of the real title, or that there existed circumstances which ought to have put him on an enquiry that if prosecuted, would have led to a discovery of it *Jaleel Ali v. Ishak Chunder* 10 C L R 469. Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of there can be no question of estoppel. A plea of estoppel in such case can only be maintained if the conduct of the person against whom the estoppel is alleged is found to be fraudulent *Ram Dat v. Chhotik*, 4 O W N 1019. Where the vendor by his conduct induced a belief in the vendee that he had a good title to the property, he is estopped from going back on the same even where he was not fully aware of his legal rights *Matu Doyal v. Lala Sahai* 25 A L J 878. Where certain lands belonging to a Talukdar were wrongly described as rent free lands in the village accounts but on a reference by the Government an order was passed to the effect that they were not rent free but the order was not given effect to and the entries in the accounts continued as before. Held that the Government was not estopped from subsequently giving effect to their previous order and levy rent on the lands *Sun Singh v. Secretary of State* 28 Bom L R 1213 = A I R 1926 Bom 590. No actual verbal representation is necessary to give rise to estoppel. It is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property *Asiullah v. Ghellam* 17 S L R 63 = 80 Ind Cas 994.

Where parties to a suit by mutual agreement make terms and inform the Court of them, which sanctions the arrangement and makes an order in conformity with it, either party who has had the benefit of the arrangement and order is not at liberty to resile from the agreement *Sheo Golan v. Beni Prosad* 5 C 27 = 4 C L R 29. Where what really induced a party to abandon a portion of his claim was not the acts of the other party, relied on as estoppel but an extraneous cause independent of such party there was no estoppel *Beni Prosad v. Multesar*, 21 A 316 = A W N 1899, 101. In order to avail himself of the doctrine of estoppel, the plaintiff should prove that the defendant, by representation which he knew to be unfounded intentionally misled the plaintiff into a position prejudicial to the interests which he would otherwise have possessed *Pichuayyan v. Subbayyan* 13 M 128. In order to prevent the owner of land, who is charged with standing by and allowing another person who believes he had a good title thereto, to enter on the land and spend money in improving it, from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved *Iangois v. Ratray* 3 C L R 1. In order to raise an equitable estoppel against the lessors it is incumbent upon the lessee to show that the conduct of the owners, whether consisting in abstinence from interfering, or in active intervention is sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation *Beni Ram v. Kundan Lal* 21 A 496 (P C) = 3 C W N 502. A plea of estoppel by general conduct raised by the plaintiff will fail if it is proved that a proper inquiry would have acquainted the plaintiff with fact *Phundo v. Bhimsa* A W N 1883 246. The plaintiff who upon misrepresentation by defendant, released a right to him believing his statement in preference to getting information any where which information he might have easily obtained, is relieved from fulfilling the terms of the release *Mela Ram v. Denu Doyal* 75 P R 1869.

The rule of estoppel ought not to be applied rigorously as against a *purdah* woman. The same inferences should not be drawn from or same construction should not be placed upon, her silence and delay in bringing a suit as might be reasonable and proper in another case *Kaniz Fatima v. Abbas Ali*, A W N 1887, 84. The Court ought to decline to redress a party asking for it who has countenanced the acts of which he complains *Bhypo v. Mussammat Lelhrance Koer* 16 W R 123. Where a representation is such that a reasonable person would act on the faith of it, the person who has made the representation cannot get rid of the estoppel by saying that person, to whom he made the



representation would not have been deceived if he made proper enquiries  
*Nandalal v Rukhman*, 13 C P L R 30

Parties who, by false representation, induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary, may be compelled to make them good *Radha Krishna v Shreefunnissa* W R 1864, 11

A judgment by consent raises an estoppel, just in the same way as a judgment after the Court has exercised a judicial discretion in the matter *Lazmishankar v Vishnuram*, 1 Bom L R 534=24 B, 77. An attesting witness to a Will cannot sue to have it quashed on any ground, as he is estopped from doing so by being an attester of the Will *Junma v Imam*, 138 P R 1889. Though the person, who elects to take a legacy under a Will, may be estopped from setting up a title contrary to its provisions still if such person be in possession, he cannot be ousted except by one who can prove a better title to the property *Prabodh v Harish*, 9 C W N 309. On a decree being passed on compromise the judgment debtors will be estopped from objecting to the execution of the same *Kashi Das v Ishan Chander*, 31 C 914 (P C)=9 C W N 49. The Civil Procedure Code allows of a decision by an umpire in certain events and hence, parties who have submitted to the decision of an umpire, without taking any objection, cannot afterwards call that decision in question in a Court *Kupu v Venkataramiyya*, 4 M 311. A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites *Timmanna v Putabhata*, 2 Bom L R 90. Where interest has been paid by a banker to a depositor at a certain rate per cent, a renewed deposit will also carry interest at the same rate, in the absence of an agreement to the contrary, and the banker will be estopped from questioning such rate *Makundi v Balalishen*, 3 A 328. The owner may be, in respect of a trade mark, as in respect of any other right estopped by his conduct from denying the title of another person *Lairgue v Hooper*, 8 M 149. A purchaser of immovable property in the name of B, and allowed B to occupy and retain possession of the property. B mortgaged the property to C for a valuable consideration. Held that A and those claiming through him were estopped from asserting as against C, his or their title to the property, and the mortgage was valid *Kally Dass v Gobind Chunder*, Marsh 569. *Ram Mohnee v Pran Koomaree*, 3 W R 87, *Smith v Mohum*, 18 W R 526, *Haldars v Bindoo*, Marsh 293. On a decree being passed on compromise, the judgment debtors will be estopped from objecting to the execution of the same *Kashi Das v Ishan Chander*, 31 C 914 (P C)=9 C W N 49.

If a gentleman entrusts to his own men of business a blank paper duly stamped as a bond, and signed and sealed by himself in order that the instrument may be duly drawn up and money raised upon it for his benefit, and if the instrument is afterwards drawn up and money obtained upon it from persons, who have no reason to doubt the bonafides of the transaction, the bond must, in the absence of evidence to the contrary, be taken to have been drawn up in accordance with the obligor's wishes and instructions *Walidunnissa v Sugra Das*, 5 C 39. Where persons claim under X and Y, they are bound by X and Y's admission of P's being entitled equally with themselves to ancestral property *Chundumun Bohoo v Thakoor Rai Beharee*, 5 W R 145. A party refusing a registered letter sent by post cannot afterwards plead ignorance of its contents *Leoft Ali v Peares Mohun*, 16 W R 223. When a trustee mortgages trust property by asserting it to be his own, he will be estopped afterwards from setting up the trust and claiming to recover it, from a bonafide purchaser for value, without notice in execution of the decree obtained on the mortgage. This, however, will not affect the right of the beneficiaries under the trust *Gulzar v Fida* 6 A 24=A. W N 1883, 182. If the heir of a deceased Hindu stands by and allows a stranger to enter into possession of the deceased's property, every person claiming under him will be bound by the decree in a suit of which he had notice instituted bonafide against the party in possession for the recovery of the debt due by the deceased to the plaintiff *Uma Sundari v Nityanand*, 3 C L R 157. When once a widow asserted a proprietary right in certain property she will not subsequently be permitted to enforce her claim for maintenance against such property in the hands of a purchaser *Golabu v Ramthahal*, 1 N W P 275.

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A person having right of pre-emption may dispute or affirm the validity of the sale of the land to a third person. If, by his conduct towards the vendee after the sale, he makes the latter believe that he had elected to affirm the sale, he is estopped from attacking the sale or enforcing his right of pre-emption over the property. *Datta Ichua v Jagannath*, 138 P R 1888. In a pre-emption suit on the foreclosure of a mortgage, the mortgagee did not appeal from the foreclosure decree but allowed execution to take place under it. Held that such a conduct was sufficient to indicate that the mortgagor had acquiesced in the sale being made absolute. *Jouaher Lal v Kalandar*, 155 P R 1882. A obtained a decree for pre-emption against B on condition that the price should be paid by him within a certain time. Before the money was paid, A mortgaged the land to B, the consequence of which was that he did not pay the price. In a suit for redemption by A, B pleaded that A had lost his right of pre-emption by his failing to act up to the condition of the decree. Held, that B having accepted the mortgage from A and made A believe by such conduct that he treated him as the proprietor of the land in question was estopped from pleading as he did. *Gubang v Vasna*, 131 P R 1890.

The defendant, in consideration of money advanced by S entered into a mortgage with plaintiff, who sued for possession after foreclosure. Held, it does not lie in defendant's mouth to object to the suit brought by S in plaintiff's name. *Sreenath v Cheradenath*, 17 W R 192. Where a wife has mortgaged property as her own to the plaintiff, the husband becoming security on the ground that his wife had no authority to pledge it neither can the defendant, an execution creditor, attach the property, nor has the auction purchaser any title as against the plaintiff. *Banu Feroz v Mann Singh*, 8 W R 67. A person who mortgages property as unencumbered when as a matter of fact, it is subject to a charge cannot, when he subsequently becomes himself entitled to enforce such charge set up such charge against the mortgagee. *Radhey Lal v Mahesh Prasad*, 7 A 864 = A W N 1885.

If a creditor in execution of a money decree which he holds against his debtor, sells certain property as that of the latter, he will be estopped from afterwards setting up as against the purchaser a previous mortgage which had been created in his own favour of which he had given no notice to the purchaser at the time the property was sold and in ignorance of which the purchaser bid for the property and paid the full price. *Agochand v Rakhma*, 12 B 678. Where a decree is obtained upon his mortgage by a mortgagee, and the mortgaged property is sold under the decree for paying off the mortgagee, the interest of the latter as well as that of the mortgagor passes to the purchaser. The mortgagee is completely estopped from disputing that such is the effect of the sale, so far as his interest is concerned although the officer of the Court may only have described the sale as one of the right title and interest of the mortgagor. *Shashini v Salvador*, 5 B 5.

A mortgagee who has the mortgaged property sold in execution of a decree other than that upon his mortgage without disclosing his mortgage lien is ever estopped from setting up the mortgage against the title of a bonafide purchaser at the execution sale. *Muhammad Hamud v Shub Sahai*, 21 A 303 = A W N 1899 87. Where a mortgagee in execution of a money decree puts up property for sale without notice of his mortgage and thus allows an innocent purchaser to purchase for full value in ignorance of the mortgage he is estopped from afterwards enforcing the mortgage against that purchaser. *Qunoor Seli v Baynath*, 7 C P L R 15. Where the plaintiff's were present at the time when possession was given to defendants in virtue of an unregistered mortgage deed and gave their consent to the mortgage, they could be equitably estopped from claiming possession of the same property under a registered instrument as against the defendants. *Somnath Das v Sindu Sudany*, 5 C P L R 97. Where a decree-holder brings to sale, in execution of his decree, property under his mortgage without notifying his encumbrance upon it, and misleads the bidder, and induces him to purchase the property as unencumbered, he cannot subsequently claim as against such bidder his mortgage right. *McCormell v Mayer*, 2 N W P 315. The rule laid down by Lord Denman in the case of *Pickard v Sears* (6 Ad & El 10), that where a man by his words

or conduct wilfully induces another to believe in a certain state of facts, so as to alter his own previous position, the former is estopped as against the latter, from averring a different state of facts as existing at the same time, is embodied in s 115 of the Evidence Act. *Anmath Nath Deb v Bishtu Chander Roy*, 4 C 783 affirmed on appeal, 9 C 265 P C = 9 I A 147

S 115.

Where a mortgagee relinquished the debt due under his bond and the mortgage security in consideration of his getting some other land instead, and the relinquishment was acted upon by a third person to his prejudice the mortgagee was estopped from asserting his mortgage right as against such third person or his representative in interest provided the requirement was not made conditional on the conveyance of the land bargained for, and provided also that such third person did all he could to give effect to the contract in pursuance of which the relinquishment took place. *Velu Rangaswami v Balakrishna Ruddy*, 12 M L J 366

When a prior encumbrancer with a full knowledge of his title stands by and through his agency allows the mortgagor to deal with the property as if it was unencumbered, held that by such conduct he loses that priority to which the prior date of his encumbrance would, had he acted otherwise, have entitled him. *Rai Seeta Ram v Kishun Dass* 3 Agr 402. A man who has represented to an intending purchaser that he has not a security in property to be sold, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force. *Munoo Lall v Lalla Choonce Lall* 21 W R 21

The defendant had received a conveyance of half of a certain piece of land from S J (S J having right to convey only two fifths of the said land, the remaining two fifths and one fifth belonging respectively to a brother and sister of S J). When S J gave the conveyance, it was endorsed by his sister. This endorsement amounted to an estoppel as against her, or any one claiming through her, against saying that S J had not full right to convey. *Blaquiere v Ramdhone Dass Bourke* O C 319. The fact that a certain person empowered to dispute a sale does certain specified acts, thereby silently showing his acquiescence in such sale, will constitute an estoppel and prevent him from setting aside the same and he cannot contend that as the acts of acquiescence took place after the sale he had not by such acts misled the vendee or induced him to enter into the sale transaction. *Nihola v Bilham Ram* 81 P R 1898. Where without objection, a defendant allowed a purchaser of the plaintiff's interest in the suit to substitute his name on the record (the original plaintiff having withdrawn from the suit) he was estopped from contending that the suit had abated. *Bu Chandra Roy v Bansu Dhar Roy*, 3 B L R A C 215. An auction purchaser not questioning the acts of his predecessor within 12 years will be estopped from objecting to them, on the ground of implied acquiescence. *Siddhal v Gouree Roy* 18 W R 281. In a proceeding for setting aside a sale the judgment debtor, with the consent of the decree holder filed a compromise, and asked for time for paying the decretal amount, binding himself not to contest the validity of the sale if he failed to pay the amount on the day fixed. On his prayer being granted he without paying the full decretal amount on the day fixed took further time. Held that it would be contrary to reason and equity that he should turn round and repudiate the agreement and that the agreement estopped him from contesting the legality of the sale. *Uttam Chandra v Rhetra Nath*, 29 C 577

A purchaser of land, who lies by for five years allowing another person to occupy the land and afterwards to sell it, is estopped by his own conduct from afterwards claiming the land from a bona fide purchaser without notice. *Mohesh Chandra v Issur Chunder* 1 Ind Jur N S 266. A plaintiff suing to realise his security under a mortgage, is estopped from recovering on the mortgage when he has allowed the auction purchaser to buy without notice of the mortgage in a suit in which he himself brought the property to sale. *Jagannath v Gangi Reddi* 15 M 303. When a person in execution of a money-decree brings to sale property subject to a hypothecation to his partner, which is not disclosed to the intending purchaser, and the sale has taken place, obtains an assignment of the hypothecation deed and sues on it he is

**S 115.** estopped from denying that the sale took place free of encumbrances. *Kastura v Venkatchalapathi*, 15 M 112. Where a decree-holder, by mistake, put up to sale the same piece of land under different numbers on two different occasions, he is estopped from setting up his purchase so as to defeat the rights of the purchaser at the second sale. *Pinnappa v Mura Jappa*, 7 M 107. A mortgagee-purchaser at an execution sale of his mortgage or interest in the mortgaged property would where such mortgagor is estopped from asserting his title as against certain persons be equally estopped. *Pareshnath v Inathnath*, 9 C 265=9 I A 117 P C. see also *Itaram v Rini Chauda*, 1 B 111. A person who steps in during an auction sale assumes the character of a principal agent, and depositing another acting as agent purchases the property, cannot afterwards in equity turn round and claim to have purchased not for the principal but for himself and obtain a profit out of his purchase. *Lohsee Narain v Kelly Puddo*, 23 W R 358. A tenant who sold by a *kobala* a non transferable holding is estopped from setting up the invalidity of the sale by him. *Bhogirath v Haju-uddin*, 1 C W N 673. The owner of a property cannot afterwards dispute the sale of his property to a *bonafide* purchaser, if it took place in his presence, and without any objection on his part. *Jouala v Jeuand*, 87 P R 1875. An alienation by a party subject to the customary law cannot, after a long silence be questioned by parties interested in it, as such silence amounts to estoppel by conduct. And where the collateralists are not merely guilty of laches in questioning the alienation but are also found purchasing the land from the transferor to the exclusion of the other collateralists or cultivating the lands under the purchasers, or exchanging it with them they must be taken to have acquiesced in the alienation and estopped from suing to contest it. *Imur v Lebo*, 12 P R 1902.

The fact that a judgment debtor has voluntarily satisfied a decree does not estop him from appealing against the same. *Mula Shah v Kurpa Ram*, 142 P R 1888. A decree in a suit which ought to have been instituted against a person but which has been wrongly instituted against his mother, though that mistake was not due to the son's misrepresentation, and in which the son has conducted the defence on behalf of his mother in the full knowledge that he and his mother should have been sued against, does not operate as an estoppel against him from contesting its validity in a subsequent suit. *Mohunt Das v Nil Komal*, 4 C W N 283.

The maxim  *caveat emptor* applies to execution sales. In execution proceedings a judgment-debtor is not bound to come forward. In the absence of any misleading on his part so as to estop him from asserting his title mere silence on the part of the judgment debtor, or his omission to come forward, cannot operate as an estoppel. *Gurupada v Japa*, 14 B 558. A decree altered by agreement of parties with respect to the mode of payment and the interest payable cannot be executed as a decree. And the acquiescence of the judgment debtor in such execution cannot estop him from objecting to further execution of it. *Debi Rai v Golul Pershad*, 3 A 585 (I B). An application by the judgment-debtor for the postponement of an execution sale would not amount to an estoppel under section 115 of the Evidence Act so as to preclude him from maintaining that the execution of the decree is barred by lapse of time. *Vina Koonuvar v Jagga Setani*, 10 C 196=13 C L R 385=10 I A 119 P C. A judgment creditor by putting up the rights and interest of his judgment debtor in a *talook* for sale in execution is not estopped from afterwards claiming a portion of that *talook* under a different title *e.g.* under a mortgage. *Chunder Kant v P Wise*, 17 W R 342. A purchaser at an execution sale of a holding who proves that in the sale-certificate granted to him, the annual rent is described as Rs 8 does not thereby establish the plea of estoppel that the landlord is not entitled to realise rent at a higher rate. To establish the estoppel it is necessary to prove a statement anterior to his purchase, which may influence his conduct. *Aman Ali v Mir Hossain*, 10 C L J 605=4 Ind Cas 739. The auction purchasers at a sale in the execution of a decree were not estopped from asserting as against a person claiming to be a mortgagee prior to the sale of the property purchased, that in fact the property was their own independently of the auction sale. *Pandit Hanuman v Mufti Assadullah*, 7 N W P 145. There could be no question of

estoppel by conduct between a judgment-debtor and the purchaser at auction, who derives his title from proceedings which are entirely *in rem* as regards the former *Vasany v Lallu*, 9 B 265. An heir does not lose his rights as heir though he cannot prove a Will, under which he claimed a larger share in a former litigation, in which no question of inheritance was raised *Moulvie Ahmedoolah v Gour Huce* 15 W R 251. When in a suit for redemption the assignee of a usufructuary mortgage put forward or consented to put forward the original mortgagor as the person entitled to redeem, he is not thereby estopped from afterwards giving for redemption in his own account, for the defendant could not be said to have been in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff *Mahammad v Mannu* 11 A 386 = A W N 1889 136. Where a plaintiff, who was the nearest heir, allowed other heirs to join him in a redemption suit, and such heirs spent money and actively assisted in prosecuting the litigation the plaintiff could not, after recovering the property, assert his superior title as the nearest heir, and that he was estopped by his conduct from asserting such superior title, the principle being that where a person has conducted himself so as to mislead another, he cannot gainsay the reasonable inference to be drawn from his conduct. *Bhaquant v Rayu* 9 Ind Cas 415. Where a person brought on the record at the instance of the decree holder as the representative of a deceased judgment debtor was on his own application struck off as not being such representative, and the decree holder did not contest the order for striking him off held that the decree holder on an appeal by such person as to costs which had been disallowed him was estopped from pleading that the appellant was not a representative of the deceased judgment debtor, and therefore not entitled to appeal *The Bank of Upper India v Bishan Dayal*, A W N 1892 10. A bequest in a Will which ran thus—"my elder brother, V's self acquisition to the extent of Rs 10 000 is kept with me. So, that money should be given to him"—was treated as a legacy in satisfaction of the indebtedness of the testator to his brother and the legatee was not estopped from claiming the legacy under the Will by that fact that, in a suit brought by a brother of his claiming his share in the testator's estate as family property he had supported his brother and had also claimed a share and it was then decided that the property was the sole property of the deceased and that neither he nor his brother had a right to a share therein *Rajamannar v Venkata Krishnayya* 25 M 361 = 12 M L J 183. Where a purchaser under a registered instrument purchased the property with full knowledge of the existence of an optionally registrable but unregistered encumbrance thereon the doctrine of equitable estoppel applied and the purchaser could not claim as against the said encumbrancer *Miran v Ramasa* 6 C P L R 112. In a suit for pre-emption under s 9 of the Oudh Laws Act, the defendant, in order to establish a plea of estoppel has to prove that he property was offered to the plaintiff at a certain price and that he expressly consented to the purchase of the property by the defendant vendee and the Court should not be satisfied with anything short of this. Some Judges have thought that such a plea should not be allowed at all in a case like this *Bank of Upper India v Munshi Alopi Prasad*, 10 O C 257. Where tenants have paid, for a period extending over fourteen years, an enhanced rate of rent an implied contract to pay at the same rate in future years may be inferred though they now and then expressed discontent without however resorting to the Revenue Courts for redress. Their conduct, in accepting *pattas* containing these terms even after protest, may operate as estoppel in subsequent years *Blupathi v Ramayya Appa Rao*, 17 M 54. A grantee of lands as long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor, and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustee of the temple *Thayelbagam v Venkatarama Krishnayya*, (1916) M W N 119 = 33 Ind Cas 808. When a grantor, by a recital is shown to have stated that he is seized of specific estate upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any afterwards acquired interest of the grantor, the newly acquired title being said to "feed

- S 115.** the estoppel is applicable to Hindu conveyances in cases before the Evidence Act *Krishna Chandra v Rasal Lal*, 23 C L J 501=21 C W N 218=33 Ind Cis 568 It is not competent to a mortgagee to go behind a mortgage to dispute the right of the mortgagor to enforce redemption *Jang Ram v Sheoraj Singh*, 30 Ind Cis 234 In a suit by a creditor to recover money the debtor pleaded that the plaintiff was bound by the terms of a contract arrived at between the debtor and a third person for the purpose of paying off the plaintiff's debt There was no proof that the defendant was induced by the plaintiff to break his contract with the third person In the circumstances the defendant could not invoke the aid of the doctrine of equitable estoppel against the plaintiff and contend that he was bound by the contract entered into between them *Babu Narendra Bahadur v Oudh Commercial Bank, Ltd*, 30 Ind Cis 323 A party who has entered into a compromise is not estopped from urging that if the sale in suit is set aside at all at the instance of another it must be set aside in its entirety *Ichhamoni Das v Prosnna Kumar* 31 Ind Cis 858 Acceptance of rent by a landlord from the mortgagee on behalf of the mortgagor does not estop the landlord from setting up the invalidity of the mortgage *Must Raj Lal Kuor v Rudra Pratap*, 34 Ind Cis 764 On the sale of a non transferable occupancy holding held by the proprietors of a share in a mauza in execution of a money decree against them without any objection on their parts as to its saleability in these execution proceedings, a purchaser of the proprietary share of these properties would be estopped from objecting to the sale on the ground that the holding was not saleable by the custom of the locality *Ramu Pal v Pralash Chandra* 32 Ind Cas 757 An estoppel arises when a man is not allowed to deny the truth of some matter which he has made another to believe to be true So where it is alleged between the parties that the claim petition of the defendant should be allowed but without costs and that the plaintiff should apparently in consideration of the 1st defendant giving up his costs refrain from instituting a suit section 115 does not apply and there is no estoppel *Venkataranea v Narayana* (1915) M W N 237=28 Ind Cis 536 Where land stood in Revenue Registers and the tax receipts appeared to be, in the joint names of husband and wife the very fact that the wife was living on the property ought to have put the mortgagee on enquiring to ascertain what her real interest was So she was not estopped from showing that the land was her sole and separate property *P L R M Meyappa v Ma Meyek* 8 Bur L T 124 Under Hindu Law a son has from birth an indefeasible right as a co parcener in the family property and mere unfriendliness on the part of his father cannot destroy that right, unless and until he is regularly separated off and given his share of the family estate He is therefore competent to contest the alienation of ancestral property if opposed to the principles of Hindu Law But he loses his competency under s 115 of Act I of 1872 where he has condoned all that his father has done and he himself gains considerable benefit out of his father's objectionable transactions *Maharaja of Bobbili v Venkataramanayulu* 16 M L T 181=27 M L J 409 A plaintiff who by taking objection to the admissibility of a certain agreement upon which the defendants relied, practically compelled them to withdraw their previous suit is estopped from asking the Court to grant him a declaratory decree upon the basis of that very agreement *Alam Shah v Nurzanah Shah*, 63 P W R 1913=114 P L R 1913=18 Ind Cas 804 An act may involve and amount to a distinct declaration which may create an estoppel So, if a man take an active part in carrying out a mortgage on behalf of another, as by signing the deed his acts may amount to a declaration of the validity of the mortgage as against any claim but his own *Mussammat Barro v Mir Muhammad* 273 P L R 1913=20 Ind Cas 291 A suit was dismissed on the ground of default The plaintiff appealed The appellate Court ordered restoration on the condition of the appellant paying Rs 10 to the respondent within a week The money was not paid within a week and the appellate Court dismissed the appeal Subsequently the appellate Court set aside its previous order of dismissal all on an explanation being given of delay The pleader of the defendant then accepted the payment of Rs 10 and the case was remanded to the first Court The defendant having

accepted the compensation money was equitably estopped from appealing from the order of remand *Hazari Lal v Gangacharan*, 18 Ind Cas 525. Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party *Waludan v Nasu Khan*, A I R 1930 All 434.

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**Mistake** A mere mistake in a deed common to all parties, or on account of which no one has acted to his detriment or altered his position, will not create an estoppel *Schobfield v Lockwood*, 33 L J Ch 106 *Boole v Haymes*, L R 6 Lq 25. But it must be a genuine mistake, and not disputed by either party *Halsbury* Vol XIII p 370, see also *Meghraj v Tyebali*, A I R 1925 Bom 64, *Syed Ali v Manujan*, 7 L R 201 (Rev), *Verlannes v Robinson*, 102 Ind Cas 639=A I R 1927 P C 151.

**Estoppel against a minor** The authorities on the question whether this section applies to minors are divergent. Whilst it has been held by some of the Judges of the Calcutta High Court in *Brahmo Dutt v Dharmodas Ghose* 26 C 381, that the section applies only to persons of full age, the contrary view was held by the Bombay High Court in *Ganesh Lal v Bapu* 21 B 198. In *Dharma Das Ghose v Brahmo Dutt*, 2 C W N 330=27 C 616 *Jenkins J* said 'on the 20th of July 1895, the plaintiff executed in favour of the defendant a mortgage over premises in Calcutta known as No 15, Bolorum Ghosh's Street, and No 133, Cornwallis Street, to secure Rs 20,000 and the present suit is brought to have the deed cancelled on the ground that at the time of its execution the plaintiff was an infant. This contention is based on section 115 of the Evidence Act as interpreted by *Ganesh Lal v Bapu*, 21 B 201, in which it is no doubt, said that having regard to that section proof of fraud on the part of the infant is not essential. The learned Judge in that case relies on the fact that in *Sarat Chunder v Gopal Chunder*, 20 C 296 and in *Mills v Fox*, 37 Ch D, 153, no suggestion is made of the exception of an infant from the doctrine of estoppel. Now in the first of these cases the individuals sought to be affected were not infants. The case of *Mills v Fox*, 4 Deg & J 458, on the other hand turned on special circumstances which do not allow of its being an authority for the broad principle laid down by the Bombay Court. On appeal (*Brahmo Dutt v Dharma Dass* 26 C 381=3 C W N 468) *Macleod C J* said. Our attention has been directed to a case (*Ganesh Lal v Bapu*, 21 B 198), decided by the High Court at Bombay, which holds that section 115 of the Evidence Act is applicable to the case of a minor. Speaking with every respect, I am unable to assent to that view and I may point out that the cases upon which the learned Judges in that Court rely as substantiating their proposition when carefully examined appear to one not to warrant the conclusion arrived at. This has been pointed out by *My Justice Jenkins*, and concurring as I do in his criticism I need not refer to what he has said. The case of *Mills v Fox* 37 Ch D 153 is quite distinguishable. In the same case *Ameer Ali J* said "Then it was argued that the plaintiff was estopped under s 115 of the Evidence Act by his misrepresentation in respect of his age. To hold that an infant may estop himself in regard to contracts by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract and a person labouring under a disability would be enabled to endorse by his own act his legal capacity to contract. In the *Liverpool Adelphi Loan Association v Fairhurst and Wife*, 9 Exch 422 it was held that a person under a disability to contract was not liable upon the contract nor for a wrong arising out of or directly connected with the contract and which is the means of affecting it and price of the same transaction. The same principle was followed in *Burlett v Wells*, 1 B & S 836. It follows therefore that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract he cannot be made liable upon the same contract by means of an estoppel under s 115. I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff. On appeal to the Privy Council, their Lordships said "But their Lordships do not think it necessary

**S. 115** to deal with that question now. They consider it clear that s. 115 does not apply to a case like the present where the statement relied on is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties'. *Mohori Bibee v Dharma Das*, 30 C W N 539 (P C) = 7 C W N 441. In *Jagor Nath v Lalla Prasad*, 31 A 21 = 5 A L J 674, *Banerjee J* said 'I do not, however, deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants (see *Bigelow on Estoppel*, p. 599, et seq). In my opinion, the law of estoppel can only be applied subject to the other provisions of law and therefore when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law. See also *Stuleman v Dawson* 16 L J Ch 205. The following rule is laid down by *Dulal J* in *Radha Krishna v Bhore Lal* 50 A 862 = 26 A L J 837 = A I R 1929 All 626 citing from *Imur Ali and Wooroffe's Evidence Act*: 'A person under disability cannot do by an act *in pais* what he cannot do by deed. He cannot by his own act enlarge his legal capacity to contract or to convey. He cannot be made liable upon a contract by means of an estoppel under this section if it be elsewhere declared that he shall not be liable upon a contract. To say that by acts *in pais* that could be done in effect which could not be done by deed would be practically to dispense with all the limitations the law has imposed on the capacity to contract. So if a person sues an infant upon a contract such contract having been entered into on the faith of a representation by the infant that he was of full age, the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability for a money decree notwithstanding his fraudulent representation. But though this section may not apply the Court may in other cases acting on well recognized principles of equity relieve against an infant's fraud. In the latest case of the Bombay High Court *Madgarkar J* said 'The question in this appeal is whether the plaintiffs respondents can set up an estoppel against the minor *Bhumappa* on the ground that he had represented himself to them as a major when he with the widow *Iduera* passed the sale deed in their favour. It is argued on behalf of the appellant that the view of this Court differing from the other High Courts that an estoppel can be pleaded by a minor must now be held to be overruled on the strength of the observations of their Lordships of the Privy Council in the very recent case of *Sadiq Ali v Jai Kishore*, A I R 1928 P C 152 = 32 C W N 874 = 47 C L J 628. For the plaintiffs respondents it is argued that the question was expressly reserved by their Lordships of the Privy Council as early as *Mohori Bibee v Dharmadas Ghose*, 30 C 539 (P C) = 7 C W N 441 and the consistent decisions of this Court from *Ganesh Lal v Babu*, 21 B 198 *Dadasaheb Dasavathnao v Bai Nahami*, 41 B 480 = 41 Ind Cas 180 = 19 Bom L R 561, *Jasraj Bastinal v Sadashiv Mahadev*, A I R 1923 B = 46 B 137 cannot be held to be overruled by the observations in the recent Privy Council case, *Sadiq Ali Khan v Jai Kishore*, *supra*, particularly as similar observations of their Lordships of the Privy Council are to be found in *Mahomed Syedol v Yeoh Doi* A I R 1916 P C = 43 L A 256 (P C) = 19 Bom L R 163. This last however, was a case from the Strait Settlements and their Lordships observed 'A case of fraud by the appellant on the subject of his age was set up but it cannot be doubted that the principle recently given effect to in the case of *R. Leslie Limited v Sheill*, would apply and such a case would fail. In that case it was held by *Lord Sumner* and other Judges that where a minor by fraudulently representing that he was of full age, induced the plaintiffs to lend him money such an action by the plaintiffs to recover the amount of the advance on the ground that he had obtained it by fraudulent misrepresentation must fail, even though fraud was proved against the minor. On the present question, the other High Courts have differed from this Court. *Dhurma Das v Brahmoo Dutt*, 2, C 616 = 2 C W N 33 on appeal 26 C 381, *Khan Gul v Lakha Singh*, A I R 1923 F 609 *Valentarama v Iuthumoolam*, 38 M 1071 = 23 Ind. Cas 749, *Jagannath v Lalla Prasad*, 31 A 21 = 5 A L J 674 = (1903)





- S 115. Cas 112, *cc Kam Mehla v Karam Singh* 5 O L J 351-45 Ind Cas 39. Though in a case of contract or transfer of property a minor cannot be held to be estopped by his conduct within the meaning of section 115 of the Evidence Act, yet when he enters into possession of property on a title obtained on his behalf by his guardian he can not be allowed to set up his title to the property as a bar to a suit for ejectment on the expiry of his life. *Ponnusami v Subramania*, 23 Ind Cas 112. A minor mortgagor who enters into the transaction and misrepresents his age is under no equitable obligation to refund the money when the transaction turns out to be void. *Gurusami v Lall Khayya* 26 M L J 1 24-10 L W 22-13 Ind Cas 11. Where a minor represents to another that he is a major, and that other lends money on a promissory note signed by the minor the minor may be in a suit on the promissory note stopped from pleading his minority. *Jiraj v Sali* 23 Bom L R 975, *cc* *Harji Mal v Abdul Halif* 20 Ind Cas 267. *Perumal v Gharumal*, 11 S L R 104-62 Ind Cas 237 but see *Jimbaitharu v Jayamunrasami* 57 Ind Cas 678. But where there have been no misrepresentations by a minor as to his age or where misrepresentation has not misled the opposite party there can be no estoppel and infancy can be successfully pleaded. *Wasinda v Sita*, 1 Lah 389-59 Ind Cas 393. Defendant No 2 who did not look a minor, represented to the plaintiff and intentionally caused her to believe that he was a major and sold to her his house. When the plaintiff sued to recover possession of the house he pleaded minority. Held that the defendant No 2 being a person within the contemplation of the section and having by direct declaration intentionally caused the plaintiff to believe that he was a major was precluded absolutely from denying the truth of that assertion. *Devisheb v Bai Naham* 19 Bom L R 761-11 B 150-11 Ind Cas 159. But the law of estoppel must be read subject to other laws such as the Contract Act and a minor cannot be made liable upon a contract by means of estoppel under s 115 of the Evidence Act. *Gulam Ghani v Hem Chander*, 20 C W N 118-32 Ind Cas 388. As a general rule except in cases of fraud the doctrine of estoppel is not applicable to an infant and the Court is never astute to hold that his acts during his infancy have created an estoppel against him to disaffirm his contracts, much less will the Court hold the infant estopped by the acts or admissions of other persons. *Lam Chundia v Joyam Majhi* 16 C L J 18-17 C W N 10.

**Person.** "The term person in this section is simply satisfied by holding it to apply to one who is of full age and competent to enter into a contract, and I cannot bring myself to think that it could have been the intention of the Legislature by such a general expression to in titute such a grave change in the law of estoppel in relation to minors. *Brahmo Dutt v Dhorma Das*, 26 C 381-3 C W N 468 but see *Khan Gul v Lala Singh* 10 Lah L J 413-111 Ind Cas 175-A I R 1928 Lah 609 (F B) where it has been held that the person in this section is a comprehensive term and includes a minor. *Balangoula v Gadigeppa* 31 Bom L R 310-118 Ind Cas 698-A I R 1929 Bom 201 but see *Golul Das v Gulabrao* 89 Ind Cas 143. The word 'person' in this section should not be narrowed down so as to exclude a minor. *Wasinda Ram v Sita Ram* 1 Lah 389-59 Ind Cas 393.

**Admission whether operates as estoppel.** Admissions do not operate by way of estoppel but it is for the party making them to explain those admissions. *Secretary of State of India v Jidyarati* A I R 1929 Lah 743. An admission made by the defendant when both the plaintiff and the defendant were under a misapprehension of the real facts does not estop the defendant from proving the contrary. *Nauab Syed Ali Hussain v Maniyar* 7 L R 201 (Rev). An admission made by a theadar in a previous case that he was an exproprietary tenant made on a misunderstanding of the law cannot create estoppel against him. *Sanju Ram v Bharosa Ram* L R 5 A 43(2).

**Attestor of a document—if and when estopped.** The mere attestation of a party does not estop him from asserting that he had the knowledge of the contents of a document or that he was not bound by the recitals in the

document But, if the person attesting asserts the facts that are stated in the document he is estopped *Firm of Bhauba Ram v Ram Pyara Mall*, 116 Ind Cys 716 *Feroze Dun v Nawab Khan* 9 Lih 224=112 Ind Cys 89=A I R 1928 Lih 432, *Bhaquan Singh v Ujagar Singh*, 47 C L J 189=107 Ind Cys 20=30 Bom L R 267=32 C W N 538=26 A L J 553=A I R 1928 P C 20=51 M L J 251 (P C) So mere attestation of a document cannot amount to an estoppel *Ram Sarup v Krishen Sahai*, A W N 1883 142, *Jeeva v Yoccoob* 6 Rang 542, *Ibdui Isaz v Ibdui* 26 P L R 215=7 Lih L J 179=87 Ind Cys 652=A I R 1925 Lih 413 *Izazullah v Ghalam* 80 Ind Cys 994=17 S L R 63, *Udar Ram v Gajendra* 70 Ind Cys 815 Attestation of a deed by itself estops a man from denying nothing whatever except that he has witnessed the execution of the deed It conveys neither directly nor by implication, any knowledge of the contents of the documents To operate as estoppel, the signature must be shown by independent evidence to have been meant to involve consent of the transaction *Pandurang Meskendeya*, 12 M L J 436=26 C W N 201=20 A L J 305=35 C L J 409 P C, see also *Baldeo Sahai v Sunder Kuar*, 7 A L J 664=7 Ind Cys 264

**Party estopped from pleading fraud** It is not open to a party to plead his own fraud against another not a party to the fraud *Ram Lal v Har Lal*, 27 A L J 423=115 Ind Cys 113=A I R 1929 All 237 Estoppel is an equitable relief and a party who has cheated another of his rightful claims cannot be allowed to raise an estoppel to deprive him further of his rights *Kolumann v Peddi*, 1923 M W N 679 To allow a patuani to conceal his cultivation by falsifying the records and then afterwards to plead that his records are incorrect would be infringing the maxim that no man shall be allowed to profit by his own fraud *Shadeo Prasad v Ram Sahai* L R 3 A 257 (Rev) The payee of a forged hundi who knowing that it is forged, fraudulently endorses it over to another person, cannot, in a suit by such person for the recovery of the consideration paid by him for the hundi set up the forgery of it as a bar to the suit *Bishnu Churn v Rajendra* 5 A 302=A W N 1883 50 A person sued for possession of half the properties on the ground that it was joint property of himself and the defendant The defendant pleaded that the plaintiff's share was sold to him by the plaintiff The plaintiff was held under these circumstances to be estopped from raising the plea that the sale was colourable and made to defraud his creditors and according to the rule of *pari delictum* he cannot plead his own fraud *Dogor Mal v Janmat*, 38 P R 1892, see also *Huray Sunkar v Kali Coomari* W R 1864, 265 *Nawab Sidhu v Ojoodhyaram*, 5 W R 83 (P C)=10 M I A 540 The Court of equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands *Jahanaddi v Debnath*, 20 C W N 657=33 Ind Cys 762

**Estoppel against law** It being the duty of a Court to give effect to a statute in spite of conduct of the parties there can be no estoppel against a statute *Venkataswar v Rimanatha* 119 Ind Cys 472=A I R 1929 Mid 622 *Sheikh Ahmed v Babu Depr* 53 B 676=31 Bom L R 778 *Bhaquan Singh v Tasadaq Hussain* 27 A L J 889=115 Ind Cys 642=A I R, 1929 All 549 *Nawab of Murshidabad v Bilash Roy*, 56 C 252=A I R 1929 Cal 433 *Balam v Ibdui* 13 R D 839, *Rajnarain v Universal Life Assurance Co*, 7 C 594=10 C L R 561 There cannot be an estoppel on a point of law given rise to the jurisdiction of the Court *Ram Singh v Imperial Bank of India Ltd*, A I R 1928 Lih 802 When a particular act is declared to be void and unlawful by statute, a party cannot by representation any more than by other means, raise against him an estoppel so as to create a state of things which he is under a legal disability from creating *Khan Gul v Lakha Singh* 10 Lih L J 413=111 Ind Cys 175=A I R, 1928 Lih 69 (F B) The doctrine of estoppel has no application to a proposition of law but refers only to a belief in a matter of fact *Nihal Singh v Hira Singh*, 98 P R 1880 A mistaken impression of law regarding the validity of an adoption is not a ground on which an estoppel can be based Though the fact that a person long held

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the property of another, as his adopted son under an invalid adoption, may enable him to acquire title to the property by prescription, it will not alter his status in his natural family, nor would it give him the status of an adopted son. *Aiyanaachariar v Lalshmi Ammal* 21 M L J 500=10 Ind Cas 194, see also *Gurungaswamy v Ramalal shamma*, 18 M 53=4 M L J 27, confirmed on appeal 22 M 398 P C. A person is not concluded by his statements as regards the method of valuation of a suit, for it is an admission on a question of law and not of fact. *Gurish Chandra v Secretary of State*, 10 Ind Cas 80. An estoppel cannot be invoked to defeat an express provision of law. *Chandoo v Mushidhar*, 13 O L J 138=92 Ind Cas 732=A I R 1926 Oudh 311. Where a transaction is expressly forbidden by the statute the rule that the grantor cannot derogate from his grant does not operate, for on a point of law there can be no estoppel and there is no rule of law standing in the way of a party asking the Court to hold that a particular transaction which is a matter of fact is void should be declared to be of no effect. *Kesorbai v Jamadar*, 20 N L R 162=A I R 1925 Nag 125. No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead to argue the point at the outset. *Savajmul v Triton* 52 C 408=23 A L J 105=29 C W N 893 P C. There cannot be any estoppel against a statute nor can the parties contract themselves out of any statute. *Jnanendra Nath v Nalin*, 87 Ind Cas 565=A I R 1925 Cal 1262. The plea of estoppel being a rule of equity cannot have the effect of validating a void contract. *Duarka Prasad v Nari Ahmed*, 78 Ind Cas 850=11 O L J 219. The general law of estoppel cannot be allowed to override specific provision of law such as that contained in Order 21, rule 2(3) Civil Procedure Code. *Motoomal v Teoomal* 79 Ind Cas 89=1925 Sind 140, see also *Kesharbai v Janadoo*, 20 N L R 162=82 Ind Cas 126. A representation as to a question of law cannot give rise to an estoppel. *Rajambai v Shanmuga*, 70 Ind Cas 653=1923 Mad 11. There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit. *Nafar Chandra v Bhuri Molla*, 65 Ind Cas 581. A representation as to a question of law cannot give rise to an estoppel. *Rajambai v Shanmuga*, (1922) M W N 481. So there is no estoppel against the prohibition of a statute. *Sanyal v Santosh*, 26 C W N 329=1922 Cal 436=49 C 507. *Alimuddin v Chintamani* 23 C W N 437=51 Ind Cas 403. *Bangshi v Kamata*, 26 C L J 90. An admission on a point of law is not an admission of a 'thing' so as to make the admission matter of estoppel within the meaning of s. 115 of the Evidence Act. *Jogant v Silan* 21 A 255=A W N 1885, 66, *Pel Chand v Gopal Devi* 13 Ind Cas 482=46 P R 1912. No estoppel can be pleaded against the directions and prohibitions enacted by the statute law and against the rights accruing to any party by reason of such directions and prohibitions. *Chidambarachallan v Jaidilinga*, 38 M 519.

There can be no estoppel against an Act of Parliament or against an Act of Legislature and the principle of estoppel cannot be invoked to defeat the plain provisions of the Statute. *Ahmed Bhanuddin v Babu Devi*, A I R 1930 Bom 13=3 B 676=31 Bom L R 778. *Jagabandhu v Kadha Krishna* 36 C 280=4 Ind Cas 444, *Ibdul Latif v Kanthi* 38 C 512=13 C L J 693. *Madantal v Rajasudanprasad* A I R Nag 191. As between a mortgagor and a mortgagee the principle of estoppel which is otherwise clearly recognised is inapplicable where the mortgage is void as contrary to a statute. *Mahamaya Devi v Hari das*, 42 C 155=19 C W N 203=20 C L J 183.

Declaration, act or omission must be of an unequivocal and ambiguous character. To create an estoppel against a party, his declaration act or omission must be of an unequivocal and unambiguous character. *Goyanan v Vilo* 6 Bom L R 864. Estoppel to have any judicial effect must be clear and non ambiguous. It must be free, voluntary and without any artifice. *Yogji v National Bank of India* 2 Bom L R 1011 25 B 199, see also *Iba v Sounbai* 3 Bom L R 832, *Jaishunathji v Virjundadas* 7 Bom L R 836. To create an estoppel the declaration, act or omission must be of an unequivocal and unambiguous character.

*Astamoorth v Rama Udali*, 96 Ind Cas 915 = A I R 1926 Mad 1052 Just as an estoppel cannot be created by an ambiguous document so too it cannot be created by an ambiguous act *Mamsa v Sallayyu*, 46 Ind Cas 609 A representation, to found an estoppel must be clear and unambiguous, not necessarily susceptible of only one interpretation, but such as will reasonably be understood in the sense contended for, and for this purpose the whole representation must be looked for *Low v Bonnerie* (1891) 3 Ch 83 C A, *Freeman v Cooke*, 2 Exch 654, *Whitechurch v Cavanagh*, (1902) A C 117 (115), *Lewis v Lewis*, (1904) 2 Ch 636 (C A), *Onward Building Society v Smithson* (1893) 1 Ch 1 *Halsbury Vol XIII*, p 379 This is merely an application of the old maxim applicable to all estoppels, that they "must be certain to every intent" *Co Litt 352 (i)*, *Halsbury Vol 13*, p 379, see also *Ram v Ram*, 13 B L R 12 P C, *Fucille v Poorna* 8 W R 125, *Gojanan v Nilo*, 6 Bom L R 864 *Ninal v Narain*, 80 Ind Cas 525 = 6 Lah L J 45

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**Plea of acquiescence—Necessary elements** Where one person constructed a building on another's land in the belief that the site belonged to him and though the owner of the land was aware of it he did not object to the same and the building was allowed to be used for a period of 20 years *Held*, that the owner of land had acquiesced in the construction and that he could not after such lapse of time turn round and ask for a demolition of the building *Mahomed Husain v Barkat Husain* 12 R D 407 The acquiescence to deprive a man of his legal right must amount to fraud *Mita Bhu h v Kaldin* 99 Ind Cas 894 = A I R 1920 Oudh 135, *Mustafa Husan v Saudul Nisan*, 99 Ind Cas 255 = A I R 1927 Oudh 66 = 3 Q W N 282 The mere fact that more than two years were allowed to lapse after the building had been begun by a trespassers before a suit for possession of the site was instituted, does not establish acquiescence, especially when a protest had originally been made by the owner of the site before building was begun *Mahadeo Patil v Narayan*, 104 Ind Cas 565 = A I R 1927 Nag 348 Acquiescence implies that a person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the bona fide belief that he was acting within his rights The absence of either of these elements makes the doctrine inapplicable The acquiescence which will deprive a man of his legal rights must amount to fraud *Suchit v Mahamed Habib Ullah*, 99 Ind Cas 199 = A I R 1927 Oudh 89 Where in answer to a suit for the demolition of a building as having been unlawfully created on land belonging to the plaintiff it is pleaded that the plaintiff acquiesced in the erection of the building, it is not enough to show merely that the plaintiff did not interfere with the progress of the building, but it must be shown that the plaintiff knowing the defendant to be under a mistaken belief that the land upon which he was building was his own, purposely remained quiet until the building was completed *Ghhotu v Inayatulla*, A W N 1899, 191 If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain *Per Cottonham L C in Duke of Leeds v Earl of Amherst*, (1816) 2 Ph 117 (123) = 14 L J Ch 5 But acquiescence cannot rehabilitate or render valid a transaction which is ultra vires and illegal Further, it must be borne in mind that estoppel by acquiescence connotes among other things, that the person estopped in effect has represented to the person who is intruding his right that he is not entitled to complain that his right is being invaded and that the party relying upon his representation has altered his position to his detriment under a mistaken impression that he was legally justified in acting as he has done *Gorinda v Lamcharan* 29 C W N 931 = 52 C 748 = 89 Ind Cas 501 = A I R 1922 Cal 1107 Where a person allowed another to exercise the powers of a *tambardar*, though he was not expressly appointed by the revenue officer for a long time, he cannot afterwards impeach his actions as *tambardar* *Lamrao v Ghulamari* 8 N L J 195 Laches can be proved only by an ambiguous evidence of waiver, abandonment or acquiescence *Narayan v Bulsi*, A I R 1920 Nag 101

A mere delay in filing a suit for the removal of an encroachment does not per se constitute an acquiescence *Narayan v Laxmanrao*, 105 Ind Cas 256

**S 115** In applying the doctrine of estoppel by acquiescence in a case of erection of buildings the primary thing to consider is whether the person who acted in contravention of his rights had a bona fide belief or not that he did possess a right to erect the building. *Mt Bibi Khamji v Hasim*, 101 Ind Cas 630 = A I R 1927 All 511. So in order to sustain a plea of acquiescence and to raise a bar of equitable estoppel it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that he had by plain implication contracted that the right of occupation under which the defendant originally obtained possession of the land should be changed into a perpetual right of occupation. *Gharia v Kam Singh* 100 Ind Cas 855 = A I R 1927 Nag 180 see also *Narayana v Fazman*, 105 Ind Cas 256. Where the plaintiff who claimed to be a bona fide purchaser for value allowed a subsequent transferee to build on the property and there was evidence of negligence on his part to take the necessary steps to protect his rights he was estopped from asserting his title. *Maunji Kyung v P I Firm* 6 Rang 643, see also *Imamji v Ibrahim* A I R 1929 Oudh 292. Coincident with common law doctrine of estoppel there is an equitable doctrine which was explained in several well known cases. In *Hamden v Dyson* L R 1 H L 129 at p 140, Lord Cranworth L C made the following weighty observations. 'If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake abstain from setting him right and leave him to persevere in his error a Court of equity will not allow me afterwards to assert my title to the land on which he has expended money on the supposition that the land was his. In a case of that description the estoppel rests upon the particular basis of actual acquiescence. It seems that that is the true ground of the decision in *De Bue v Mt* 47 L J Ch 381 = 8 Ch D 286. In that case *Thesiger J* delivering the judgment of the Court of Appeal said (47 L J Ch at p 389 8 Ch D at p 314). 'If a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he assents to its being committed he cannot afterwards be heard to complain of the act.' In *Wilmore v Burbur* 49 L J Ch 732 = 15 Ch D 96 *Ely J* states that the doctrine of acquiescence which deprives a man of his legal rights must amount to dishonesty. *Jones Brothers v Woodhouse* 92 L J K B 638 = (1923) 2 K B 117. By acquiescing in what is done by another a person may be estopped from afterwards alleging a different state of facts from that which the other assumed to exist. *Mold v Wheat* (1867) 27 Beav 100 *Fisher v Maqnay* 5 M & Gr 778. *Rule v Jewell* 18 Ch D 660. *In re Burnads Bank Peel's Case* L R 2 Ch 614. *Sheridan v Barret* 4 L K Ir 223. *Thompson v Rouse* (1893) P D 70. It must be shown that it was the duty of the acquiescing party to have spoken. *McKenzie v British Linnen Co*, 6 App Cas 82 = L T 431 and that he had knowledge of the matter in which he is alleged to have acquiesced. *Ramden v Dyson* (1869) L R 1 H L 129, *Lynch v Commissioners of Sewers* 32 Ch D 79 = 50 L J Ch 409 see also *The Gupat Ginning Co v Motilal* 31 Bom I R 1310. *Atamoonthe v Nambudripad* 96 Ind Cas 915 = A I R 1926 M 1002. *Ramratan v Shroddattarai* 73 Ind Cas 137. *Paddu v Mahabir Prasad* 53 Ind Cas 683. *Sauai v Kalloo*, 44 Ind Cas 517.

A party is not estopped from setting up a defence on the ground of acquiescence in a contract where the contract is illegal. *Joseph v Joseph*, 5 Bur L J 86 = A I R 1926 Rang 186.

Where the defendants regarded through mistake certain land to be their own and partitioned it among themselves and there is no evidence to the effect that the plaintiff knew that the defendants were partitioning his land as theirs and the plaintiff kept silent knowing that the defendants were likely to be prejudiced by the partition and by a subsequent claim on the part of the plaintiff the plaintiff has done nothing and is not estopped from setting up his title and possession to the land by the principle of acquiescence. *Mubarak v Mahomed*, 97 Ind Cas 268 = A I R 1926 All 721. Where a party has

derived any advantage and taken benefit under the order of the Court, he is to be deemed to have acquiesced in it and should not be allowed to challenge it at any subsequent proceeding or by way of appeal *Jogesh Chandra v Fa-ai Ali*, 95 Ind Cas 10 = A I R 1926 Cal 960 Generally speaking if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to his prejudice than he would have had if it had been done with his previous license Though mere acquiescence is not equivalent to consent, yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act it is clear that acquiescence may under certain circumstances be taken to be consent *Uniam v Paruk*, 85 Ind Cas 540 = A I R 1925 Cal 993

Where a person objected to another putting up a structure on his land and objected before the Municipal authority who however refused to go into the question of title, he cannot in any sense be held to have acquiesced in the act *Kohla Kumari v Kahan Mal* 1923 All 452, see also *Moola v Bahoru* 1923 All 567

**Estoppel by silence** Mere omission to speak does not create estoppel in the case of a person who is under no duty to speak *Kanchan v Kamala* 21 C L J 441 It is essential to an estoppel that the person estopped should be under a duty to some other person to speak or to act, and that his failure to perform that duty should have caused damages to that other person *Jones Brothers v Woodhouse* (1923) 2 K B 117 = 92 L J K B 639 see also *Proctor v Bennet* 36 Ch D 740 *Polat v Everett*, 1 Q B D 669 (675) *Barton v London, E W Ry* 21 Q B D 77 *Re Lewis* (1904) 2 Ch 656, *Re Walker* 26 T L R 260 So a mere silence cannot operate as an estoppel unless it is established that there was duty to speak *Bhagawan Dutt v Lachminarayan* 119 Ind Cas 882 Mere silence or omission to act does not create estoppel unless there is a duty to speak *Umaram v Parul Chand* 85 Ind Cas 540 = A I R 1925 Cal 993 see also *Suresh Nath v Jabel Sh* 85 Ind Cas 747 *Chadwick v Manning* (1896) A C 231 (234), *Fox v Mackreth* 2 Bro C C 400, *Lewis v Lewis* (1904) 2 Ch 657 "It cannot be doubted that there may be cases in which there is deception by omission, but silence may be treated as deception only where there is duty to speak in other words as *Bigelow* points out 'duty to speak which is the ground of liability arises wherever and only where silence can be considered as having an active property that of misleading' (*Bigelow on Fraud*, vol I p 597) To take one illustration The silence of A in the presence of B and C who are negotiating in regard to a sale of property from B to C, stops A from claiming the property as against C, upon the conclusion of the sale, but knowledge by an owner of property that some one is about to buy it from a third person does not impose upon the owner a duty to seek out the purchaser and advise him of the facts *Pickard v Sears* 6 A & E 469 The essence of the matter appears to be, that in the one case silence may be treated as a true cause of the change of position, in the other case it cannot be so considered The question consequently arises whether there has been on the part of the defendants a disregard of a duty to speak As was observed by Lord Chancellor *Fletcher* in *Fox v Mackreth* 2 W & F I C 709 the question in such cases is not whether an advantage has been taken which in point of morals is wrong or which a man of delicacy would not have taken, but it is essentially necessary that there should be some obligation on the party sought to be made liable to make the discovery so as to bring his silence within some definition of fraud Again as pointed out by Story (*Equity Jurisprudence* §§ 204-207) it is not every concealment which entitles a party to the interposition of a Court of Equity, 'the case must amount to the suppression of facts which one party under the circumstances is bound in conscience and duty to disclose to the other party and in respect to which he cannot innocently be silent' or in other words, 'the true definition of undue concealment which amounts to a fraud in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and

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circumstances which one party is under some legal or equitable obligation to communicate to the other and which the latter has a right, not merely in *foro conscientiae* but *juris et de jure*, to know' *Per Moonerjee in Joychandia v. Srinath* 1 C L J 23 (28)=32 C 357, see also *Mohunt Das v. Nil Komul*, 4 C W N 283 *Ukenzie v. British Linen Co.*, 6 App Cas 82 *Chabit Das v. Doyal Mouji*, 6 Bom L R 557 *Gheran v. Kunj Behary* 9 A 413 (419), where one of the three brothers sold ancestral property and the other brothers with knowledge of the sale kept quiet while the vendee was spending moneys in building on the land. *Held* that the plaintiff's long silence coupled with the fact that they knew all along of the building operations and abstained from asserting their own rights showed that they acquiesced in the sale and that they were consequently estopped from asserting those rights in a suit. *Dhanpat Rai v. Guwandutta* 3 Loh. 204=64 Ind Cas 520=10 P L R 1922. An abstinence from interference on the part of the owner of land, upon which another man is building does not raise an equitable estoppel against him. In order to estop the owner it must be proved that besides his abstinence there was a mistaken belief in the builder that the land was his own property. *Mahammad Umordara v. Mora* 6 A L J 57=1 Ind Cas 821 see also *Kanal v. Broughton*, 5 C W N 846.

The principle, that where a person by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position the former is concluded from averring against the latter that a different state of things existed at the time has no application where the person against whom estoppel is sought to be applied is under no duty to speak. *Kanchan v. Kanula* 21 C L J 441=29 Ind Cas 734. Silence cannot operate as an estoppel unless it is established that there was duty to speak. *Bhagwinderut v. Lachmi Narayan*, A I R 1930 Pat 150=119 Ind Cas 882. A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it. *Stand v. Stand* 7 Man & G 417. It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay. *Ukenzie v. British Linen Co.* 6 App Cas 82, 109. *Ogilvie v. Western Australian Mortgage*, (1896) A C 257 P C. *Ewing v. Dominion Bank*, (1904) A C 806 (P C.), *Halsbury Vol XIII* p 396. No general rule can be formulated as to when silence may be unlawful in transactions between men at arm's length. The presence of the silent party, when the transaction takes place, makes a much clearer case for estoppel than when he is absent. The main test to be applied is—whether the silence may be attributed as a true cause not necessarily the entire or main cause, but one of the causes of the change of position and whether upon due regard to all the circumstances it is just that the defendants should be prejudiced in the manner in which they have been prejudiced by the omission of the plaintiff to speak. *Thomas Barclay v. Syed Hussein* 6 C L J 60. When silence is of such a character and under such circumstances that it would be a fraud upon the other party for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel. *Jalpomull v. Saroda*, 7 C L J 604.

**Estoppel by omission.** The acquiescence or estoppel which will deprive a man of legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent to set up those rights. The element, or the requisites necessary to constitute fraud of that description are these—In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's lands) on the faith of the mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the



defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but nothing short of this will do. *Hemangum Devi v. Bhooy Singh*, 73 Ind Cas 223 see also *Bishan Singh v. Balanda* 4 Lah L J 419. The estoppel under this section may arise by reason of either a declaration, an act or omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. *Ralli v. Forbes* 3 Pat L J 167=67 Ind Cas 744=(1922) P 209. Mere acquiescence on the part of the true owner or omission to volunteer any advice or assistance to intending purchasers who could themselves have ascertained the truth by reasonable inquiry cannot affect the legal rights of such owner. A person is not to be deprived of his legal right unless he has acted in such a way as would make it fraudulent for him to set up the same. The illustration to section 115 of the Indian Evidence Act sets forth that one is bound who intentionally and falsely leads a purchaser to suppose he is taking a perfect title. There is an obligation to truth in speech, and act, but no obligation to speak or act, where no confidence is given or accepted, merely for the purpose of guarding, or furthering the interests of strangers proceeding wholly *in initium* and with an omission to inquire which is equivalent to knowledge. *Basantapa v. Janu* 9 B 96.

S died leaving three sons and a daughter. H who was the plaintiff in this case S died more than 12 years prior to the suit, and upon his death his three sons got their names entered in the revenue papers to the exclusion of H. It was found that up to the time of her marriage, the plaintiff did live on amicable terms with, and indeed was supported by her three brothers, and ever since, there had been no feeling of unfriendliness. The three brothers executed a deed of sale in favour of G. Plaintiff brought a suit against G for recovery of her share of inheritance under the Mahomedan Law, by avoidance of the deed of sale mentioned above. The defence to the action was that the plaintiff, having omitted to enter her name in the Government record was estopped from maintaining her claim against the defendant who was a transferee without notice. Held, that there was no evidence on the record to show that the omission on the part of the plaintiff to have her name entered in the Government Revenue records were intentional within the meaning of s. 115 of the Evidence Act or that it was by reason of such omission that the defendant altered his position so as to operate as an estoppel against the plaintiff and that as the plaintiff's title was admitted, she should get a decree in her favour. *Gobordhan v. Hasiat*, A W N 1897, 110. The doctrine of estoppel cannot be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped, and the word "omission" used in section 115 of the Evidence Act does not mean only an omission to perform such a duty as is prescribed by law. *Mand Ram v. Ram Lalai*, 27 Ind Cas 611.

**Estoppel by waiver.** Where a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled and the compromise fell through, the admissions made by him for the purpose of compromising the litigation do not amount to a waiver of his right. Nor do they prevent the party a representative from pleading the true state of facts in any other litigation. *Pikaya Ram v. Warmisser*, 50 Ind Cas 361. Parties may by their conduct in the course of a suit preclude themselves in a subsequent suit from asserting rights which they have waived deliberately. *Jinku v. Kamalathammal*, 7 M H C 263. A waiver is an intentional relinquishment of a

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known right or such conduct as warrants an inference of the relinquishment of such right. Hence there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which could enable him to take an effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed and that the effect of his action will be to confirm it. *Dhanul Dhar v Nathani*, 6 C L J 62, *Blennerhassett v Day*, 2 B & B 128, *Darby v Fouden R Co*, 2 H L C 13, *Beauchamp v Hann*, 6 H L C 223, *Hustin v Chambers*, 6 C L J 1, *La Banque v La Banque*, 13 App Cas 11, *Imbilal v Whitewall*, 6 C L J 111, *Nripati v Jatindra* 91 Ind Cas 107, *Jahandar v Ram Lal*, 31 C 110.

**Order of Court** There can be no estoppel where a party acts under a mistaken impression as to the legal effect of an order. *Ibdulla Sahib v Muhammad Husain* 5 Mys L J 182. An involuntary act done by a person in pursuance of an order of Court cannot operate as an estoppel against him and prevent him from enforcing the remedy given to him by law. *Ishor Das v Buta Lal*, 11 Ind Cas 67 = A I R 1929 Jh 12, see also *Mam Lal v Durga Prasad* 5 Pat L J 125 = 3 Pat 930 = 80 Ind Cas 667 = 1121 P 673 = 1924 Pat 251. *balgobind v Sheo Kumar* 82 Ind Cas 181 = 22 A L J 791. Where a party has adopted an order of the Court and acted under it he cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. *Jogendranath v Khoda Bux* 72 Ind Cas 554.

**Application of equitable estoppel in case of part performance** Where there was a verbal agreement that the plaintiff would grant a permanent lease to the defendant on certain terms and conditions and the defendant came into possession in pursuance of it and erected superstructures on the land but no lease was executed as required by s 107 T P Act and the plaintiff sought to eject the defendant it has been held that the doctrine of equitable estoppel could be applied and that the conduct of the plaintiff can be deemed to be fraudulent. *C H C Anith v Indu Nath Maundoo*, 55 C 1090. Though a party has complete power to resile from an incomplete agreement such a power will be denied when the actings and conduct of the parties have carried the incompletely executed engagements into effect. The doctrine of part performance does not apply to a case when a Hindu widow even though purporting to relinquish her estate remains in possession thereof. *Rad Bahadur Man Singh v Nualal hbat* 73 Ind Cas 822 = 2 Pat 607 = 4 Pat L J 335. Under the English law equity will not fail to support a transaction clothed imperfectly in those legal forces to which finality attaches after the bargain has been acted upon. The law of India is not inconsistent with the principles applied by equity in such cases but on the contrary follows them. *Mahomed Musa v Aghore Kumar* 19 C W N 251. When in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents had not been executed subject to the all important proviso that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. *Gajendra Nath v Moulari* 27 C W N 159 see also *Pitamber v Ramechurn* 28 C W N 157.

**Estoppel and Adoption** In a suit by reversioner for a declaration that an adoption by a widow is invalid no estoppel arises as against the plaintiff by reason of the mere fact that he concurred in the adoption which was supposed by all parties concerned to be legal and valid. *Gurlungaswamy v Ramalal shamma* 18 M 53 = 1 M L J 237. In delivering the judgment on this point *Muttusami Ayyar J* said: 'No estoppel can arise from ignorance of law which both parties must be presumed to know. The adoption took place in 1883 whilst this suit was brought in 1892. There are not in this case equitable considerations consequent on the growth of a new family or rights of property under an invalid adoption concurred in for a considerable interval of time. It must also be remembered that according to true Hindu theory, adoption is both a religious and a secular act and estoppel cannot take the place of a religious act on which rests the conventional Hindu belief that a valid adoption generates filial relation and religious competency to make funeral and annul offerings with

efficacy" This case was confirmed on appeal, in 22 M 398 (P C) But the conduct of a widow who actively participates in an adoption and thereafter in treating the boy as her own son by marrying him to a girl of her own choice and allowing him to perform the funeral ceremony of her husband, estops her from disputing the validity of the adoption *Kaunabimal v Thasani*, 15 M 186=2 M L J 111, *Rajni Inayalia v Lakshmbai*, 11 B 391 A widow represented that she had authority to adopt, and the ceremony of adoption was carried out on the faith of the representation and the marriage of the adopted son was celebrated by the adoptive mother, the adoption was then challenged by a reversioner and the adopted son in order to defend his right incurred heavy responsibilities held that the adoptive mother was estopped from maintaining a suit for a declaration that she had no authority to adopt *Dharm Kunuoi v Balwant Singh* 5 A L J, 568=A W N 1905 211=30 A 549, see also *Durga v Ahluwalia*, A W N 1882, 97, *Santappayya v Rangappayya*, 18 M 397=5 M L J 66

The rule of estoppel by conduct does not apply to a case where no doubts were entertained by the adopter as to the validity of an adoption made by him and all that could be urged against him was that he had a foundation for a belief in the person adopted that the adoption was valid and that his subsequent conduct contributed to the persistence of the adoption in that belief and that in consequence of that belief the adopted abstained from claiming a share in the inheritance of his natural family *Lishnu v Krishna* 7 M 3 (F B) Where an adoption made by a Hindu widow is invalid for want of permission from her deceased husband, she is not estopped from repudiating or denying it by the circumstance of her having for some time treated it as effective An adoption *ab initio* invalid may be raised to the level of a valid adoption on the ground of estoppel only when, by a course of conduct long continued on the part of the family which has purported to affiliate him his situation in his original family has been so altered that it would be impossible to restore him to it *Parathibogamma v Ram Krishna Iau*, 18 M 14=5 M L J 44 *Kutari v Babaji* 19 B 371 Where a person is treated by another in such a way as leads him to believe that he is the adopted son of that other and on that footing and on account of such acquiescence and by reason of such encouragement he severs his connection with his natural family or undergoes a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it the person treating him as described above and those who claim through him will be estopped from questioning the adoption *Umaram Gogoi v Purul Chand* 85 Ind Cas 510=A I R 1925 Cal 993 see also *Mahamad v Ghulam* 96 Ind Cas 777, *Iedla v Iedla*, 19 L W 83=77 Ind Cas 214 Though an adoption is invalid circumstances may arise in which the likelihood of hardships to be caused to the adopted boy in upsetting the adoption on which all the parties acted for a number of years may be so great that it would be inequitable and unjust not to hold that an estoppel is created against the person adopting for having changed his position It was not cast upon the person who sets up the estoppel to prove conclusively that he was in fact adopted by the father residing from the story of the adoption, but it is enough diminished if he proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the adopted boy must have been dumified Also estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character but commonly operates to close the mouths of certain people who have acted in a certain way from setting up what may be true facts of the case, and the estoppel will operate only as against the adoptive father and not against his *amasa* son *Parasuramayya v Venkata ramayya*, (1927) M W N 311=103 Ind Cas 875=A I R 1927 Mad 777 The parties were Agarwallas and the adoption was made in the manner customary among the Agarwallas The story of the regular Brahminical adoption of the same body previous to the Agarwalli adoption was invented with the object of giving to latter adoption the rights of collateral succession The acts and representations of the plaintiffs were set up as estopping them from questioning the adoption related to the Agarwalli adoption Held, that the

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were not estopped from questioning the adoption and denying that the adopted son acquired any rights of collateral succession by the adoption *Dhandray v Soni Basi*, 52 C 492=52 I A 231=27 Bom L R 837=23 A L J 273=49 M L J 173 (P C) Where a person executed a registered document declaring he had adopted another and in mutation proceedings described himself as the guardian of such adopted son and even entered into a compromise wherein for valuable consideration he gave up all intention of repudiating such adoption, he would be estopped from alleging there was no adoption *Kumar Dutt v Duan Ramdhar* 1923 A 58 Representation on a matter of law is as to the validity of an adoption creates no estoppel *Rajambal Amma v Shadnaga* 70 Ind Cas 653=1923 Mad 11

An adoption by a minor widow who has not attained sufficient maturity of understanding to appreciate the nature of her act is invalid There is no personal estoppel preventing the widow from disputing the validity of the adoption and recovering her husband's properties from the adoptee unless the latter's position has been prejudiced *Ramchori v Saraswati* 60 Ind Cas 246=12 L W 544=(1920) M W N 721 A person setting up an estoppel under s 115 of the Act must be induced to believe in a fact and not in a proposition of law So where a Hindu widow adopted an orphan and subsequently supported the adoption, her conduct, even if it can be regarded as equivalent to a representation that an orphan can be validly adopted does not give rise to an estoppel *Gobind v Chandrabhaga*, 12 N L R 100

**Estoppel by acts of Government officer** A Government officer had no authority to waive the rights to which the Government might be entitled by escheat, and a decree founded thereon by a competent Court in India did not operate as estoppel *The Collector of Masulipatam v Caraly Venkata Narayanaiah*, 2 W R 61 P C=8 M I A 529

**Inconsistent pleas** It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court to play fast and loose to blow hot and cold to approbate and reprobate to the detriment of his opponent *Dusseendra Narayan v Jogesh Chandra* 39 C L J 40=79 Ind Cas 520 see also *Bama v Nema*, 35 C L J 58, *Ram Pratap v Sheo Lal* L R 5 A 243 (Rev) A party who asserted all along that the lands could be identified, cannot turn round and assert the contrary on appeal *Chalai v Swendra*, 1 Pat 75=3 Pat L T 17=65 Ind Cas 616 A person who successfully sues another for rent cannot subsequently be heard to impugn that the defendant was a tenant *Jitan Mahdon v Lala Bhagwan* 64 Ind Cas 262

**Neither he nor his representatives** Where a person by his own solemn and deliberate act, wilfully induces another to believe the existence of a certain state of thing, and to deal with him on the faith of it, he and as a general rule his heirs or those who claim under him are conclusively bound by the representation so made and will never be allowed to contradict it to the prejudice of the other *Moonshee Syed Meer Ali v Syed Ali* 5 W R 289 The purchaser at the execution sale requires the right title and interest of the judgment debtor and does not consequently occupy a position of greater advantage than the judgment debtor does in the application of the doctrine of estoppel *Nanai Lal v Jogendra Chandra* 23 C W N 403=39 C L J 222=82 Ind Cas 297, *Nandu v Jogendra* 70 Ind Cas 960=1923 Cal 53 The transferee of a party is his legal representative *Syed Ali Hassan v Syed Ali*, 10 O & A L J 1229 It is not open to the representative of a lessor to prove that the status of the original lessee was other than what was described in the deed of lease *Isaori Chandra v Goursunder* 1923 Cal 608 Where the conduct of a grandfather has given rise to estoppel the grand on claiming through him is bound by it *Yoman v Dhanni* 1 I L J 31=55 Ind Cas 569 A subsequent mortgagee is bound by the representation made by the mortgagor to prior mortgagee and is estopped from challenging the validity of the prior mortgagee so far as it affects the share which was subsequently mortgaged *Gurdayal v Tard Hussain*, 51 Ind Cas 766 A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor *Kahdas v Prasanna*, 55 Ind Cas 189 The doctrine of estoppel is

applicable to persons claiming under those whose conduct had led to a change of position *Rajah of Deo v Abulla* 45 C 909=45 I A 97 (P C), *Badi Bishal v Bai Nath* 50 L J 458=47 Ind Cas 931, *Jagannath v Syed Adulla* 16 A L J 576=35 M L J 46=20 Bom L R 851=22 C W N 891=28 C L J 162=45 Ind Cas 770 (P C) The equitable doctrine of estoppel as laid down in 11 B L R 46 which applies to any person is equally binding on the purchaser of his right title and interest at a sale in execution of the decree *Mahomed Mo. offer v Kishori Mohun Day*, 22 C 909 (P C)=22 I A 129=5 M L J 101 In *Debendranath Sen v Mirza Abaul Samed* 10 C L J 150 (165), *Mookherjee J* said 'It was ruled by this Court in *Kishori Mohun v Mohamed* 18 C 183 (198) contrary to the principle deducible from *Richards v Johnston*, 4 H & N 660 and *Heine v Rogers*, (1891) 1 Q B 230 that the estoppel that would bind A would also bind the execution purchasers of his interest This view was subsequently affirmed by their Lordships of the Judicial Committee and they rested their conclusion on the ground that the principle of estoppel founded in that case upon the decision in *Ram Coomar v Moqueen* L R 11 I A sup Vol 40 applied not only to A, but also to the execution purchasers of the interest of A who were equally bound by it, as they had purchased only his right title and interest This is in accord with the statement of the rule by *Kay L J* in *Maded v Thomas* 18 W R 201 No doubt the statement sometimes has been made by text writers (*Hulim Chand on res judicata* 204 and *Casperx on estoppel*, 2nd Ed 66) apparently on the basis of judicial dicta of the highest authority that as there is no privity between the purchaser at a sale in execution of a decree and the judgment debtor whose property is sold the purchaser at the execution sale is not bound by the same rule of estoppel as the judgment-debtor Thus in *Anundo Moyee v Debendra Chandra* 14 M I A 101 *Lord Justice James* observed that the title of a purchaser under a judgment-decree could not be put on the same footing as the title of the mortgagor or of a person claiming under a voluntary alienation from the mortgagor Again in *Imrit Koer v Dehee Pershad* 18 W R 201, *Sir Richard Couch* remarked with reference to purchasers at an execution sale that they were not in the position of persons taking a conveyance direct from the party and were therefore not bound by what the judgment debtor might have stated on some previous occasion Somewhat to the same effect are the observations of *Sir Barnes Peacock* in *Dinendra Nath v Coomar Ram Kumar*, 7 C 107=8 I A 65 There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree Under the former the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor In the latter, the purchaser, notwithstanding he requires merely the right title and interest of the judgment debtor acquires that title by operation of law and is to the judgment debtor and freed from all alienations or incumbrances affected by him subsequent to the attachment of the property sold in execution' On the authority of these observations it was ruled by this Court in *Parbu Lal v Nylu* 14 C 401 that a purchaser at an execution sale was not the representative of the judgment debtor for the purpose of the rule of estoppel Substantially to the same effect are the decisions in *Ranga Moone v Raj Coomaree* 6 W R 197 *Gow Smiter v Hem Chander* 16 C 355 and *Bashu Chander v Laxayet Ali* 20 C 236 There can be no question, however, that the rule so widely formulated in these judicial dicta, is neither supported by authorities nor defensible on principle It will suffice for our present purpose to refer to the judgment of the Full Bench of this Court in *Ishan Chunder v Beni Madhab* 24 C 62 in which it was pointed out that the view taken in these cases is based on a misapprehension of the passages from the decisions of the Judicial Committee in *Anandamoyee v Dhuvendranath* 11 M I A 101 and *Dinendra v Ram*, L R 8 I A to which we have just referred See also *Radha Kant v Ramnaram* 16 C W N 475 (480) *Krishna Pati v Vilramal* 18 M 13, *Sicaminaltha v Narmalinga* (1917) M W N 83, *Bepin v Joqueswar*, 31 C L J 256 *Nandlal v Jogendra* 28 C W N 403, *Sashibhusan v Debnath* 60 Ind Cas 705, *Prodhot v Jori*, 16 Ind Cas 792 A person is not estopped from instituting a suit for a share of joint ancestral property by the circumstance that he claims under one who, when sued on a former occasion as trustee,

**S 115.** never pleaded that he was a co-purchaser. *Surnomoyee v Gunga*, 2 W R 261. An admission by an adoptive mother, in a suit brought by her mother in law to set aside the adoption, that an alleged *unomutteeputtur*, under which her mother in law had previously professed to adopt a son to her deceased husband, was valid would not estop her adoptive son from denying the validity of that instrument in a suit subsequently brought by him for the assertion of his rights under the adoption. *Imundomoyee v Sheeb Chunder*, Marsh 433. Where a trustee does any act in breach or repudiation of the trust, such act is not binding, by way of estoppel on his successor in the trust. *Shri Ganesh Dhornulhar v Keshavnai* 15 B 625. A compromise by father as next reversioner is not binding on son the real reversioner. *Dorasmay Reddy v Muthulingu* 19 M L J 1=33 Ind Cas 50.

The doctrine of estoppel cannot bar the plaintiff's claim in a suit when the person making the representation is not the person at whose representation the plaintiff claims the property. *Rajah of Bobbili v Bhojayamm*, 4 M L J 192. A widow claiming through her husband cannot impeach a settlement come to by her husband with other members of the family whereby he released by necessary implication the interest which he had in the property. *Dadabhai v Cousji* A I R 1925 P C 306. A purchaser at an execution sale is bound by the same rule of estoppel as the judgment debtor and consequently he cannot dispute the validity of a mortgage which the mortgagee himself is estopped from questioning. *Nandalal v Joyendra Chandra*, 36 C L J 421.

**Constructive estoppel.** The law knows no such thing as constructive estoppel. *Parvotam Gari v Hobda*, 21 A 505 P C=3 C W N 517=1 Bom L R 700=26 I A 175.

**Fraud, whether necessary to give rise to estoppel.** This section embodies the rule of English law on the subject of estoppel. The doctrine of estoppel is based on a fraudulent purpose and a fraudulent result. If therefore the element of fraud is wanting, there is no estoppel. There must be deception and change of conduct in consequence. *Ganga Sahai v Hua Singh* 2 A 809 (F B).

**Estoppel, whether can arise when document is inadmissible.** The rule of estoppel does not apply where the document giving rise to it is not in evidence in the case in which it is inadmissible for want of registration. *Raju Bahu v Krishnavai Ram Chavali* 2 B 213. An enhancement suit was decided in a compromise by which the landlord accepted *na'arana* from the tenants and gave them permanent heritable rights with powers of transfer. The landlord subsequently sued the transferees of the tenants for ejectment and pleaded that the compromise being unstamped and unregistered was invalid in law. Held that the compromise having been acted upon by the parties the landlord was estopped from suing the tenants for ejectment. *Akheta Ahir v Ram Prasad* 8 L R 365 (Rev.). The rule that an occupancy tenant who makes usufructuary mortgage of his holding to another man is estopped from alleging that the other man is his sub-tenant has no application where the mortgage is unregistered and so ineffective to pass the mortgagor's rights in the property. *Ram Charan v Shiva Jagat* L R 3 A 161 (Rev.).

**Landlord and tenant.** Where a landlord wrongly described a person as an ex-proprietary tenant in a rent suit, he is not estopped from denying the same in a subsequent suit for ejectment. *Lachchu Bhauani* 8 L R 8 (Rev.). Where a landlord sued the tenant in ejectment and the tenant agreed to pay a higher rent provided the landlord did not eject him and the landlord collected the enhanced rent in that case he is estopped from ejecting the tenant. *Ram Nath v Bhaquant Prasad* 8 L R 320 (Rev.). see also *Mt Khushalo v Sahibada Shabbir Ali* 8 L R 341 (Rev.). Where a landlord executes a money decree as a rent decree and the judgment debtor takes no objection, he is not thereby estopped from contending subsequently that the decree was only a money decree and not a rent decree. *Bhagandutt v Lachmi Narayan*, 119 Ind Cas 882. A misdescription of a person as occupancy tenant in rent receipts and suits for arrears of rent does not amount to grant of occupancy rights or have

the effect of estoppel *Ashofi v Kishor Ramani*, L R 6 All 64 (Rev). A tenant by acquiescing in the payment of enhanced rent is not precluded from raising any objection under section 23 of the B T Act. *H H Meyrick v Deepa Pandai*, 3 P 11 825. There is no peculiarity in the law of estoppel in India as distinguished from that of England, the law of India is compendiously set forth in s. 115 of the Evidence Act. Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mesne profits during the particular year or years for which such rent was received. *Mitra Sen Singh v Mt Jani Kuar* 26 Bom L R 1131=40 C L J 463=20 L W 766 (P C)=16 A 728=51 I A 326=82 Ind Cas 946. A grove holder after cutting the trees in the grove was allowed to remain in possession on payment of rent. He planted fresh trees and for 3 or 4 years, the zemindar did nothing to prevent it. *Held*, he was estopped by his inaction from ejecting the grove holder. *Ram Singh v Hanu*, L R 4 A 352=90 A A L R 1087. Where the tenants knew perfectly well what their rights were and they were not deceived or encouraged in any way, the mere silence of the landlord or his inaction does not create an estoppel against him. Further to create an estoppel it must also be shown that he was aware of what his rights were and that he had the power to prevent tenants from building. *Budhan Peli v Madanmohan Lal*, 1923 P 111=68 Ind Cas 653=3 P 11 L J 486 see also *Syed Ali v Mani Chandra*, 27 C W N 969. The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenant. *Habib v Salamat*, L R 4 A 174 (Rev). A decree holder landlord who in execution of a rent decree purchases the holding subject to liability for a second rent decree is not estopped from proceeding against other properties in execution of the latter decree. *Jural Kishore v Bhatu Modi* 1 Pat L R 311=19-3 P 11 265. The rule that a person cannot be permitted to derogate from his own grant is not a universal application and certainly cannot apply to the case of a landlord where, by a bona fide surrender by the tenant, he acquires statutory power of re-entry into the land which was originally dismissed in favour of the tenant. *Ram Ojain v Doman Kalal* 2 Pat 598=4 Pat L J 362=75 L J 111. The mere fact that a tenant's status is incorrectly described in a receipt issued by the zemindar does not estop him from denying the status. *Partab v Dunga Navam*, L R 4 A 8. Where the buildings have been in existence for a long period and certainly for 20 years and the landlord has been aware of their erection and kept quiet and did not turn round and claim to demolish the buildings. *Saligram* 66 Ind Cas 603=(1922) A 210.

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rents from the alienee, he is as much bound by the alienation as if he had expressly assented to it. *Baghubar Singh v Kedar Nath* 1 W N 189 107, see also *Gunga v Ram Gurt* 2 Agr 18 *Guda v Ramji* 3 P R 1900, *Fa v Godar Khan*, 161 P R 1883. An owner of land omitting to sue for demolition of buildings when the infringement of his right is first threatened or commenced, is estopped from claiming demolition, but is only entitled to compensation. *Bhagh v Nadir* 57 P R 1871. A tenant cannot be permitted to object to the terms of a *patta* when he has accepted previously similar *patta* for a series of years for that constitutes a representation by conduct that the landlord may proceed on the footing that the parties were proper ones, which, of course, would have the same effect as representation in so many words. See *Samlachari Swami v Parada Pillai* 27 M 332. The service of a notice for ejectment under s 36 of Act VII of 1881 presupposes the existence of the relationship of landlord and tenant between the person who causes it to be served and the person to whom it is served. And the landlord cannot afterwards bring a suit for ejectment in a Civil Court to eject the same person from the same land, alleging that he is not tenant but only a purchaser. *Buldeo v Indad* 15 A 189=A W N 1893 93.

The previous acceptance of a *pattah* from one who was neither a registered Yeomahdar nor lawfully entitled to the Yeomah but who performed the service for some time, apparently under a deed of assignment executed in his favour by the previous Yeomahdar is a good defence to a suit by lawful owner against the riyats to enforce acceptance of *patta* when the owner's conduct is such as to justify the belief of the riyats that the assignee was authorised to collect rent from them until the assignment was questioned by the owner and a notice of his title given to them. *Khador v Subramanya* 11 M 12. The Rajah of Tipperah granted *Sanad chits* to certain tenants permitting the tenants to construct embankments to a silted up tank and to re excavate the tank, but no rent was reserved for the tank. The tenants acting upon that *sanad* spent money in re excavating the tank. In the circumstances and having regard to a long course of conduct implying the rent-free character of the tank the Rajah was estopped from revoking the license granted and from asserting that the subject matter of the grant should come under a new liability. *Rajah Barendra Kishore v Aliam Ali* 16 C W N 304. Parties holding a permanent settlement from the Government cannot question the validity of a Mokurree *pattah* previously granted by themselves. *Karce Abdool v Borod Kant*, 15 W R 394. A party having enough in him to make a Mokurree grant substantial and valid cannot in a Court of Equity deny its efficacy. *Jeelan Singh v The Collector of Baelingunge* 2 W R 77. *Syed Ameer Ali v Heera Singh*, 20 W R 291.

Where the Government purchased the zemindari rights of a pergunnah at an auction sale and have thus waived their rights to cancel the tenures of the defendant talukdars and recognised their rights and the zemindar subsequently purchases those rights from the Government he cannot enforce against the talukdars any rights which had been waived by his vendor. *Joozil Kishore v Khaja Ahanoollah* 4 W R Act X Rent 6. Where a decree has declared a certain rate of rent payable, the landlord is not prevented by the mere fact that he has not insisted on the rent being paid at that rate but has accepted the lower one, from recovering at the rate given by the decree. *Syed Musam v Pirthe Singh*, 3 Agr 263. The mere fact that the plaintiff had applied to the Revenue Court, under s 36 of the N W P Rent Act for the ejectment of the defendant as tenant does not estop him from asserting in a subsequent suit for ejectment, in a Civil Court, that the defendant is unlawfully in possession, as a trespasser. *Zebbeda Bibi v Sheo Charan* 22 A 83=A W N 1899, 189, see also *Hamid Ali v Waiyat* 22 A 93=A W N 1899 193. A lessee is estopped from showing that the lease is void and that no interest passed to him. *Bamandas v Almadhab*, 20 C W N, 1340=24 C L J 541=35 Ind Crs 751. Where a zemindar agreed not to eject his tenant so long as he paid rent in consideration of the receipt of the large amount of arrears due from a previous tenant, he is estopped from ejecting the tenant so long as he paid rent. *Yusuf-aman v Bodhan*, 29 Ind Crs 656.



Hindu widow Estoppel arises in the case of a reversioner where he consents to an alienation made by a Hindu widow *Srinivasagharachariar v Gopal charan*, (1927) M W N 231=A I R, 1927 Mad 438 Where the widow and the next reversioner joined in conveying a property by which they transferred the absolute interest in it the reversioner cannot after he comes into possession challenge the transaction under the rule of estoppel *Amar Krishna v Rajendra* 97 Ind Cas 790=A I R 1925 Cal 1205 Where the reversionary heirs to a Hindu widow's estate caused the purchasers of the estate to believe that he approved of the sale by the widow and that such rights as he had he was willing to give up he is estopped from questioning the transaction of purchase subsequently *Kama Sastri v Kunnumma*, (1925) M W N 495=83 Ind Cas 764=A I R 1925 Mad 638=48 M L J 284 A document recited that the executants' reversioners had given their consent to the deed, and the endorsement showed that the Sub Registrar read the document to the executant and the reversioners and had their thumb marks put in a second time It was held that it was not a mere attestation but would estop them from questioning the validity of the deed *Sundar Singh v Bhan Singh*, 90 Ind Cas 1033=26 P L R 736 The mere fact that a reversioner cultivated the lands alienated by the widow under the vendee so long as the widow lived, does not estop him from claiming the properties on the death of the widow *Bahar Khan v Kirshen Chaud* 72 P R 1919=52 Ind Cas 845

Where the next presumptive reversioner consented to and joined in a gift by a Hindu daughter into her father's estate as a limited owner and on the death of the daughter succeeded to the estate as actual reversioner he or any one deriving title from him was estopped from challenging the gift *Mahadeo Prasad v Mata Prasad* 19 A L J 799=63 Ind Cas 721, see also *Shunmugha v Koyappa* 60 Ind Cas 635=(1920) M W N 679, *Basappa v Falappa* 23 Bom L R 1040 After the death of a last male holder, a reversioner entered into a compromise with the widow of the last male holder and other reversioner and on the basis of that compromise the property was divided After the death of the widow, he is precluded from claiming as reversioner *Kanhailal v Brij Lal*, 40 A 487 (P C)=22 C W N 914 (P C) A reversioner who has voluntarily signed the deed executed by a widow cannot legally claim in opposition thereto *Shub Chandra v Dulchen*, 28 C L J 123=48 Ind Cas 78 Where a Hindu reversioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance neither he nor any person claiming through him, could set up that her relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow *Jogendra v Monunda* 47 Ind Cas 978 The attestation of a reversioner to a document implies only that there was necessity for the alienation and does not create estoppel *Namaswamy Pillai v Kuthalingam*, 21 M L J 30=(1917) M W N 78=38 Ind Cas 40, but see *Ganda Singh v Sulab Singh*, 159 P L R 1914 But where the reversioners induced the purchaser to believe the recitals of the document to be true and to act on them they are estopped by conduct *Bhubaneshwar v Haradhan*, 21 C W N 728 In *Hari kishen Bhagat v Kashi Pershad*, 42 C 876 the Judicial Committee only laid down that a thoughtless reversioner should have a door of escape from an uncomfortable position rather than bind him down conclusively by the stringency of the equity brought about by his conduct *Paraswameddi v Mahameddi* 6 L W 270=22 M L J 260=42 Ind Cas 496 Where a Hindu widow, in possession of her deceased husband's separate immovable property, his concubine and his illegitimate daughter, with the concurrence of the next reversioner effect a distribution of the property, in pursuance of an instrument in writing to which they were parties and a remoter reversioner attests such instrument and consents to, and assists in the distribution of the property, such remoter reversioner would be estopped by his conduct from questioning the legality and validity of the distribution or of assignments made by those who shared in such distribution *Sia Dasi v Gur Sahai*, 3 A 362 A reversioner by unknowingly accepting the mortgage of the land in the joint holding sold by a widow to

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another reversioner, is not estopped from contesting the validity or its sale *Sheva v Hayat* 32 P W R 1914=108 P L R 1914=23 Ind Cas 525 The interest of a Hindu reversioner is an interest expectant on the death of a qualified owner, it is not a vested interest, it is a  *spes successionis*  or a mere clause of succession, it cannot be sold mortgaged, assigned or relinquished, for a transfer of a  *spes successionis*  is a nullity and has no effect in law But though transfer of his interest is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner *Nalhe Choudhury v Suldeo Chaudhury*, A I R 1930 All 430

**Estoppel by acts of agents** 'The principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution is universally estopped from denying the authority of his agent' *Per Erle C J in Erpate Swan*, 7 C B N S 400 (432) A principal who has by his conduct led other persons to believe that his agent is clothed with a larger authority than that which he actually possesses where such persons have acted in that belief to their detriment, cannot rely upon any secret limitation of his agent's authority or upon any private understanding he may have with him of which the rest of the world must necessarily be ignorant Strangers' said Lord Ellenborough, 'can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be assumed that the apparent authority is the real authority' *Pickering v Busi* 15 Earl, 38 (43) *Carper Estoppel*, 177 Similarly in *Ramsden v Dyson* 1 E & I A 128 (158) Lord Cranworth said If indeed the principal knows that the person dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and knowing this allows the person so dealing to expend money in the belief that the agent had an authority which, in fact he had not, it may be that in such a case, a Court of Equity could not allow the principal afterwards to set up want of authority in the agent But this equity where it exists depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal' *Carper Estoppel* 178 But an agent cannot set up his own breach of trust *Harris v Furman* 51 L J Q B 338 Where a tenant without Zemindar's permission makes a grave on the *abadi* the mere fact that the servants of the Zemindar stood by and did not object cannot amount to the agent's acquiescence so as to estop Zemindar from interfering with the grave *Khuda Bakh v Janshankar* 115 Ind Cas 628 An endorsement by an agent of a decree holder on a notice of sale that a property need not be sold does not estop the decree holder from executing the decree against the property *Parthasavaty v Muhammad* 82 Ind Cas 434=A I R 1925 Mad 270

**Difference between s 115, Evidence Act, and section 43 of the Transfer of Property Act** The difference in language between s 43 of the Transfer of Property Act and the language of the illustration to s 115 of the Evidence Act seems to be that under s 43 of the T P Act, mere erroneous representation will apparently suffice and the representation need not be intentionally false whereas the illustration to s 115 of the Evidence Act uses the words intentionally and falsely Again under s 43 there is nothing said about the belief of the transferee in the truth of the erroneous representation whereas the illustration to s 115 implies that the transferee must have believed the intentional and false representation and acted in the faith of such representation *Haltikudar Narain v Imdar Sayad* 28 M L J 41=27 Ind Cas 785

**Family arrangements** Where parties settled their disputes amicably and each of the contracting parties took a share of the properties entered into possession and subsequently dealt with the items allotted to them as their own by selling and mortgaging them, they are estopped from challenging the validity of the settlement *Jagdom Sahay v Rupanman* 5 Pat L R 375=1921 P 736 Where an agreement relating to division of family properties is entered into and the parties enter into possession of the properties allotted and occupy it for a long time, they are estopped from setting up their independent rights

dehors the agreement and from denying the rights of the other parties. *Bahadur Singh v. Ram Bahadur*, 15 A 277=21 A L J 140=71 Ind Cas 105=1923 A 204. It would not be reasonable, or conducive to the peace and welfare of families to construe acts, done out of kindness and affection, to the disadvantage of the doer of them. Where two surviving brothers constituted a Mitakara family, and the elder brother naturally and properly treated his younger brother, who had been born deaf and dumb, as a member of the family, and entitled to equal rights until it became absolutely clear that his malady was incurable, held that there was no ground for supposing that the elder brother intended to divest himself of his own property or to waive any rights, accruing to him by reason of his younger brother's incapacity and that there was no principle of law founded on the doctrine of estoppel or laches or the law of limitation or otherwise to hold under the circumstances of the case that the elder brother's acts and conduct had an effect and operation which he could not have intended or contemplated. *Lala Muddun Gopal v. Ahluwalia Koer* 18 C 311 (P C)=18 I A 9.

**One estoppel against another.** In a case of one estoppel against another the parties are set free and the Court has to see what their original rights are. *Juanlal v. Behari Lal*, 152 P W R 1918=15 Ind Cas 69.

**Benami.** Where a father whether Hindu or Muhammadan purchases a property in the name of one of his sons the ordinary presumption is that it is a benami transaction and not that it is in advancement in favour of the son. Where the vendee from the son in such a case had various indications which should have led him to make inquiries into his vendor's father's claim at the time when the deed was presented for registration he could not urge that the father was estopped by his conduct from setting up a title against him. *Ghulam Dastur v. Tejaswini*, 73 P R 1918=159 P W R 1918=47 Ind Cas 367. If parties allow their benamidar to sue in his own name and not in a representative character, they cannot come in on his death under Order 22, rule, 3. *Doraisami v. Chulambnam*, A I R 1930 Mad 221=58 M L J 18.

**Estoppel by election.** Where a man has an option to choose one or other of two inconsistent things when once he has made his election, it is final and cannot be retracted. *Per Lord Blackburn J in Scarf v. Jardine* L R 7 App C 360. *Quod semel placuit in electionibus, amplius displicere non potest.* Co Lit 116 a. A man cannot approbate and reprobate at the same time. *Casper v. Estoppel* p 167, *Acir v. Houshope* 1 Bligh 1. 'You cannot both eat your cake and return your cake. *Per Crompton J in Clarke v. Dickson*, 1 B & E 152. To illustrate the doctrine of election suppose A by Will or deed, gives to B property belonging to C, and by the same instrument gives other property belonging to himself to C, a Court of equity will hold C to be entitled to the gift made to him by A only, upon the implied condition of his conforming with all the provisions of instrument by renouncing the right to his own property in favour of B, he must, consequently make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument, if C elects to take under and consequently to conform with all the provisions of, the instrument, no difficulty arises, as B will take C's property, and C will take the property given to him by A, but if C elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A an important question arises whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election. *W & F Leading case* Vol I p 312. It is an obligation imposed upon a party to choose between two inconsistent alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one that he should not enjoy both. Every case of election, therefore presupposes a plurality of gifts or rights, with an intention, express or implied, of the party, who has a right to control one or both, that one should be a substitute for the other. The party who is to take, has a choice, but he cannot enjoy benefits of both. *Story Eq Jur* § 1077, see also section 35 of the

**S 115** Transfer of Property Act (IV of 1882) and, section 180 of the Succession Act XXXIX of 1925). The doctrine says *Fry L J in In Re Vardon's Trusts*, 31 Ch D 275 (279) "rests, not on the particular provisions of the instrument which raises the election but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, the ordinary intent to use the words of *Lord Hatherley in Cooper v Cooper*, L R 7 H L 53 (71) implied in every man who affects by a legal instrument to dispose of property that he intends all that he has expressed. This general and presumed intention is not repelled by showing that the circumstances, which in the event gave rise to the election were not in the contemplation of the author of the instrument but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention."

**Estoppel by negligence** It is true that there can be no negligence unless there be a duty. *Corenthy v The Great Indian Railway Co*, 11 Q B D 776. Before any one can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one. *Halsbury Vol 13 398, Seton v Lafone* 19 Q B D 68. A second essential condition of estoppel by negligence is that the negligence must be in the transaction itself, and a third, which is so closely connected with the second that it is impossible to treat them separately, is that the negligence must not only be calculated to have the misleading effect attributed to it but must be proximate or real cause of that result. *Banl of Ireland v Evans Charities in Ireland* 5 H L Cas 389 per *Parke B*, *Suan v North British Australian Co* 7 H & N 603 633.

**Other cases** After the right to get either rescission or reformation of the contract is barred, it is not competent to a party to a contract enjoying the benefit under it to say that he is not bound by one of its terms. *Sashi Kanta v Genda Sheikh* 82 Ind Cas 970 = A I R 1925 Cal 489. Admission in a different proceeding that one had sold the land does not act as estoppel so as to do away with the necessity of registering the document. *Maung Po Yin v Maung Pet Tin* 86 Ind Cas 205 = A I R 1925 Rang 68. Where a person accepts a gift of property made by a number of donors jointly he cannot after wards say that some of the donors had no right to make the gift. *Keerhanathi Janaki v Gornulan*, 80 Ind Cas 546 = A I R 1925 Mad 990. Where a plaintiff accepted the transfer of certain shares from a widow during her life time he is estopped from denying the truth of the representation in suit between himself and the representatives of the lady. *Mahamed Hasan v Ali Haider*, 85 Ind Cas 509 = A I R 19 5 Oudh 337 = 12 O L J 1. Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person primarily. *Umaram v Purul* 85 Ind Cas 540 = A I R 1925 Cal 993. A defendant cannot be allowed to set up his own fraud in defence. Where a plaintiff claiming a title by purchase sues for declaration and possession it is not open to the defendant to show that it was she who provided funds for the purchase by means of a fraud on the reversioner to which she and the plaintiff were parties. *Iachayammal v Devanammal*, 22 I W 313 = A I R 1925 Mad 1016. A man who has represented to an intending purchaser that he has not a security and induces him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force. *Jia Lal v Saera Bibi*, 99 Ind Cas 2 = A I R 1927 Oudh 104. Although the house of an agriculturist is ordinarily unsaleable, still the conduct of the agriculturist judgment debtor may estop him from pleading that the house is not saleable. *Ganga Lishum v Jajmohan* 6 P 254 = 102 Ind Cas 616 = 8 Pat L R 563 = A I R 1927 Pat 235. Where the question arose whether a company was liable to be assessed to companies tax by municipality and it appeared that the agent of the company had written a letter to the Municipal Council assuming that the company was liable to be assessed on its profits held that the company was not estopped from questioning the validity of the assessment by a suit in the civil court. *Bombay Co Ltd v Municipal Council of Dindigul* 105 Ind Cas 26 = 27 I W 213. Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that

compromise does not constitute an estoppel barring him from challenging it *Thiruvath v Viroda Sundari* 103 Ind Cis 11=A I R 1928 Cal 331 Where a person describing himself as the holder of *ganti* interest purported to grant a permanent lease he will be estopped from asserting his right as a riyot but the purchaser at an execution sale of that person's right and interest who got his name mutated in the *sherista* of the superior landlord on payment of an enhanced rent is not so estopped *Saladhar Mandal v Amrita Lal Roy* 105 Ind Cis 611=A I R 1928 Cal 87 A *muafidur* who has mortgaged his *muafi* plots cannot assert against the mortgagee whom he has ejected his want of title The case might be different if the Legislature had expressly enacted that in no circumstances would a transfer of *muafi* land be recognised 50 W N 515=110 Ind Cis 120=A I R 1928 Oudh 336 A mortgagee cannot deny the mortgagor's title *Soubhai v Jaggucan*, 30 Bom L R 987=A I R 1928 Bom 350 Where a party whose name did not appear in the cause title by mistake but claiming to be a proper party to a legal proceeding takes step for the purpose of securing some relief from the Court in that capacity, he really becomes estopped from afterwards setting up that he was not in due a party If such a step had been taken without the full knowledge of all the circumstances and without notice of the manner in which the thing had come about, it may be estopped may arise *Sutharavana (chara) v Samarapuri*, 110 Ind Cis 837=(1928) M W N 634=A I R 1928 Mad 690 If a person takes possession of certain property as a *mutadali* and holds possession of it on that basis he cannot afterwards turn round and say that the *uaf* being void, he was in possession in his own right and claim the property as his own as against the beneficiaries *Rukya Banu v Aqwa Banu*, 55 C 148=32 C W N 248

Where a co sharer who is also the *mul tar am* of the vendor took part in the sale proceedings in favour of a third person and subsequently he purchased a part of the property from the vendee and the plaintiff sued later to establish his right of pre-emption Held that the mere fact that the co sharer was a party to the original sale did not estop him from setting up his title under a sale deed as an answer to the plaintiff's claim *Bhora Ganga Prasad v Pooran*, 26 A L J 89=103 Ind Cas 157 A party having claimed on basis of investment in commercial speculations cannot claim on another basis when he finds the first basis prejudicial to him He cannot both appropriate and reprobate *Harnam v Madan Gopal* 33 C W N 493=19 C L J 335=27 A L J 406=A I R 1929 P C 77 Where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of the transaction *Seemmalai v Selappa*, 33 C W N 107=29 L W 439=114 Ind Cis 568 Where a co sharer refuses to purchase the property of his other co sharer, he is estopped from exercising his right of pre-emption *Rameswar v Ghisaiwan Prasad*, 27 A L J 665=A I R 1929 All 531 For purposes of estoppel an order by consent not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal *Charles Hubert v Eduard Keith*, 118 Ind Cis 7=A I R 1929 (P C) 289=17 M L J 429 (P C) A party who takes advantage under partition is estopped from pleading imputability *Narendra v Nagendra* 50 C L J 267=A I R 1929 Cal 577 Where a County Court Judge has tried an action which he had no jurisdiction to try and the unsuccessful party appeals the respondent is entitled to raise the point of jurisdiction notwithstanding that it was not ruled below and the fact that no objection was taken to the jurisdiction in the county Court does not create any estoppel by conduct *Simpson v Crouie* (1921) 3 K B 243=90 L J K B 878 Where in prior land requisition proceedings there was a declaration that minerals beneath a particular land could be used by the Government for the purpose of construction of a bridge and the owner of the land received compensation on that footing and after the completion of the bridge he sued for a declaration that he was entitled to the remaining mineral in the land, held, that he was not estopped from asserting such a claim *Secretary of State v Gyanendra Chandra*, 8 Pat 742 A judgment debtor who agrees to the figure of price which is to be advertised

**S 115** for the information of the intending bidders at the preparation of proclamation cannot be heard later or after the sale to plead that the figure was unduly low and the sale should therefore be set aside *Romanathan v Ramanathan*, 117 Ind Cas 705=30 L W 995 A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property *Shanlar v Ganpal*, 31 Bom L R 139=119 Ind Cas 166=1929 Bom 227

A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status *Jai Nandan v Lmiao*, 119 Ind Cas 568=A I R 1929 All 305

Where a widow makes a gift of her husband's property in her possession as widow, to her daughter and her husband jointly, the daughter's acquiescence for less than 12 years since the death of the widow in the property is not sufficient to deprive her of her reversionary right or sufficient to constitute any ground of estoppel which would dispose of the case *Pappammal v Alamelu* 119 Ind Cas 152=A I R 1929 Mad 467 If a Hindu reversioner enters into a compromise which amounts to a settlement of a doubtful claim, it is binding on him, even though at the time when he entered into it he was a mere reversioner. There is nothing to prevent him from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed *Moti Shah v Chandhar Singh* 18 A 637=96 Ind Cas 595 Where an order directing the payment of the decree by instalment was passed at the request of the judgment debtor who subsequently acted upon it he is precluded from contending that the order was not binding on him *Fielding v The Firm of Janaki Das* 95 Ind Cas 243=A I R 1926 Lah 465

A Hindu widow executed a mortgage as guardian of her adopted son subsequently she sold the properties to the plaintiff as her own. The plaintiff sued to redeem the mortgage. Held that the plaintiff was not estopped from denying that the adopted son and not the widow was the owner *Jangayya v Basana* 23 L W 367=94 Ind Cas 639=A I R 1926 M 594 The Zamindari rights in a village were mortgaged and the mortgaged right was sold in Court auction and purchased by a third person, subsequently the mortgagee himself took a lease of the properties from the third person. In a suit for redemption of the mortgage, held, that the mortgagee was estopped from setting up the plea of tenancy *Gauri v Mangla*, 7 L R 171 (Rev)=A I R 1926 All 463 As between a mortgagor and his mortgagee, neither can deny the title of the other for the purposes of the mortgage, but the estoppel does not arise in a suit neither based on nor connected with the mortgage *Deo Kahi v Ranchoor Bur* 92 Ind Cas 19=13 O L J 208=A I R 1926 Oudh 233 Where in case of an alienation a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it, does not object, he cannot challenge the alienation subsequently *Ram Sarup v Ram Saran* 96 Ind Cas 915=A I R 1926 Lah 650 Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit on the mortgage by the mortgagee. *Gurindorao v Huchand* 95 Ind Cas 563=A I R 1926 Nag 446 Where the owner of a property keeps quiet when his property is being sold as belonging to the judgment debtor in execution of a decree, though he was aware of the attachment and sale he is estopped from impeaching the sale *Jhanda Singh v Hornam Singh* 27 P L R 260=A I R 1926 Lah 415 Where the defendant has successfully pleaded in the Small Cause Court, that the suit was one triable by the regular side he ought not to be allowed when the suit is filed on the regular side to turn round and plead that it ought to have been filed in the Small Cause Court *Aatar Singh v Nanda*, 95 Ind Cas 846=A I R 1926 All 664 Where a lease is taken on the understanding that it would be for the benefit of the local public and thus formed part of the consideration for the lease the lessors cannot afterwards turn round and claim an absolute interest in the lands leased and deny rights to the public *Peary Lal v Surendra Nath*, 88 Ind Cas 505=A I R. 1925 Cal. 1233 A mere undertaking may operate

is an estoppel, though it may not amount to a contract *Shailesh Chandra v Bechar Gope*, 84 Ind Cas 121=A I R 1925 Cal 94. Where mortgagee entered into agreement before final decree to pay higher interest to get extension of time, he is estopped in an application by the mortgagee for execution of the agreement, from contending that the agreement could not be enforced in execution *Subramania v Corera*, 86 Ind Cas 723=48 M L J 121. There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law *Imjad v Ashraf*, 2 O W N 83=87 Ind Cas 445=A I R 1925 Oudh 568. A person is not precluded from setting up an inconsistent case in a subsequent litigation. The contention put forward in the previous suit in support of a legal argument cannot by itself become a foundation for any estoppel *Shyama Bai v Purushotham Das*, 21 L W 551=90 Ind Cas 124=A I R 1925 Mad 645. A person is not precluded from setting up an inconsistent case in a subsequent litigation. The contention put forward in the previous suit in support of a legal argument cannot by itself become a foundation for any estoppel—*Shyama Bai v Purushotham Das* 21 L W 551=90 Ind Cas 421=A I R 1925 Mad 645. A party to a submission to arbitration through Court can question the validity of the arbitration proceedings on the ground that the Court had no jurisdiction to refer to arbitration *Punay v Sona Wanjdi*, 52 C 559=42 C L J 26=29 C W N 886=87 Ind Cas 633=A I R 1925 Cal 812. The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase can not be allowed, after the sale has been made after his refusal, to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases *Don Mahomed v But Zohra*, 87 Ind Cas 414.

A person is not entitled to give an undertaking to a criminal Court to abstain from certain action to go and file a civil suit for declaration that the undertaking given by him was of no effect. *Ramsaran v Seo Pratab*, 85 Ind Cas 556=A I R 1925 All 605. Where the vendee under a contract for sale of immovable property stated to the vendor that his (the vendee's) money was ready and that the title deed was being engrossed and where those two matters alone were wanting to complete the sale and where the vendor gave five days notice to the vendee to complete the sale, the vendee was estopped from denying the truth of his statements *Motulal v Haji Moora*, 41 C L J 334=89 Ind Cas 440=27 Bom L R 814.

Where a prior vendee induced a subsequent vendee to believe that notwithstanding prior sale deed the vendor continued to be owner and to purchase property in that belief he is estopped from claiming priority under his sale deed *Mohamed v Arunachellam* 1925 M W N 596=90 Ind Cas 875=A I R 1926 Mad 39=49 M L J 496. The entries in the settlement Record may amount to an admission but they do not amount to estoppel *Malhanlal v Pitamber* L R 6 All 22 (Rev). If a man obtains possession of land claiming under a deed or Will, he cannot afterwards set up another title to the land against the Will or deed though it did not operate to pass the land in question and if he remains in possession till 12 years have elapsed and the title of his testator's heir is extinguished, he cannot claim by possession and interest in the property different from that which he could have taken if the property had passed by the Will or deed *Jageswar v Pandurang* 7 N L J 82=78 Ind Cas 840=A I R 1924 Nag 73. Where there is a contract for sale no decree for possession can be given unless the title is completed by a registered deed and an agreement between parties to call the land cannot act as estoppel so as to do away with the necessity for registered deed of the transfer where the statute expressly requires it *Maung Poyin v Maung Tut Fer* 2 Rang 159=1925 Rang 68. *Dharam Chand v Marji Sahu* 16 C L J 436. *Mahra Mohan v Ram Kumar* 20 C W N 307. But an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract. Situations may arise in which a contract should be held to be an estoppel as in cases where only an adequate right of action would exist in favour of the injured party if estoppel were not allowed. In such a case estoppel may sometimes be available to prevent fraud *Shailesh Chandra v Bechar Gope* 40 C L J 67=1925 Cal 94.

**S 115** for the information of the intending bidders at the preparation of proclamation cannot be heard later or after the sale to plead that the figure was unduly low and the sale should therefore be set aside *Romanathan v Ramanathan*, 117 Ind Cas 705=30 L W 995 A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property *Shanai v Ganpat*, 31 Bom L R 139=119 Ind Cas 156=1929 Bom 227

A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status *Jai Nandan v Lmao*, 119 Ind Cas 568=A I R 1929 All 305

Where a widow makes a gift of her husband's property in her possession as widow, to her daughter and her husband jointly, the daughter's acquiescence for less than 12 years since the death of the widow in the property is not sufficient to deprive her of her reversionary right or sufficient to constitute any ground of estoppel which would dispose of the case *Poppammal v Alamelu* 119 Ind Cas 152=A I R 1929 Mad 467 If a Hindu reversioner enters into a compromise which amounts to a settlement of a doubtful claim, it is binding on him, even though at the time when he entered into it he was a mere reversioner There is nothing to prevent him from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed *Moti Shah v Chandhar Singh*, 48 L 637=96 Ind Cas 595 Where an order directing the payment of the decree by instalment was passed at the request of the judgment debtor who subsequently acted upon it he is precluded from contending that the order was not binding on him *Fielding v The Firm of Janaki Das* 95 Ind Cas 243=A I R 1926 Lah 465

A Hindu widow executed a mortgage as guardian of her adopted son subsequently she sold the properties to the plaintiff as her own The plaintiff sued to redeem the mortgage Held that the plaintiff was not estopped from denying that the adopted son and not the widow was the owner *Rangayya v Basana* 23 L W 367=94 Ind Cas 639=A I R 1926 M 594 The Zamindari rights in a village were mortgaged and the mortgage right was sold in Court auction and purchased by a third person, subsequently the mortgagee himself took a lease of the properties from the third person In a suit for redemption of the mortgage held, that the mortgagee was estopped from setting up the plea of tenancy *Gauri v Mangla* 7 L R 171 (Rev)=A I R 1926 All 463 As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage, but the estoppel does not arise in a suit neither based on nor connected with the mortgage *Deo Kali v Ranchoor Bux* 92 Ind Cas 19=13 O L J 208=A I R 1926 Oudh 233 Where in case of an alienation, a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it, does not object, he cannot challenge the alienation subsequently *Ram Sarup v Ram Saran* 96 Ind Cas 915=A I R 1926 Lih 650 Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit on the mortgage by the mortgagee *Gorindoo v Huchand*, 95 Ind Cas 563=A I R 1926 Nag 446 Where the owner of a property keeps quiet when his property is being sold as belonging to the judgment debtor in execution of a decree though he was aware of the attachment and sale he is estopped from impeaching the sale *Jhanda Singh v Hornam Singh* 27 P I R 260=A I R 1926 Lih 415 Where the defendant has successfully pleaded in the Small Cause Court that the suit was one triable by the regular side he ought not to be allowed when the suit is filed on the regular side to turn round and plead that it ought to have been filed in the Small Cause Court *Kantar Singh v Nanda*, 95 Ind Cas 846=A I R 1926 All 661 Where a lease is taken on the understanding that it would be for the benefit of the local public and this formed part of the consideration for the lease the lessees cannot afterwards turn round and claim an absolute interest in the lands leased and deny rights to the public *Pearry Lal v Surendra Nath*, 88 Ind Cas 505=A I R 1925 Cal 1233 A mere undertaking may operate



as an estoppel, though it may not amount to a contract. *Shailesh Chandra v Bechar Gope*, 84 Ind Cas 124=A I R 1925 Cal 94 Where mortgigor entered into agreement before final decree to pay higher interest to get extension of time, he is estopped in an application by the mortgagee for execution of the agreement, from contending that the agreement could not be enforced in execution. *Subramania v Corera*, 86 Ind Cas 723=48 M L J 121 There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law. *Amjad v Ashraf*, 2 O W N 83=87 Ind Cas 445=A I R 1925 Oudh 568 A person is not precluded from setting up in inconsistent case in a subsequent litigation. The contention put forward in the previous suit in support of a legal argument cannot by itself become a foundation for any estoppel. *Shyama Bai v Purushotham Das*, 21 L W 551=90 Ind Cas 124=A I R 1925 Mad 645 A person is not precluded from setting up in inconsistent case in a subsequent litigation. The contention put forward in the previous suit in support of a legal argument cannot by itself become a foundation for any estoppel—*Shyama Bai v Purushotham Das* 21 L W 551=90 Ind Cas 424=A I R 1925 Mad 645 A party to a submission to arbitration through Court can question the validity of the arbitration proceedings on the ground that the Court had no jurisdiction to refer to arbitration. *Puany v Sona Wangdi* 52 C 559=42 C L J 26=29 C W N 586=87 Ind Cas 633=A I R 1927 Cal 812 The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase can not be allowed, after the sale has been made after his refusal, to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases. *Don Mahomed v Bait Zohra*, 57 Ind Cas 414

A person is not entitled to give an undertaking to a criminal Court to abstain from certain action to go and file a civil suit for declaration that the undertaking given by him was of no effect. *Ramsaran v Seo Pratab* 95 Ind Cas 556=A I R 1925 All 605 Where the vendee under a contract for sale of immovable property stated to the vendor that his (the vendee's) money was ready and that the title deed was being engrossed and where those two matters alone were wanting to complete the sale and where the vendor gave five days notice to the vendee to complete the sale, the vendee was estopped from denying the truth of his statements. *Motilal v Haji Moora*, 41 C L J 334=88 Ind Cas 440=27 Bom L R 814

Where a prior vendee induced a subsequent vendee to believe that, notwithstanding prior sale deed, the vendor continued to be owner and to purchase property in that belief, he is estopped from claiming priority under his sale deed. *Mohamed v Kunachellam* 1925 M W N 596=90 Ind Cas 875=A I R 1926 Mad 39=49 M L J 396 The entries in the settlement Record may amount to an admission but they do not amount to estoppel. *Mahantlal v Putamber*, L R 6 All 23 (Rev) If a man obtains possession of land claiming under a deed or Will, he cannot afterwards set up another title to the land against the Will or deed though it did not operate to pass the land in question and if he remains in possession till 12 years have elapsed and the title of his testator or heir is extinguished he cannot claim by possession and interest in the property different from that which he could have taken if the property had passed by the Will or deed. *Jogesar v Pandurang* 7 N L J 82=78 Ind Cas 840=A I R 1924 Nag 73 Where there is a contract for sale no decree for possession can be given unless the title is completed by a registered deed and an agreement between parties to sell the land cannot act as estoppel so as to do away with the necessity for a registered deed of the transfer where the statute expressly requires it. *Munni Poyin v Munni Titai* 2 Rang 459=1925 Rang 68 *Dharam Chand v Marji Sahu* 16 C L J 436, *Mahar Mohan v Ram Kumar* 20 C W N 307 But an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract. Situations may arise in which a contract should be held to be an estoppel as in cases where only an adequate right of action would exist in favour of the injured party if estoppel were not allowed. In such a case estoppel may sometimes be available to prevent fraud. *Shailesh Chandra v Bechar Gope* 40 C L J 67=1925 Cal 94

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The donee of a property is not estopped from contending that the property does not belong to the donor but was all along his own property *Rudha Kishen v Moolechand*, 76 Ind Cas 128=1925 Lih 27 Where the parties to an arbitration sign the award and as a result thereof one of them withdraws a suit which he would otherwise have prosecuted the other party is estopped from contesting the validity of the award *Monohanlal v Mt Amana* 77 Ind Cas 41

It cannot be said that a Mahomedan tenant in common can be held to be represented by another Mahomedan tenant in common merely because their interests are identical *Karim Baksh v Wahaj Uddin* 46 A 214=L R 5 A 5 (Rev)=22 A L J 73-75 Ind Cas 1035 A mortgagor is estopped from pleading in a suit on the mortgage that he had no title to the property at the date of the document But if the mortgagee is proved to be well aware of the actual facts as regards the mortgagor's title to the property the plea of estoppel is not available to him *Pulnam v Tularam* 1924 Nag 363 Where the alienee from a Hindu father applied to mutation of names and the son on being examined in the proceedings did not object to alienation he is there after estopped from challenging the same as he must be deemed to have represented that it was a valid transaction *Sheodin v Haibullah* 1924 All 721 Where a person gets another's name recorded as owner of a moiety of the property and on the faith of that another purchases it in an auction sale the former can not later on claim ownership of the same *Mathura Prasad v Anand* 21 A L J 498=L R 4 A 505=74 Ind Cas 911 A dispute under s 145 Cr Pro Code relates only to possession of the properties and consequently a compromise of the proceedings does not estop a party from denying the title of the other *Gopi Das v Madhu Lal* 45 A 162=1923 All 77=2, A I J 932

In order to maintain a plea of estoppel in a pre-emption suit it must be proved that the plaintiff believed the representation made and brought his suit on the basis of it *Banke Behari Lal v Manna Lal*, 73 Ind Cas 372 Where the mortgage deed clearly purports to be executed by the mortgagor as the proprietor of the property in his own interest he is estopped from denying the interest which he represented as his own proprietary right in the deed *Brij Tarun v Raghunandan*, 71 Ind Cas 944=(1923) Pat 49

Where a co-sharer had been allowed by other sharers to treat certain land as his exclusive holding and he grants a perpetual lease of a small portion of the land so as to confer occupancy right on the tenant and at a subsequent partition the land was allotted to another co-sharer held that the co-sharer was estopped from disputing the title of the occupancy tenant to the land *Iqbal Singh v Munshi* L R 4 A 54=90 & A L R 435

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage *Brij Ratan v Raghunand*, 1 Pat L R 225=4 Pat L F 47

In a suit for rent defendant objected to the non inclusion of certain plots whereupon plaintiff included the same reserving right to sue upon title afterwards He then brought a suit in ejectment based on title Held that there was no estoppel by conduct *Choudhury Ram Prasad v Ram Chandar*, 4 Pat L F 730 A statement in the Court of an Assistant Collector during the mutation proceedings to the effect that the plaintiff and two others were in possession of the property in equal shares and that mutation of names may be made accordingly, does not prevent the plaintiff from asserting his right to the entire property in Civil Court subsequently *Jamratan v Buda* 90 & A I R 20=72 Ind Cas 832 Where in execution of a money decree the decree holder under a bonafide mistake brought to sale certain of his own properties as those of his judgment-debtor and the sale was confirmed and delivery of possession was made to the purchaser held that the decree holder was estopped from setting up his own title to the properties as against the auction purchaser notwithstanding the fact that the mistake was bonafide *Ram Suman v Anant Lal Uddin*, 15 I W 272=1922 M W N 121 Though a lease of joint family property was actually executed by two out of three brothers still it

was found that the other brother was acting, in concert and in the same interest with the executants of the lease. In the circumstances the brother who did not join in the lease was estopped from disputing the validity of the same. *Raja Ram v Ram Kichay*, L R 3 A 81=65 Ind Cas 577. Where in execution of a decree against several persons, a certain property was attached and sold as that of one of the judgment-debtors, and the others though they had knowledge of the proceedings and were present at the sale raised no objections whatever and even allowed the sale to be confirmed, they are estopped from bringing a suit against the auction purchaser for possession of the property on the ground that they had interest in the same. *Abdul v Mahammad*, 67 Ind Cas 797. Where a purchaser assumes liability for the discharge of certain mortgages on the property and receives consideration therefor, he is bound by them. *Alla Datta v Gnan Singh*, 4 Lah. L J 451. When in rent receipts given by the agent of the Zemindar, the tenants are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zemindar is not estopped from asserting that the tenants had no occupancy rights. *Kanula v Misralal*, L R 3 A 517. One out of two plaintiffs joined in an application with the defendant to the Court, for the case to be referred to arbitration. On the next day G R the other plaintiff made an oral application before the Court to the effect that he accepted the arbitration. The arbitration lasted for over a year and G R conducted the proceedings throughout on behalf of the plaintiffs. An award was duly filed but G R objected to it on the ground that he had not signed the original application to the Court for an order of reference. G R was held estopped by his own action from raising any objection as to the legality of the arbitration proceedings on account of the want of his writing. *Gauri Shankar v Gangaram*, 77 P R 1919=52 Ind Cas 859.

Where a mortgagee on inquiry by an intending vendee gives him the exact amount due on his mortgage and the latter acts on this information and retains that amount out of the purchase money for paying off the mortgage, the mortgagee is estopped from recovering any larger amount from the vendee. *Secretary v Punjab National Bank Ltd*, 111 P R 1919. When a mortgagee takes a mortgage from a person in possession and obtains possession from him, he is not permitted to question the mortgagor's title. *Surendranath v Khutndra Mohan*, 29 C L J 431=52 Ind Cas 59. A mortgagee brought a suit for possession of the mortgaged property against a person whom he treated as the successor of the original mortgagor and obtained a decree, subsequently when the said representative of the mortgagor sued the mortgagee for redemption of the mortgage, the mortgagee is estopped from disputing his right to represent the original mortgagor. *Gorind v Chokke*, 49 Ind Cas 356.

A person seeking to create title to real property by estoppel must satisfy the Court that he had neither actual nor constructive notice of the title of the real owner and had not before him any circumstances which could put him on reasonable equity to find out the truth. The Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable enquiry. *Venkatarama v Venkatarama* 50 Ind Cas 969=9 L W 318=(1919) M W N 180. The trustee of a temple, who, for his own private purposes, mortgages land which is afterwards sold in Court auction at the instance of the mortgagee, can sue on behalf of the temple to recover the land lord's interest, which was dedicated to the temple, and is not estopped from setting up a claim against a bona fide purchaser for value that it is trust property. *Yasim Sahib v Ekanbera Aiyar*, 37 M L J 698=26 M L T 141=10 L W 672=54 Ind Cas 497. Where a person by his conduct in a redemption suit had elected to affirm the sale and to act upon it he is estopped from suing for the cancellation of the sale of equity of redemption on the ground of fraud. *Chanham v Behari Lal*, 52 Ind Cas 513. Where a person purchases property subject to a mortgage he is not by that sole fact estopped from disputing the validity of or the consideration of the mortgage. *Bila Prosad v Surin Singh*, 28 P W R. 1919=49 Ind Cas 997. It is not open to the lessee of a mortgagor in a suit brought for his ejectment by the auction purchaser in execution of a decree on the mortgage, to question the validity of the mortgage. *Sashi Bhusan v Deb Nath*, 60 Ind. Cas 705.

**S 115** Where parties enter into a binding agreement by which they give up certain rights, which they allege they have, in consideration of certain proceedings in Court being brought to an end, they cannot thereafter allege the continuing existence of those rights *Mahomed Ibrahim v Chandan Singh*, 63 Ind Cas 727

The fact that permanent structures are constructed on the lands of the defendant to the knowledge of the plaintiff would not estop him from denying the permanent character of the tenancy of the defendants *Onkar Mal v Secretary of State*, 56 Ind Cas 814 But where the plaintiff having, by his conduct permitted the defendants to believe that they would have the right of using the water of a well if they would repair it and the defendants relying upon the permission had acted upon the belief that they would be entitled to that right the plaintiff was estopped from denying the right of the defendants under s 115 of the Evidence Act *Ananta Murarad v Gunn Nitha* 22 Bom L R 415=57 Ind Cas 143 A dispute was settled by arbitration Subsequently two of the arbitrators purchased the interest of one of the parties to the dispute and sought to upset the arrangement arrived at as a result of the arbitration In the circumstances they were estopped from doing so *Budhai Singh v Karan Singh*, 55 Ind Cas 506 When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward to impugn it *Muhammad v Wah*, 2 Lrn L J 306 Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage against the subsequent transferees and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagees *Sakhmuddin v Somaulla*, 22 C W N 641 After settlement of account a party is estopped from suing for an item as being omitted U B R (1892 1896) Vol II, 387

Where in an application to execute a decree which provides for no interest, the decree-holder puts in a prayer as to the award of interest and the judgment-debtor accepting his liability to pay the decretal debt as well as interest obtains from time to time adjournments from the Court to enable him to pay the amount he (the judgment debtor) cannot at a later stage of the proceedings dispute the item of interest and is bound to pay interest from the date on which he admitted his liability to pay interest *Narayan v Raoji*, 6 Bom L R 417=28 B 393

A party cannot take benefit of a transaction and at the same time repudiate it when the transaction is one and indivisible Where the property of a judgment debtor is sold in execution of a decree and the sale proceeds go in satisfaction of the decree, and the judgment debtor accepts the payment of the decree he cannot impeach a part of the sale *Annapurnabai v Ramchandra*, 13 Ind Cas 178

Where two persons embark upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property, it is the legal duty of each to inform his co mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is contemplated by s 115 of the Evidence Act and operates as estoppel, *Pandurang v Narayan* 44 Ind Cas 317

A judgment-debtor got in execution sale postponed on undertaking that he would not raise any objection on the ground of regularity or irregularity After the sale took place on the postponed date he applied to set it aside on the ground of an illegality or irregularity of which he was cognizant at the time he gave his undertaking *Held* that he could not be allowed to impeach the sale *Lakshmi Prasanna v Rajendar*, 17 Ind Cas 531

A party should not be allowed to take up a position inconsistent with that on which he has succeeded in defeating a claim in a previous proceeding brought to enforce it *Basit Begam v Sayyad Mirza*, 21 O C 188=47 Ind Cas 553 A landlord who withdraws the amount deposited by the transferee of a non transferable holding to set aside its sale under s 310 A of the C P Code of 1882 without

raising any objection, cannot plead subsequently that the transferee did not, by his purchase acquire a valid title to the holding *Gadadhar v Madnapur Zemindary* 27 C L J 385=43 Ind Cas 742 Where the plaintiff had in a prior suit brought against him by the defendant agreed to give up possession of the land in dispute to the defendant by a deed of compromise, the deed of compromise executed by the plaintiff in the earlier suit operated as a relinquishment of his right, title and interest in the land, and he is estopped from alleging that he had a subsisting title to it *Chhanga v Phumman*, 46 Ind Cas 7

A person who accepts a position conferred on him or her by a Will cannot at the same time repudiate so much of the Will as conveys an interest to another person *Durga Das v Ishan Chandia*, 44 C 145 Section 72 of the Contract Act should be read subject to the law of estoppel *Solomon Jacob v The National Bank of India Ltd* 19 Bom L R 789 The delay of nearly five years prior to the suit for rescission of contract on the ground of defect in title of plaintiff's vendors and onerous covenants is highly prejudicial to the defendant's vendors, especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects Plaintiff's conduct in enforcing the contract against his vendee and laches of five years work out an estoppel against him and equally debar him from enforcing his claim *Sorabji v Tarachand*, A I R 1930 Sind 66 A purchaser at a Court sale buys a property with all risks and with all defects in the judgment-debtor's title except where it is found that the latter has no saleable interest at all The object of notifying the encumbrance is to warn the purchaser that he is buying the property subject to the claim which may be put forward against the property but it does not mean that the encumbrance charge or any other claim against the property has been established In connection, therefore, with the sale of immovable property subject to an encumbrance the auction purchaser is entitled to contest the factum and the validity of the encumbrance There is no rule of estoppel which can prevent him from impeaching the charge on the property *Mt Man Kum v Ishar Das* A I R 1930 Lah 40, see also *Iatunmessa v Partab Singh* 31 A 583=36 Ind Cas 203 (P C) *Aqa Sultan v Mohabbat Khan*, A I R 1921 All 79=43 A 489, *Ganesh Moheshwar v Puroshotam* 33 B 311=11 Bom L R 26 *Narayan v Umbor*, 35 B 275=13 Bom L R 307=10 Ind Cas 913 The fact that after the death of the successful pre-emptor the vendor himself has become the legal representative is not enough to estop the latter from taking the benefit of the decree *Brindaban v Durag Singh*, A I R 1920 All 220

### 116 No tenant of immovable property, or person claiming

Estoppel of tenant,  
and of licensee of per-  
son in possession

through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such

immovable property, and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given

**Principle** 'Where a man having no title obtains possession of land under a devise by a man in possession who assumes to give him a title as tenant he cannot deny his landlord's title That is a perfectly intelligible doctrine He took possession under a contract to pay rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord and having taken it in that way he is not allowed to say that the man who gave title he admits and under whose title he took possession has not a title That is a well established doctrine That is estoppel by contract' *Per Jessel M R in In re Stranger's Estate*, L R 6 Ch D 9, 10 In *Cooke v Loxley* 5 T R 4 Lord Kenyon C J said "Conforming to the uniform decisions in all the cases upon this subject,

**S 116** I rule at the trial, and continue to entertain the same opinion, that in an action for use and occupation it ought not to be permitted to a tenant, who occupies land by the license of another, to call upon the other to show the title under which he let the land. This is not a mere technical rule, but is founded in public convenience and policy. And the only question is whether that rule shall still prevail if it do it applies equally strongly to the present case as to all others. Here the defendant who occupied the land, did so by the permission of the plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff's right but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title, such an action as the present does not involve the question of title. In the same case *Grose J* said "It has been said that the rule of not giving in evidence *nil habuit in tenements* in an action for use and occupation is a technical rule but in my opinion, no rule is better founded in justice and policy than this. The general rule is admitted that in such an action as this the tenant cannot dispute the landlord's title, and no exception to it has been shewn applicable to this case." "The principle is that a tenant shall not contest his landlord's title on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession." *Per Lindal C J* in *Doe dem Manton v Austin* 9 Bing Rep 41

**Scope of the section** The estoppel of a tenant is one of the most noticeable instances of estoppel by conduct. Similar cases of estoppel are those of bailees licensees and agents who cannot deny the title of the bailors licensors or principals after having acknowledged them by their dealings. *Coelle Cas Ev* 53. By this section a tenant is only precluded "during the continuance of the tenancy," from denying that the landlord had "at the beginning of the tenancy," a title to the property, the subject of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has expired subsequently. *Balalushaba v Abat Amrita* 11 Bom L R 1093. In the same case *Batchelor J* in delivering his judgment said "The law on this branch of estoppel is contained in s 116 of the Evidence Act which in express terms limits the unassailability of the landlord's title of the continuance of the tenancy, and during the continuance of that the tenant is not permitted to deny that his landlord had a good title at the beginning of the tenancy. These words leave it open to the tenant to show that his landlord's title has expired and in these respects the Evidence Act followed what has long been the law in England see for instance *Delany v Fox* 2 C B N S 768 and *Neave v Moss* 1 Bing 60. And that this is the clear meaning of the section has been accepted in India. *Ammu v Ram Krishna Sastri*, 2 M 266 and *Subboraya v Krishnayya* 12 M 422. So the tenant is not estopped from showing that the title of his landlord has expired since the tenancy commenced or that the land in question is not comprised in the lease. There is no inconsistency in holding the land and at the same time proving such matter. *Coelle Cas Ev* 53. A tenant cannot allege that his landlord has only an equitable interest. *Francis v Doe d Horley* 4 M & W 331, *Dolby v Iles* 11 Ad & El 335, *Board v Board* L R 9 Q B 53 per *Blackburn J*. A tenant who takes premises from lessors as trustees of the joint estate of two persons, is estopped from alleging that they are trustees for only one of them. *Fleming v Gooding* 10 Bing 549. Two conditions require to be satisfied to create that consideration upon which the estoppel is founded. Possession must be given to the tenant and the tenant must take possession by landlord's permission. *Bigelow on Estoppel*, 5th Ed 509. *Casperx on Estoppel* p 100. The principle upon which such cases rest is one of the broadest in the law to wit, that one who has received property or money from another shall not dispute the title of that person or his right to do what he has done. *Bigelow on Estoppel* 5th Ed 545. In *Doe d Knight v Smythe* 4 M & S 348 at p 349 *Dampier J* said "The tenant in possession paid rent to the lessor and then disclaimed. But he ought to give back the possession to the lessor, and after that the defendant may have her ejectment. It has been ruled often that neither the tenant nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, he must deliver up the premises to his own landlord. This I believe, has been the rule for the last twenty five

year, and as I remember was so laid down by *Buller J* upon the western circuit" S 116  
That case was decided in 1815. So this rule is not a very ancient one. See  
also *Doe d. Bristol v. Pegge*, 1 T R 758.

Where a person entitled as co partner made a lease of the whole land, the tenant, after having entered and paid rent, was estopped from denying that the heir and privy in blood to the lessor was entitled to the whole. *Weeks v. Birch* (1894) 69 L T 759. In ejectment by a superior landlord against a lessee the latter cannot dispute the title of the former (*Baruch d. Mayor of Richmond v. Thompson* 7 T R 488, and where an intermediate landlord is introduced, the lessee, if he has occupied with notice of the lease to such landlord cannot question his title. *Renne v. Robinson*, 1 Bing 147. The relation of landlord and tenant is also virtually created so far as the question of estoppel is concerned, where a party enters into possession of land under a contract to purchase it, and such a person until ousted or disturbed in possession by one having a paramount title, will not be permitted in an action for possession by the party under whom he entered to get up a title inconsistent with his. *Bigelow on Estoppel* 5th Ed pp 545-547. But this section does not debar one, who has once been a tenant from contending that the title of his landlord has been lost or his tenancy has been determined. It precludes him only during the continuance of the tenancy from contending that his landlord had not title at the commencement of the tenancy. *Immu v. Ramkrishna*, 2 M 226. In a suit to eject a tenant holding over after the expiration of his lease, it is not incumbent to the tenant to set up that his landlord the plaintiff holds under an invalid *lakheraj* tenure and that the zemindar and not the plaintiff is entitled to the land. *Mohesh Chunder v. Gooloo Pershad Mörsh* 337=2 Hvy 473. So also where the plaintiff sued to recover possession of a house from the defendants alleging that they were his tenants under a lease which he had granted to them and that though the term of the lease had expired, they refused to vacate, the defendants having passed the *Kabuliyat* to plaintiff could not be heard to deny the latter's title as ground for refusing to give up possession. *Patel v. Hargovan*, 19 B 133. Plaintiff alleging a purchase of land from A and B and that he afterwards granted them a *Patta* and retained them in possession, sued to recover possession on the ground of the tenancy having expired. He tendered in evidence a consent decree obtained against B for arrears of rent. Held that the decree worked no estoppel against B by virtue of s. 116 of the Evidence Act and did not relieve the plaintiff for the necessity of proving his case completely. *Soldar Mondal v. Vilcomal* 1 C L R 328. Two persons mortgaged certain property, and five years later joined with another person in executing a lease of certain lands including a portion of the mortgaged property. In a suit on the mortgage to which the lessee was made a party defendant, it was held that the lessee was not owing to the lease taken by him five years after estopped from showing that the mortgagors were not, at the date of the lease, entitled to the whole of the property comprised in the mortgage. *Prosunno Kumar Sen v. Mahaborat* 7 C W N 575. A person who obtained possession of property from another is estopped from denying the title of that other to the property at the time he was so let into possession. But where the defendant obtained possession of certain property under a rental agreement from one S who was the manager of certain charity to which the said property was attached held that the defendant was not estopped from showing that S although he was entitled to manage the property, was incapable of disposing of it by Will and that therefore the executors appointed under the Will had no title to the property. *R. Vaidyanada v. Subramania*, 4 L W 349. A co-sharer landlord purchased the holding of the tenant at a rent sale in execution of a decree for his own share of the rent and resettled the whole holding with the same tenant. He did not secure to the tenant peaceful possession of the whole holding. The principle of equitable estoppel has no application to a case like this. *Nora Narayana v. Kali Mohan*, 43 Ind Cas 47. A tenant in possession cannot even after the expiration of the tenancy, deny his landlord's title without actually and openly surrendering possession to him. *Maham Singh v. Barshah Ramshah* 50 Ind Cas 591. (37 Ind Cas 7 21 C L J 163 23 C W N 1335 33 Ind Cas 97, 37 All 557 foll), see also *Ekoba Govindshet v. Dayaram*, 22

**S 116.** Bom L R 82=55 Ind C 353, *Wah Lal sh v Lal Khan* 67 Ind Cas 263, see also *Mahomed v Ubiro*, 89 Ind Cas 390=12 O L J 501, *Mahomed v Zahnuddin*, 101 Ind Cas 771, *Pundlik v Utluda*, 97 Ind Cas 992, *Dayalal v Ko Lon*, 6 Rung 637, *Sudil v Mahomed* 21 S L R 185, *Verannes v Robinson* A I R 1928 Rung 162. A person who executes a lease in favour of another, is estopped from denying that other's title to grant the lease. It is immaterial whether he was the tenant of some other person before the execution of the lease *Chandoo v Purbhoo*, 59 Ind Cas 707. A person entering into a covenant in his *habuliyat* is bound to recognise rights so recorded even if such rights were incorrectly recorded and had no real existence. *Mednapore Zemindari Co Ltd v Nages Narain*, 38 C L J 317=63 Ind Cas 161, *Samsuddin v Aga Syed*, 9 O & A L R 1041.

A tenant is not estopped from questioning the title of a landlord from the mere fact that he had paid rent to him as the recorded *Malguzar* *Seth Suyun Chand v Lala Chhababam*, 18 N L R 11=1922 Nag 60. Entries in revenue records as tenant for a long time raises a presumption of correctness which has to be rebutted but tenants are not entitled to a declaration under s 42 of the Specific Relief Act of his title as regards the land *M T Jai Kuar v Lathu* 4 Lah L J 207=(1922) J ah 163. Where rent is paid but not under circumstances which would establish a relationship as between the parties of landlord and tenant the tenant is not estopped from showing that the person to whom he paid the rent is not the landlord *Abdul Rajjal v Promada Sundari*, 80 Ind Cas 22. Tenant in possession prior to lease also is estopped *Meal Ram v Mt Bhola* A I R 1925 J ah 60. Where a tenant takes land from one person but after him pays rent to another he is not estopped from disputing title of that other *Abdul Rajjal v Promada Sundari* A I R 1925 Cal 482. Where a property is leased by a person without title to it and the lessee is ejected by the true owner it is not open to the lessee in a suit by his lessor against him to deny the plaintiff's title *Mota Lal v Yar Mahomed*, 47 A 63=85 Ind Cas 756=A I R 1925 All 275.

Though the tenancy may be continuing it is quite open to the tenant to plead and show that his liability to pay rent has wholly or partially or for a time ceased. Such a plea does not amount to disputing the landlord's title but is really one of confession and avoidance. One such plea is that of non liability to pay the rent on the ground that the lessor's title has been defeated by a title paramount. In the case of complete eviction it is not quite easy to see the distinction as the question of continuance of the tenancy and the question of eviction by title paramount terminating the liability to pay the rent would go hand in hand. But in the case of a partial eviction demanding not suspension but abatement of rent the distinction is quite apparent. An attornment to a third person is a disclaimer but attornment in the sense in which the word is used in English Law is not a mere agreement in favour of a third party to pay rent but has been defined as the act of the tenant putting one person in the place of another as his landlord *Jogendra Lal v Mahesh Chandra*, 55 C 1013=32 C W N 539=112 Ind Cas 172=47 C L J 387. Where the rights of the vendors of the plaintiff had become extinguished by adverse possession of plot of land by defendant for more than 12 years the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot *Maning Ba Than v Maning Sen Wm* A I R 1929 Rang 170. Where the mortgagees in possession allow the mortgagors to remain in occupation of the mortgaged properties as tenants and the mortgagors duly execute and register the lease, the relation of landlord and tenant subsists between them and the mortgagor cannot be allowed to turn round and plead that the lease they executed should not be interpreted as a lease *Isa Ram v Krishna Chand* A I R 1930 Lah 386=120 Ind Cas 602, see also *Morton v Woods* L R 3 Q B 658 s c L R 4 Q B 293.

The mere fact that a person has taken a lease from the Municipal Board cannot stop him from setting up his own title as against a third person, who was no party to that lease. If any estoppel arose, it would have been only as



between the lessor and the lessee *Tila Ram v Moti Lal*, A I R 1930 S 116  
All 229

**Immoveable property** A several fishery is an incorporeal hereditament and would be considered real or immoveable property, and therefore this section applies to such a case *Lal shman v Ramji* 23 Bom L R 939. Whatever may have been the nature of a person's possession prior to a lease, once he takes a lease deed in respect of the land from another, he is thereafter estopped from denying the title of his lessor *Sital Prasad v Badri Prasad* 20 A L J 907=L R 3 A 623. This section is applicable in the case of immoveable property only *Maung Kyue v Maung Kata*, 99 Ind Crs 996=A I R 1927 Rang 94.

**No tenant** "The true ground of estoppel is 'according to the judgment of Vice Chancellor Sir P W Page Wood, in *Longford v Selmes*, 3 K & J 220, 229 "that a tenant may not dispute the right of his landlord by saying that he had nothing in the property. It is equally clear he observes, that he may, nevertheless, show that the landlord had in interest at the date of the lease, which has since determined." The ground of the doctrine, is stated by *Lush J*, in *Morton v Woods*, (1868) L R 3 Q B 658 at p 671, is that 'in as much as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters premises, so long as he continues in possession, he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement, in other words he cannot set up that the landlord has no legal title'. The principle is exactly expressed by *Palls C B* in *Wagan v Doyle*, (1883) 12 L R Ir 69, 72,—"The defendant is estopped from alleging that his lessor had not, at the time of letting, any estate in the premises. He may, however, on proper pleading show, that the estate which the lessor had at the time of letting had expired before the commencement of the action'. A tenant may dispute the title of one from whom he did not get possession, and to whom he has not attorned, in the strict sense of the word, at the request or with the privity of the person from whom he did get possession *Gregory v Doulge*, 3 Bing 471, *Cornish v Scovell* 8 B & C 471, *Lal Mahomed v Kallames*, 11 C 519. A tenant who has repeatedly acknowledged that a person in possession of the proprietary right was entitled to receive rent, and who has in fact attorned to him, cannot afterwards be allowed to question the validity of the title of such person, for the reason that the instrument by virtue of which possession of the proprietary right had been obtained was unregistered *Shums Ahmed v Ghoolam Mohen*, 3 N W P 143. A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title, he may show that the title is in some third person or in himself *Venkata v Inyama*, 31 M L J 712=20 M L F 457=36 Ind Crs 817 (F B). A grantee of lands so long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor and in alienation from such grantee is similarly estopped and the alienation itself is invalid as against the trustee of the temple. Section 116 of the Evidence Act is not exhaustive of the law of estoppel *Thayelbagam v Venkatarama Krishnayam*, (1916) M W N 49=33 Ind Crs 858. This section applies not only to tenants let into possession at the beginning of the lease but also to tenants who are already in possession and continue in it *Adawat v Dandi* 25 Ind Cas 615. An adverse action taken by a third party, whether that third party be the Government or some other rival claimant cannot have the effect of terminating the relationship of landlord and tenant and the tenant will be estopped by this section from denying the landlord's title *Kunthum v Kannan Phala*, (1918) M W N 376=8 L W 44=45 Ind Crs 635. Under this section a tenant is precluded from denying the title of the landlord but it is open to him to question the status of his landlord *Loloram v Bulya Bai*, 53 Ind Cas 43. A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in

**S 116** his lessors' title or that his execution of the lease was procured by fraud, misrepresentation or coercion *Malham v Bushall*, 123 (P R) 1919=30 Ind. Cas 591 A tenant inducted of land by one person cannot alter by the character of his possession and make it adverse to the landlord going over to another person and paying rent to him *Abdul Halim v Pana Ma*, 11 Ind. Cas 191 A tenant cannot deny the right of the person from whom he took the tenancy *Janti v Jam Sahai* L R 1 A 393, *Sital Prasad v Badri*, 69 Ind. Cas 617 A tenant can prove eas or of landlords title by ouster by paramount title holder and can attorn to the latter on ouster *Ramaswami v Nagapillai*, A I R 1925 Mad 113 see also *Nagapillai v Ramaswami*, 49 M L J 740, *Katuri v Ayyararu*, 101 Ind. Cas 892, *Hopcroft v Keys* 9 Bing 613

Where in a suit by a landlord against his tenant the execution of the lease has been admitted, the tenant is estopped from questioning or challenging the landlord's title *Rathiram v Nandlal*, 103 Ind. Cas 121=A I R 1927 Lah. 626 This section of the Evidence Act is designed to meet the case of a tenant who has been put in possession by his landlord and is based on the provisions of English law which enacts that a tenant who was so let into possession could not deny his landlord's title The plea of estoppel is of no avail where tenants are not put into possession by *habuyats* entered into by certain members of the tenant's family on account of a misapprehension as to their legal position or by any lease executed by the landlord, the tenants remaining in possession of their own *Sir* plots and the execution of the *habuyats* having no effect upon their position or upon their title *Bishu Nath Saran v Suraj Pal Singh*, 4 O W N 1037 Where the tenancy itself is in question the tenants are not estopped from disputing the landlord's title *Bharan Lallu v Umar* 51 B 43=29 Bom L R 97=100 Ind. Cas 1004=A I R 1927 Bom 129 This section applies to cover where the lessee is let into possession by the landlord *Ramman v Asurn* 108 Ind. Cas 182 When a person has attorned to the lessors as a tenant it does not lie in his mouth to question in any manner whatsoever the title of the lessors *Kesoram v Bonamali*, 45 C L J 249=103 Ind. Cas 93=A I R 1927 Cal 941 but see *Kumar Kumakhyia v Surendra*, A I R 1928 Pat 284 "The rule said *Best C J* in *Alchome v Gomme* 2 Bing 54, "which prohibits a tenant from disputing in a Court of law the title of his landlord, is a wise rule tending to general convenience I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that a landlord could not justify a distress in all of these, however, the right of the landlord to demise has been admitted, and the plea has been either that his title has since expired or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent, these cases therefore rather confirm than impeach the general rule but the tenant here broadly disputes the lessor's right to demise

Or person claiming through such tenant When the relation of landlord and tenant is once established it attaches to all who may succeed the tenant, immediately or remotely, and the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own *Crease v Barrat*, 1 Croup M & R 919 The assignor of a lease is estopped equally with his assignor *Taylor v Needham* 2 Taunt 278 *Johnson v Mason* 1 Esp 89, *Doe d Bullen v Mills*, 2 Ad & El 17 *Doe d Manton v Plomer* 9 Bing 41 But a third person not claiming possession of the land, who has brought goods on to the land by the license of the tenant, is not estopped from disputing the lessor's title *Tadman v Henman*, (1893) 2 Q B 168 So persons not claiming possession of land through the tenant are not estopped from denying the title of the lessor *Maharaja of Jaipur v Surjan Singh* 44 A 671=20 A L J 615=(1922) A 333 Where the lessors accepted and acted upon the *habuyat* the lessors as well as the persons claiming under them are equally estopped from denying the validity of the lease *Hari Mondol v Durjodhan*, 94 Ind. Cas 661=A I R 1926 Cal 832 The estoppel operates against persons claiming through the tenants as for instance sub-lessees *Casperx on Estoppel* 107 *Doe d Knight v Smythe*, 4 M & S 347 *London and A W Rail Co v West* L R 2 C P 353, *Barwick v Thompson*, 7 T R 458

During the continuance of the tenancy A tenant cannot, in the absence of fraud or mistake, question the title of a person to whom he has attorned (*Gravenor v Woodhouse*, 1 Bing 38, *Hall v Butler*, 10 Ad & El 201, *Doe d Marlow v Wiggins* 4 Q B 367), or paid rent (*Carlton v Boucoel*, (1885) 51 L T 659) or at whose hands he has submitted to a distress, (*Panton v Jones* 3 Camp 372 *Cooper v Blandy*, 1 Bing N C 45) A tenant is, as has already been observed not estopped from showing that his landlord's title has expired *Neave v Mors* 1 Bing 360 *England v Slade* 4 T R 682 *Doe d Marriot v Edwards* 5 B & Ad 1065, *Downs v Cooper*, 2 Q B 256, *Doe d Stode v Seton*, 2 C M & R 728 *Mounting v Collier*, 1 El & Bl 630, *Doe v Watson*, 2 Stark 230, *Fenner v Duploel*, 2 Bing 10, *Hill v Saunders*, 4 B & C 529 *Doe v Ramsbotham*, 3 M & S 516, *Doe v Bolton*, 11 Ad & El 307, *Clark v Adie*, 2 App Cas 423 By this section a tenant is only precluded, 'during the continuance of the tenancy,' from denying that the landlord had 'at the beginning of the tenancy' a title to the property, the subject of the tenancy The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired *Bala Klashaba v Abai Annita*, 11 Bom L R 1093, see also *Subbaraya v Krishnappa* 12 M 422 Where the defendant is adjudged a tenant of the plaintiff he is estopped under this section from denying the title of the plaintiff at the beginning of the tenancy *Chhadamm v Parbati* A W N 1884, 274 A tenant cannot, during the continuance of the tenancy, be permitted to deny that his landlord had a good title at the beginning of the tenancy The relation of landlord and tenant continues until it is proved to have ceased *Devahaju v Mahamed*, 36 M 53=19 Ind Cas 555 but see *Yerraganta v Mullumalla*, 25 Ind Cas 721 A tenant who has been let into possession cannot deny his landlord's title how ever defective it may be, so long as he has not openly restored possession by surrender to his landlord *Mussamet Bala Kunwar v Dessing*, 19 C W N 1207 P C=29 M L J 335, *Muhammed Mumtaz v Nawrang*, 60 Ind Cas 502=3 Lah L J 227 In a suit brought by the plaintiff in ejectment on the expiry of the lease it is not open to the defendant under s 116 of the Evidence Act to say that the plaintiff is not the sole landlord when the defendant had been inducted on the land by the plaintiff and when the lease in favour of the defendant had been executed by the plaintiff alone *Alimuddin v Hanaddin*, 34 Ind Cas 534 This section only operates as an estoppel during the continuance of a tenancy and not after it has come to an end A tenant is liable to pay rent to the person who has the real title *Mahadeo v Jamarayan*, 62 Ind Cas 850 But it is open to the tenant to prove a subsequent cessor of the landlord's title and one way in which the tenant can show that the title had determined is by proving an eviction by title paramount or the equivalent of such an eviction *Ramchandra v Pramatha Nath*, 63 Ind Cas 754 A person who has lawfully come into possession of land as tenant from year to year or for a term of years cannot set up during the continuance of such relation any title adverse to the landlord inconsistent with the legal relation between them and however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation title as owner of any other title inconsistent with that under which he was let in possession *Sidi Haji v Mahamed Faruq* A I R 1926 Sindh 71 (34 M 246 37 M 1 and 21 M 153, followed) The tenant is concluded for ever from filing a suit on his title if a suit is filed against him in ejectment during the continuance of the tenancy and is decreed against him *Vertaunes v Robinson*, A I R 1928 Rang 163 A tenant is not estopped even before or after the expiration of the term from showing that his lessor's title is determined *Downs v Cooper*, 2 Q B 256, *Langford v Selmes* 3 K & J 220, 229, *Gipps v Bael land*, 1 H & C 236 *Wogan v Doyle* 12 L R Ir 39, *Sergeant v Nash Field & Co* (1903) 2 K B 304, 312 C A But if the tenant came into possession under the lessor, the better opinion would seem to be that he must surrender possession before he disputes his lessor's title *Doe v Smythe*, 4 M & S 317, *Bills v Westwood*, 2 Camp 11, *Halsbury Vol 13*, p 104

At the beginning of the tenancy The words "at the beginning of the tenancy" in this section only apply to cases in which the tenants are put into

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possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. *Lal Mahomed v Halliames* 11 C 519 See also *Gregory v Dodge*, 3 Bing. 471, *Cornish v Scurrell* 8 B & C 171, *Ashta v Melli* 73 Ind Cas 170=1923 Lah 143 The words 'at the beginning of the tenancy' are expressly inserted in section 116 of the Evidence Act to show that the tenant is prevented from showing that after the tenancy commenced the estate of the landlord devolved on some other person and the defendant or the person through whom he claims is not entitled to deny that the plaintiff or the person through whom he claims is the owner, during all the time that the relation of landlord and tenant subsists and right up to the time that relation hip ceases to exist. *Ganpat v Mulan*, 11 A L J 263=38 A 226=33 Ind Cas 97 This section is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy or that since its commencement it has expired or has been defeated because the bar operates only during the continuance of the tenancy. *Lama Suami v Ilanga Pillai* 79 Ind Cas 881=1923 Mad 113 This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property. He is not estopped from saying that on the death of the lessor the property did not devolve on the plaintiff but devolved on some body else. *Mudan Lal v Mt. Gour Das*, 26 A L J 1255=110 Ind Cas 376=A I R 1923 All 650

**How a relationship of landlord and tenant is created** A relationship of landlord and tenant can be created either by written contract or by verbal contract, when the landlord has put the tenant in possession of the land. It may also be inferred from the payment of rent, attornment or other circumstances. *Casperzon Estoppel* 102 If once the relationship of landlord and tenant is established between the parties the tenant would be estopped from disputing the landlords' title. There are no words in this section to show that the tenant must be put into possession by the landlord in order to estop the tenant from disputing the landlords' title. The question in each case is whether a new tenancy has arisen. Of course in support of the contention that there was no relation of landlord and tenant between the parties the tenant may assert that the contract of tenancy is void or voidable on account of misrepresentation or fraud. *Shankar v Jagannath*, 30 Bom L R 741=111 Ind Cas 911=A I R 1923 Bom 165 Payment of rent is evidence of permissive occupation and in all cases furnishes a strong presumption against the tenant. It furnishes the landlord with a *prima facie* case but the circumstance is always open to explanation, and where rent has been paid under a mistake or upon misrepresentation, it is open to the tenant to rebut the presumption. *Grazenor v Woodhouse* 1 Bing 38, *Bogers v Pitcher* 6 Faunt 202 *Casperzon Estoppel* 113, *Williams v Bartholomew* 1 B & P 326 *Doe v Charles Perke* Ad Cas 239, *Fenner v Duploel* 2 Bing 10, *Doe v Barton* 11 Ad & El 307 *Doe v Francis* 2 M & R 57, *Doe v Brown*, 7 Ad & El 447 *Hall v Butler* 10 Ad & El 204, *Carlton v Boucoek* 51 L T 659, *Sergeant v Nash*, (1903) 2 K B 304 C A *Knight v Cox* 18 C B 645 But in any case he must show a better title in some one else and he is not allowed simply to impeach the title of the person to whom he has paid rent. *Halsbury* Vol 13 p 405 *Carlton v Boucoek* 51 L T 659 He can also rebut the presumption by making out a very strong case. *Rogers v Pitcher*, 6 Taunt 202

**Landlord is a benamidar** In cases where the doctrine of estoppel does not come into play, it is open to the tenant defendant to urge that the plaintiff, as benamidar for the beneficial owner is not entitled to claim rent from him. *Rahmannessa v Mahadeb* 12 C L J 428 In that case at page 431 *Mr Justice Moolerjee* said "The District Judge, as we have already stated, has held that it was not open to the defendant to urge that the plaintiff was a mere benamidar for Mahkhan Lal and could not consequently claim rent from him. In support of this view, he has not mentioned any judicial decision, but in fact the view taken by him is opposed to a long series of decisions of this Court amongst which reference may be made to the cases of *Donelle v Kedarnath* 16 W R 186=7 B L R 720, *Kedarnath Chuckerbutty v Donelle*, 20 W R

352, *Inderbuttee Koor v Sheikh Mahboob Ali*, 21 W R 44 and *Kailash Mondal v Baroda Sundari Dasi*, 24 C 711, possibly also reliance may be placed to some extent upon the case of *Jaynarain Bose v Kadimbini Dasi*, 7 B L R 723. In some of these cases, there are expressions to be found in the judgments to the effect that the doctrine of estoppel recognised in English law should not be adopted in this country. It is not necessary for us to consider, whether this view is not too widely expressed and whether such a position could be maintained in view of the provisions of section 116 of the Indian Evidence Act. It is sufficient for us to hold that in cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the plaintiff is *benamidar* for beneficial owner is not entitled to claim rent from him. We may point out that in the case before us no question of estoppel arises. As already explained, the defendant was a tenant of the *Maharaja of Budwan*. The plaintiff claims to intervene and to receive rent from the defendant on the ground that an intermediate tenure has been created in his favour by the *Maharaja* on the 2nd November, 1905. It is not alleged either that he was the landlord of the defendant at the inception of the tenancy, or that he induced the defendant into the disputed land. Consequently upon the authority of the decision of this Court in the case of *Lal Mahomed v Kallanees*, 11 C 519, we must hold that no question of estoppel arises. We may also observe that as explained by this Court in the case of *Lodai Mollah v Kally Das Roy*, 8 C 238, the plaintiff cannot possibly maintain the position that the defendant is not entitled to question his title. As was pointed out by the learned Judges in the case last mentioned, even where the plaintiff claims by a derivative title and the defendant has attained to him the defendant is not thereby estopped from showing that the title is really not in the plaintiff but in some other person. This position is amply supported by the cases of *Rogers v Pitcher*, 6 Taunt 202, *Clonidge v Macenzie*, 4 M & G 143 and *Gregory v Deridge*, 3 Bing 174. But in a suit for rent, instituted by the person, in whose favour a tenant executed a lease the tenant is estopped by s 116 from raising a plea that the ostensible landlord was only a *benamidar* for somebody else. The question of a lessor's title is wholly foreign to a suit of this nature. *Bogor v Karam Singh*, 141 P R 1906=96 P L R 1907=13 P W R 1907, see also *Meer Jangoo v Chota Sahib* 6 N L R 161. *Sibu Sant v Netaji Charan*, 9 Ind Cas 806, *Probhat Chandra v Byoy Chand* 50 C 572=75 Ind Cas 89. But the Madras High Court has decided otherwise. So where a lease is executed by a tenant in favour of the *benamidar* the real owner rather than the *benamidar*, must be regarded as the landlord for the purposes of this section. A person, having admitted that he is *benamidar* under the general law, has no right to sue the tenant for rent and in such a suit the tenant can deny his right to sue. *Kuppi Konan v Thuru Guana*, 31 M 461, see also *Kuthaperumal v Secretary of State* 30 M 245, *Muthusamy v Solai* 26 M L J 597.

**Landlord and tenant—Collusion—Estoppel.** A party obtaining possession of premises held by a tenant by colluding with him and claiming those premises by a title adverse to that of the lessor, cannot set up his adverse title against the landlord as a valid defence in an action of ejectment, and if he has collected rent from the tenant, he is liable therefor to the lessor. *Pashupati v Narayan*, 13 M 335.

**Acceptance of lease under coercion etc.** A person who, under coercion, takes a lease, is not bound by his acceptance, nor is he estopped, by paying rent to the person granting the lease, from questioning the title of the payee, unless the payee let him into possession. Even then the effect of payment as estoppel would be confined to the title of the payee at the time the possession was given. *Collector v Suraj Bahadur*, 6 N W P 333. Where application is made to a Collector for a tenure liable to pay revenue on account of an estate, which the applicant has carved out of an unoccupied waste and cannot create such a tenure, the applicant is under no obligation to adhere to his offer made erroneously and not estopped thereby from denying liability to payment. *Bryonath v Lal Meah*, 14 W R. 391. Though under this section no tenant can deny his landlord's title existing at the commencement of the lease, the

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rule only applies where the tenant has been let into possession. If through ignorance or mistake a tenant has executed a rent note and has been put in possession by the lessor it seems that he can dispute the lessor's title. *M. Laxmibai v. Devi* 72 Ind. Cas. 555. A tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in the lessor's title or that the execution of the lease was procured by fraud, misrepresentation or coercion. *Melaram v. M. Bholi*, 76 Ind. Cas. 4 = 192, Lah. 60. If through ignorance or fraud in the matter of executing a lease the tenants attorn to a certain person, they are not estopped in a suit by the latter from showing that he had no title either when the lease was executed or attornment was made by payment of rent. But the onus of proving want of title is on them. *Chengtu Soolor v. Jaloruddin Mondal*, 91 Ind. Cas. 669 = A. I. R. 1926 Cal. 720. Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance mistake or the like. *Bishen v. Fude Husam*, 112 Ind. Cas. 332.

**Assignee of landlord.** A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord. *Rance Tillessuree v. Rance Ashneth* 24 W. R. 101. *Cornish v. Searrell* 8 B. & C. 471, *Claridge v. Mackenzie* 4 M. & G. 143. The defendant mortgaged in 1895 an unrecognised sub-division of a Narwa but remained in possession of it under a rent note executed in favour of the mortgagee. The mortgagee assigned his rights to the plaintiff. Plaintiff sued defendant in ejectment and the latter pleaded that the mortgage, the lease and the assignment were void. Held that the defendant having attorned to plaintiff it was not open to him to contend in the ejectment suit that plaintiff had no right to let out the property on rent. *Devidas v. Shamal* 23 Bom. L. R. 119 = 53 Ind. Cas. 595. But in the case of an assignee of the lessor though he is to all intents and purposes in the same situation as the lessor and takes the benefit of and is bound by a lease by estoppel, the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee. *Barniel v. Thomson*, 7 Term Rep. 488, *Parker v. Manning*, 7 Term Rep. 537. *Rennie v. Robinson* 1 Bing. 146, *Carniel v. Blagazze* 4 Moo. P. C. 303. *Doe v. Whitroe* Dow. & Ry. N. P. 1. *Seymour v. Franco* 7 L. J. O. S. 18. *Jew v. Wood* Cr. & Ph. 185, *Gouldsworth v. Knights* 11 M. & W. 337. 343. *Doe v. Wiggins* 4 Q. B. 367. 375. *Sturgeon v. Wingfield* 15 M. & W. 221. *Cuthbertson v. Irving*, 4 H. & N. 742, *Halsbury* Vol. 13 p. 405.

**Disclaimer of right to evict.** The authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *pro tanto* adverse to the right to evict either at will or on notice given. A manifest assertion by the tenant to the knowledge of the person representing the landlord's interests of a right inconsistent with that claimed by the landlord to treat him as a tenant at will or from year to year would be a disclaimer of the landlord's title. *Tuan v. Moat* 16 Ch. D. 730. A landlord merely receiving rent cannot preserve his right to other claims continuously denied by the tenant. The fact that such assertion and enjoyment are not challenged does not change their adverse character when once necessity for challenging it has arisen. *Thakore Fatisugri v. Banaji* 27 B. 515 = 5 Bom. L. R. 274. see also *Shaili Nujmoddu v. Ployd*, 15 W. R. 237, *Takachnee v. Saroo* 19 W. R. 252 (P. C.). *Dinomoney v. Durga Prosad* 12 B. L. R. 275. *Pitambar v. Nilmoney* 3 C. 793. *Mardin v. Ngapa* 7 B. 96, 99, *Madhava v. Narayana* 9 M. 244. *Narayana v. Yaminabai*, P. J. 156, *Sanakaran v. Periasami* 13 M. 467.

Whether sections 116 and 117 are exhaustive. Sections 116 and 117 of the Evidence Act mention certain well known forms of estoppel by agreement, i.e. that of the tenant, the licensee, bailee and acceptor of a bill of exchange. The case does not come within any of these though it has been argued in part on the analogy of the tenant's estoppel. It has however been correctly

submitted that these sections are not exhaustive of the doctrine of estoppel by agreement. The case of *Dutton v Fitzgerald*, (1897) 1 Ch D 140 on appeal (1897) 2 Ch D 86 is an instance of such an estoppel which is not provided for by the Act. *Rupchand v Sarbeswar*, 10 C W N 747=3 C L J 629=33 C 915. The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right which could not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived, there is an estoppel. *Ibid*, but see *Nur Mahomed v Kessumar* 7 S L R 11=20 Ind C 523. There it has been held that the rule of estoppel based on a dictum in *Tooker v Small*, 1 R R 212 *u*, that a mortgagee is not at liberty to dispute the title of his mortgagor does not apply and section 2(1) of the Evidence Act expressly repeals all rules of evidence which are contained in any Statute Act or Regulation in force in British India. Here the dictum in *Tooker v Small* has not the effect of enlarging the instances of estoppel given in ss 116 and 117 of the Evidence Act. There can be no estoppel unless s 115 applies. The Calcutta High Court again held that ss 115 to 117 of the Evidence Act are not exhaustive in force in British India. *Bhaiganta v Hummat* 20 C W N 1335=24 C L J 103. In delivering this judgment *Sanderson C J* said "It has been decided by this Court in *Ganges Manufacturing & Co v Sourymull* 5 C 669 that sections 115 to 117 of the Evidence Act are not exhaustive and the judgment of the late Chief Justice Sir Richard Garth to which I wish to draw attention is at p 678. There he is reported to have said 'It has been further contended by the Appellants, that ss 115 to 117 contained in Chap VIII of the Evidence Act lay down only rules of estoppel which are now intended to be in force in British India, and that those rules are treated by the Act as rules of evidence, and that by section 2 of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well founded, the consequence would indeed be serious. The Courts here could then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of section 115 to 117 however important those questions might be to the due administration of the law'. I desire to point out that the principle of law which was laid down by Chief Justice Zinjal (*vide notes under principle supra*) to which I have referred is a matter of great importance. Therefore in my judgment it is a matter of great importance that the principle of law to which I have referred should be affirmed. In the same case Mr Justice Moolerjee said "It has not been disputed before us that according to the law of England a person who has been let into possession as tenant by the plaintiff is estopped from denying his lessor's title without first surrendering possession. Reference may be made to *Doe v Smythe*, 1 M & S 347 decided in 1815 where the tenant in possession paid rent to the lessor and then disclaimed. *Bayley J*, observed that the tenants should have given up the possession to Knight (lessor) and then the defendant, if she has title, might have maintained her ejectment." Mr Justice Dampier added "It has been ruled often that neither the tenant, nor any one claiming by him can controvert the landlord's title. He can not put another person in possession but must deliver up the premises to his own landlord. This I believe has been the rule for the last 25 years and I remember was so laid down by *Buller J* upon the Western circuit" (*Doe v Pegge* (1786) 1 R R 758n). This exposition of the law has been repeatedly re-affirmed. (*Al Choine v Gomme* 2 Bing 54 *Doe v Austen* 2 Bing Rep 41 and *Tadman v Harman* (1893) 2 Q B 164). There is an instructive discussion on this subject in *Bayley v Badley* 5 C B 396, to which reference may usefully be made. In the course of the argument in that case, *Wilde C J*, observed "Does the lease operate as an estoppel except during the term?" *Serjt Byles* answered "A tenant is at all times estopped from disputing the title of his landlord and referred to a long line of cases, including *Doe v Smythe* 1 M & S 347. At a later stage of the argument Mr Justice Vaughan Williams repeated the question whether the estoppel does not end with term." *Serjt Byles* answered the estoppel is limited in point of extent, but there is no authority for saying that it is limited in point of time." *Wilde C J* then intervened with the following observation "In *Co Litt* 47(6), it is said that 'if a man

**S 116.** take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended, for, by the making of the lease, the estoppel doth grow, and consequently, by the end of the lease the estoppel determines. The only qualification I am aware of that has been engrafted upon that rule, is, that if the tenant came into possession under the lessor, he must restore the possession before he disputes the title' The position is different as *Earle C J* pointed out in *Accidental Death Insurance Co v Macleane*, 5 L T N S 20, when the tenant had possession before he took the lease. Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel, first, possession secondly, permission when these conditions are present, the estoppel arises and the estoppel prevails so long as such possession continues. That this was unquestionably the law in this country before the Indian Evidence Act was passed, is clear from a long line of decisions. The doctrine was expressly formulated in *Maresh Chandra v Gurus Prosad* 9 Murr 877 and *Vasudeb v Babay* 8 B H C R 175 and was impliedly recognised in *Dance v Thakoor*, B L R (F B) 588 *Gource v Jugurnath*, 7 W R 25, *Burn & Co v Rushmonce*, 14 W R 85 and *Jannaram v Kadambuni*, 7 B L R 723 n. We have further the weighty opinion of *Sir Subramanya Iyyar C J* expressed in the case of *Mutha nyan v Sunna Sama Iayan*, 28 M 526 that the law has not in this respect been altered by the Indian Evidence Act, and that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession (see also *Ram Chandra v Gulam Zilani* 34 B 329). The respondent however has contended that this view is erroneous and that the law is embodied in section 116 of the Indian Evidence Act is an intentional departure from the English law on the subject. In my opinion there is no foundation for the contention that the Legislature in 1872 intended to revive and introduce into this country the archaic rule prevalent in England in the days of *Lord Coke*. Section 116 does not by its very terms affect the present case. That section merely provides that, during the continuance of the tenancy, a tenant of an immoveable property or persons claiming through such tenant cannot be permitted to deny that the landlord of such tenant, at the beginning of such tenancy had no title to the immoveable property. This does not imply that after the expiration of the tenancy the tenant is free to dispute the title of the landlord. In connection with the observations of *Chief Justice Garth* in *Ganges Manufacturing & Co v Sourupmall* 5 C 669 that sections 117 and 116 of the Indian Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections the following observations of the same learned Judge in the same case should also be borne in mind, namely 'The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. *Prof Wigmore* also says that the estoppel is an obligation made by a rule of substantive law. So those rules of estoppel which are not rules of evidence not being included in section 115 116 or 117 of the Evidence Act are not excluded by virtue of section 2 of the Indian Evidence Act. This section does not contain the whole law of estoppel. Thus the tenant's estoppel operates even after the termination of the tenancy. *Mayban v Isab Surati*, 33 C W N 867 = A I R 1928 Cal 546.

**Licensee of a person in possession.** There is no distinction so far as concerns the law of estoppel between a licensee and a tenant and a licensee who has obtained possession by aid of the license before he can show that his licensor's title has determined must first surrender possession of the premises. *Doe d Johnson v Baylup* (1935) 3 Ad & El 188 *Halsbury* Vol 13 p 404. In that case the defendant, a daughter of the plaintiff's lessor, obtained possession of the premises upon the pretext of selling vegetables in the garden, and refused to vacate on the ground that the plaintiff had no title. In delivering his judgment in the above case *Patteson J* said 'In the case of a person who has become a tenant there is no doubt as to the land. *Doe d Knight v Lady Smythe* 4 M & S 347, shows that he must first give up possession to the party by whom he was let in, and then, if he, or any one claiming through him, has a



title *abunde*, that title may be tried by ejectment. It was held in that case, not that the party claiming as landlord to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession. If the defendant here has any right, she might, in the first instance, have brought ejectment, or have entered on Mrs. Johnson and dispossessed her. But she takes neither course. She fraudulently obtains permission to go upon the land, and then turns upon the lessor of the plaintiff and insists upon holding the land. The rule, as to claiming title, which applies to the case of a tenant extends also to that of a person coming in by permission as a mere lodger or as a servant. In the same case *Coleridge J* said: "There is no distinction between the case of a tenant and that of a common licensee. The licensee, by taking permission, admits that there is a title in the landlord." *Casperx on Estoppel* pp 106, 107. So a licensee cannot be permitted under this section to deny that a licensor had a title to the possession of the property at the time when the license was given to him to enter, though there was no relationship of licensor and licensee subsisting between the parties during the period sued for. *Dhuhumom v Tulsa Chaman*, 13 Ind Cas 512, see also *Gour Hari v Anumunnessa*, 11 C R 9. But the mere fact of a person bringing goods on the demised premises by the tenant's license does not estop him from disputing the validity of the instrument of demise under which the tenant holds. *Padman v Henman*, (1893) 2 Q B 168, *Halsbury* Vol 13 424. The respondent came upon the land in dispute by the license of the appellant who caused M T to redeem it from mortgage, after which it was held jointly by the families of M T and the respondent. About 15 years subsequently according to the respondent, the appellant made over the land altogether to him and M T. The respondent also raised the question of the appellant's title. The burden of proof being entirely on the respondent and no limitation being established, in the absence of proof of adverse possession, the respondent was held to be estopped from denying the appellant's title under s 116 of the Indian Evidence Act, and the presumption was that he continued to hold under him. *U Tha Pe v Maung Pa Naw*, U B R (1892 1896) Vol II, 561. When the occupation of the defendant is proved to be permissive, he is estopped from denying plaintiffs' title under this section. *Mah Hli v Maung San Dwin*, L B R (1893 1900) 4. Subsequent licensee can sue a prior licensee for injunction. *Zahoor Hosan v Saker Banoo* A I R 1925 All 29. This section merely states that the licensee ought not to deny the title of the licensor. It does not state that every license is revocable at the instance of the lessor. Consequently the licensee is not prevented from asserting that he must not be turned out. *Uthulchsa v Ma San Me* 7 R 617 = A I R 1930 Rang 29.

**Estoppel between mortgagor and mortgagee.** Where a mortgagee is put into possession by the mortgagor in pursuance of the contract of mortgage, he is estopped from denying the title of his mortgagor during the continuance of the mortgage. The principle of estoppel between the mortgagor and the mortgagee works in favour of and against both of them. The mortgagor is estopped from denying his own authority to mortgage the property. On the other hand the mortgagee is estopped from denying the authority of the mortgagor to mortgage his property. *Ibad Ashraf v Inayatullah*, 80 Ind Cas 62 = 11 O L J 722, see also *Lakshmi Nachiar v Ramechandra*, 16 M L J 5, *Sundera v Khatindra*, 29 C L J 434, *Jangi v Sheoraj*, 30 Ind Cas 234, *Kadakan v Oothman*, 10 Ind Cas 339 = (1911) 2 M W N 61, *Rajaram v Jadunandan*, A I R 1925 All 758, *Deendra v Mva* 10 C L J 150, *Mahomed v Hanaya* 35 B 507, *Gulab v Duan*, 18 C 591 (P C), *Jogini v Bhut Nath*, 31 C 116, *Shamacharan v Molhoda*, 15 C W N 703, *Ranjan Sala v Dhiku Singh*, 16 C L J 261 = 16 Ind Cas 246, *Kanara Venkata v Ramaswami*, 35 M 75, *Mahamaya v Haridas*, 42 C 455. In a redemption suit a mortgagee is estopped from setting up the interest of a third party. He cannot do so long as he has not handed over possession to his mortgagor or his representatives. *Rajnarayan v Jadunandan*, 83 Ind Cas 539 = L R 6 A 196 Rev = A I R 1925 All 758. A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is however, open to him to assert that on the death of the mortgagor persons who are his heirs under the Hindu Law did

- S 117. not succeed to his occupancy rights in accordance with the special rules laid down in Act 12 of 1891 *Mahadeo v Rani Jay*, A I R 1930 All 108

**117** No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license

*Explanation (1)*—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn

*Explanation (2)*—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor

**Principle** Instances mentioned in this section are estoppel by agreement. The instances cited are all cases of implied agreements. As has been well said some transactions there are which are so obviously based on a conventional state of facts that for that very reason the parties never in practice come to any express agreement about them at all and the estoppel is nothing but the carrying out of what the parties as honest men must have intended if they thought about the matter at all at the time they made the bargain (*Cubabe Estoppel* 12, 21). The parties are deemed to have dealt with one another on the basis of their rights being regulated by a conventional state of facts. The tenant and licensee and bailee obtaining possession are taken to accept it upon the terms that they will not dispute the title of him who gave it to them and without whose permission they would not have got it. The act of acceptance of a bill amounts to an undertaking to pay to the order of the drawer. Though all are instances of estoppel by agreement the precise nature of the agreement and, therefore of the estoppel may vary according to the nature of the particular transaction in each case. *Per Woodroffe J in Rup Chand Ghosh v Surbessur Chunder* 3 C L J 629

**Negotiable Instruments** The principle of estoppel is frequently applied in the case of the acceptance of bills of exchange. The acceptor by such act admits the genuineness of the signature of the drawers and the competency of the drawers to assume that responsibility. *Burr Jones Esq* § 286, see also *Phillips v Im Thurn* L R 1 C P 463. The object of the law merchant says *Eyles J in Swan v North British Australasian Co* 2 H & C 175, 'as to bills and notes made or become payable to bearer is to secure their circulation as money, therefore honest acquisition confers title. So whenever one of two innocent parties must suffer by the act of a third he who has enabled such third person to occasion the loss must sustain it. *Per Ashurst J in Lackbarrow v Mason*, 2 T R 63 (70). So in England and in America the rule is thus laid down. For more than a century it has been held and decided without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine that he is presumed to know the handwriting of his correspondent and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid. *National Bank v Ninth National Bank*, 46 N Y 77. And, speaking of *Price v Neal*, 3 Burr 1354, in the same case it was said 'But as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid, by the drawee its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill said upon pre-entment as to one accepted and afterwards paid. The rule is thus stated by *Stephen* 'No acceptor of a bill of exchange is permitted to

deny the signature of the drawer, or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to endorse the bill though he may deny the fact of the endorsement, nor if the bill be drawn by procuration, the authority of the agent by whom it purports to be drawn in the name of the principal though he may deny his authority to endorse it. If the bill is accepted in bank, the acceptor may not deny the fact that the drawer endorsed it." But by accepting and paying a bill the drawee is not held to a knowledge of a want of genuineness of any other part of the instrument or of any other names appearing thereon, or of the title of the holder. *Burr Jones* § 286. The reason of the English rule is thus stated by, *Bayley J* in *Cooper v Meyer*, 10 B & C 471. "The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the enquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills. See also *Sander son v Collman*, 4 M & Gr 209. But in India the law differs from the law of England as it appears from Explanation 1. In India the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn. So he is at liberty to show that the signature is a forgery. This section is supplemented by sections 41 and 42 of the Negotiable Instruments Act (XXVI of 1881). Section 41 runs as follows: "An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill." Section 42 says: "An acceptor of a bill of exchange drawn in a fictitious name and payable by the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer." Sections 118-122 of the Negotiable Instruments Act, lay down special rules of evidence. Section 118 lays down certain presumptions as regards consideration, date, time of acceptance, time of transfer, order of endorsement and stamp. This section further authorises the presumption that the holder is a holder in due course. Section 119 provides that the Court shall, on proof of the protest, presume the fact of dishonour. Section 120 makes provision for estoppel against denying original validity of instrument by the maker of the promissory note, drawer of a bill of exchange or cheque and acceptor of a bill of exchange. Section 121 makes provision for estoppel against denying capacity of payee to endorse. Under section 122, no endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument. In an action on a promissory note or a bill of exchange against a person whose name properly appears as a party to the instrument, it is not open to the defendant to show that the signatory was in reality acting for an undisclosed principal, whether the defendant is a drawer or an acceptor. *Phoenix Trading Co v Deivan Chand*, 117 Ind Cas 160 = A I R 1929 Sind 172.

**Bailor and Bailee.** A bailee entrusted with the care of goods is estopped to claim that the bailor had no title at the time of bailment. *Burr Jones* § 285, *Wilson v Anderton*, 1 B & Ad 450 = 9 L J K B 48. *Holl v Griffin*, 10 Bing 216, *Hunderson v Williams* (1895) 1 Q. B 531. The estoppel upon bailees and those with whom property is either actually or constructively deposited bears a close resemblance to the estoppel of the tenant. *Casper v Estoppel* p 111, vide section 116 *supra*. A bailee cannot set up the title of a third person, unless the bailment is determined by what is equivalent to an eviction by title paramount. *Biddle v Bond*, 34 L J Q B 137 = 6 B & S 225, *Bulleley v Ince*, 4 Q. B 511, Explanation 2. The law on the subject is thus laid down by *Blackburn J* in *Biddle v Bond supra*. "We do not question the general rule, and we agree with what is said by my brother *Marten* in *Chesman v Fnull*, 6 Exch 341 (346) that 'there are numerous cases in connection with wharfs and docks, in which if a party entrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact business.' But the bailee has no better title than the bailor, and consequently, if a person entitled as against the bailor claims

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it the bailee has no defence against him, *Wilson v Anderton*, 1 B & Ad 450. The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another is estopped from denying his landlord's title but whose estoppel ceases when he is evicted by title paramount. The position of the bailee is precisely the same, whether the bailor was honestly mistaken as to the rights of third person or fraudulently acting in derogation of them. See also *Hardman v Willcock* 9 Bing 383(n), *Rogers v Lambert*, (1891) 1 Q B 318. *Ross v Edwards* 73 L T 100 (P C). So while the bailee cannot avail himself of the title of third person, though that third person be the true owner, for the purpose of keeping the property for himself yet he may show a defence against the bailor that he has actually delivered the property to the true owner, who had the right to possession upon demand by the latter even before legal proceedings have been commenced. Such demand by the true owner is equivalent to eviction by title paramount. *Burton Jones* § 285. Stephen thus states somewhat differently, the general rule "No bailee agent or licensee is permitted to deny that the bailor principal or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted. Provided that any such bailee agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor principal, or licensor or that his bailor principal or licensor wrongfully and without notice to the bailee agent or licensee obtained the goods from a third person who has claimed them from such bailee agent or licensee. Referring to *Biddle v Bond* 6 B & S 225. Lord Esher M R said "In my opinion the law is laid down in *Biddle v Bond* *supra*, by Lord Blackburn in a considered judgment of the Court of the Queen's Bench delivered by a Judge who knew more about these matters than any one else and it is I think, laid down there distinctly, that, as between a bailee and his bailor under an ordinary contract of bailment, the bailee must if he desires to defend an action for non delivery of the goods upon the demand of the bailor, shew that he has already delivered them upon a delivery order authorised by the bailor or he may ask for an interpleader order or he may, at his own risk as regards the plaintiff say 'I defend the action on behalf of A B, and I say that he is the person really entitled to the goods. If he takes the latter course he must not only allege the title of the third party, but he must prove it and if he does not prove it he has no defence.' A bailee says Lord Blackburn "can set up the title of another only if he defends upon the right and title and by the authority of that person." He must allege that title and must prove it. That is the law laid down and it seems to me rightly laid down in *Biddle v Bond* 6 B & S 225. Therefore I am of opinion that the defendants cannot defend the action on the right and title and by the authority of a third person, because they have not named any such person, or shewn that they have any such authority, or that any person has such a right. Indeed the defendants have said in deliberate terms that they are not defending the action for any one else but are defending for themselves only. As between the plaintiffs and themselves the defendants have no defence. Therefore, if we were to stand upon the strict rights as between the plaintiffs and the defendants, it seems to me that the plaintiffs were entitled to succeed in the action." *Rogers, Sons & Co v Lambert & Co*, (1891) 1 Q B 318 (325). In the same case Lindley L J said "As soon as there were several rival claimants to the copper, the defendant should have instituted interpleader proceedings against the rival claimants." This was settled by *Ellenborough v London and St Katharine's Dock Co*, 3 C P D 450. That case and the more recent decision in *Robinson v Jenkins* 21 Q B D 275, shew, that notwithstanding the contract of bailment, the defendants could have instituted interpleader proceedings in this case." See also *Civil Procedure Code Order XXXV*. Lopes L J added "A bailee may, however equally with a tenant, shew that the title of his bailor to the goods has expired since the bailment. *Thorney v Tibury*, 3 H & N 531. So, too a bailee may set up a *jus tertii*, if the facts shew that there has been what is equivalent to an eviction by title paramount. *Shelbury v Scotsford*, Yelv 22. But suppose the bailee retains possession of the goods, and there has been

no eviction, the bailee may nevertheless, set up and rely upon the *jus tertii*, if he defends his possession upon the right and title and by the authority of the *tertius* *Biddle v Bond*, (6 B & S 253) is an authority for this. In that case, *Blackburn J* delivering the judgment of the *Queen's Bench*, said (at p 233) 'We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shebory v Scotsford*, Yelv 22, viz, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Bettley v Real*, 4 Q. B 511, 517, that to allow a depository of goods or money, who has acknowledged the title of one person to set up the title of another who makes no claim, or has abandoned all claims, would enable the depository to keep for himself that to which he does not pretend to pass any title in himself whatsoever.' Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by *Pollock C B* in *Thorne v Tilbury* 3 H & N 534 537, that a bailee can set up the title of another only 'if he defends upon the right and title and by the authority of' that person. Thus restricted we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences." 'But if the bailor has no title to the goods and the bailee in good faith delivers them back to or according to the directions of the bailor the bailee is not responsible to the owner in respect of such delivery.' *Vide s 166 of the Contract Act, The Bank of Bombay v Nandlal Thackerseydas*, 17 C W N 358=40 I A 1=37 B 122 (P C.) But if a person other than the bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods *Contract Act*, § 167.

But if bailment is accepted with knowledge that another than the bailor claims the subject matter of it, the bailee cannot set up the claim of such third person against the bailor. *Burr Jones* § 285. In *Ex parte Davies*, 19 Ch D 86, *Jessel M R* said. There are, no doubt cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount and, if there has been no fault on the part of the bailee, it has been held that this is good excuse to him as against his bailor. An illustration of this is the old case of *Shebory v Scotsford*, Yelv 23 in which a stolen horse has been bailed by the thief and had been forcibly taken away from the bailee by the rightful owner and it was held that the thief could not maintain an action of trover for the value of the horse against the bailee, on the ground that the eviction of the horse out of his possession was a discharge in law of his promise to return it to his bailor. But, in order that the bailee may be able to avail himself of such a defence, he must himself have been in no default. If the bailee knowing of the adverse claim, has said to his bailor 'I will sell the horse for you if you will let me have a commission, and I will hand over the proceeds to you' he could not have afterwards set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open," and *Lush J* added, 'I am of opinion that when a person in such a position, knowing of two adverse claims to goods elects to take part of one of the claimants and to sell the goods as his, he is estopped from afterwards denying that claimant's title. If he had not taken this course he would have been entitled to show that there was a better title in the bill of sale holder there might have been what is called an eviction of trustee by title paramount.

**Licenses of patentee etc.** One who manufactured goods by consent of and under agreement with the patentee cannot be allowed to prove the invalidity of the patent. *Burr Jones* § 285. This kind of estoppel is closely analogous to that between landlord and tenant. A licensee of a patent under agreement with the patentee, so long as he continues to act under the license or during the continuance of the agreement is not at liberty to dispute the validity of the patent. *Goncher v Clayton* 34 L J Ch 239, *Crossley v Dixon* 10 H L Cas. 293. The United States Supreme Court in an oft-quoted case said "Having actually received profits from the sales of the patented machine which profits the defendants do not show have been or are in any way liable to be affected

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by the invalidity of the patent, its validity is immaterial. Moreover, we think the defendants are estopped from alleging that invalidity. They have made and sold these machines under the complainant's title, and for his account, and they can no more be allowed to deny that title and return the profits to their own use than an agent, who has collected a debt for his principal, can insist on keeping the money upon an allegation that the debt was not justly due. (*Kinsman v Parlhurst* 18 How 289) The invalidity of a patent does not render the sales of machine illegal, so as to taint with illegality the obligation of the defendants to account. Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received by settling up the illegality of the transaction in which it was paid to him. (*Burr Jones* § 283)

"Although said *Lord Blackburn* in *Clark v Adie* L R 2 App Cas 436, "a stranger might shew that the patent is as bad as any one could wish, the licensee must not shew that." 'So far as he is concerned' said *Lord Cairns* in the same case, 'he must stand here admitting the novelty of the invention, admitting its utility and admitting the sufficiency of the specification'. (*Casperz Estoppel* 130, see also *In the matter of D H R Moses*, 15 C 241. The analogy between a licensee and a tenant is thus described by *Lord Blackburn* "So long as the lease remains in force and the tenant has not been evicted from the land, he is estopped from denying the lessor's title to that land but he is entitled to show that a particular parcel was never comprised in the lease. So a licensee may show that the particular thing he has done was not included in the patent and that he has done it as one of the public, and is therefore not bound to pay royalty for it. If he used that which is in the patent and which his licensee authorises him to use then like a tenant under a lease he is estopped from denying the patentee's right and must pay royalty. Though a stranger can show that the patent was bad, the licensee must not do so." *Clark v Adie* 2 App Cas 423 (433), see also *Jagornath v Cresswell*, 40 C 814. But this rule does not bind either an equitable assignee of the licensee who is not acting under it (*Pidding v Frazer* 1 Mac. & G 56 *Baxter v Combe*, 1 Ch R 284 289) or a purchaser from the licensee (*Gillette Safety Razor Co v Gamage (A W) Ltd* (1909) 25 T P R 808, *Halsbury Vol XIII* p 413. The user by the licensee of the invention amounts to consideration. *Laues v Parser* 6 E & B 930, *Faylor v Hare* 1 New Rep 260, *Noton v Brooks* 7 H & N 499, *Crossly v Dixon* 10 H L C 293, *Smith v Neale* 2 C B N S 89, *Cooper v Smith*, 26 Ch D 700, *Proctor v Bennet*, 36 Ch D 749.

A licensee of a trademark also is estopped, as against his licensor, from questioning the latter's title to the trade mark. (*Jagornath v Cresswell*, 40 C 814. In delivering the judgment *Inam J* said. The first question that I have to consider is whether the defendant can be allowed to deny the plaintiff's title. The contract between the owner of a trade mark and his licensee is like a contract between a landlord and his tenant and as between landlord and tenant so between licensor and licensee the former's right cannot be questioned by the latter. In *Clark v Adie* L R 2 A C 423 which was a case of a patent *Lord Blackburn* said 'Although a stranger might show that the patent is as bad as any one could wish it the licensee must not show that' and in the same case *Lord Cairns* observed 'so far as he is concerned he must stand here admitting its utility and admitting the sufficiency of the specification'. In an earlier case *Grover and Baker Sewing Machine Co v Mulkord*, 8 Jur N S 713 *Wood v C* held that the fact of a patent having been found invalid at law in an action between the patentee and a third party could not be set up against the patentee by his licensee in a suit upon the same patent. The licensee of a trade mark is in the same position as the licensee of a patent. See also *Leverage v Hooper*, 8 M 149 (154) *Ebrahim v Essa Abba* 24 M 163. 'In India there is no system of registration nor is there any provision for a statutory title to a trade mark, so that the rights of the parties must be determined in accordance with the principles of the English common law. Per *Jenkins C J* in *British American Tobacco Co Ltd v Mahboob Buksh* 33 C 110 at p 117, see also *G S Hannah*

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▼ *Messrs Jagannath* 43 C 262=19 C W N 1 When the plaintiffs, the transferees of the trade marks and business of a jute baidor, gave a license to the defendants the right to use and to authorise others to use exclusively the trade marks and to hold the good will of the business of original jute baidor and the marks without any interference by the proprietors for a particular period on the payment of certain royalty and the defendants sought afterwards to repudiate their obligation under the agreement alleging that the plaintiff's title to trade marks was illegal and invalid. *Held* that under section 117 of the Indian Evidence Act a licensee cannot be permitted to deny that his licensor had at the time when the license commenced authority to grant such license. Section 117 would, at any rate, cast upon the defendants the burden of proving the plea that was taken by the defendants, viz that the good will of the business had lost its separate existence by merger and that the plaintiffs had not the authority they professed to exercise. *G S Hannah v Jagannath*, 19 C W N 1. The licensee of a trade mark cannot put an end to the relation of licensor and licensee by repudiating the contract, in as much as in such a case the concurrence of the other party is also essential. *Jagannath v Crosswell*, 40 C 814 see also *Johnstone v Milling*, 16 Q B D 460, 467. A distinctive mark may be adopted by a person who is not the manufacturer but the importer of goods and he will acquire the property in that mark as indicating that all goods which bear it have been imported by him. *Latif v Emperor*, 14 A L J 1080=76 Ind Cus 583=39 A 123.

**Warehouse man** A warehouse man who on receiving an order from the seller of malt to hold on account of purchaser, gives a written acknowledgment that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is measured and that before the malt in question was remeasured the seller became bankrupt. *Stonord v Demelin*, 2 Camp 314. So if a warehouse man in possession of goods attorns to the buyer of them, acknowledging that he holds them for him, and upon the faith of that the buyer pays the price or the warehouse man charges, the ordinary principles of estoppels by representation apply, and the warehouse man cannot afterwards turn round and say 'The goods are not yours, setting up the *ius tertii*'. *Biddle v Bond*, 6 B & S 225, 231, 232. *Gosling v Burne*, 7 Bing 339, *Hawes v Watson* 2 B & C 540, *Halsbury* Vol XIII p 408. In *Henderson v Williams* (1895) 1 Q B 521, 533, A L Smith L J said "The principle upon which an estoppel *in pais* is created is laid down in the well known cases of *Pickard v Sears*, 6 A & F 469, *Freeman v Cooke*, 2 Ex 654 and *Cornish v Affiniston*, 1 H & N 549 and need not be stated here, for it is familiar to all lawyers. It is upon this principle that many warehouse men in like circumstances to those of the defendant have found themselves estopped from denying the plaintiff's title, and from setting up a title in a third person and as examples, I will take the cases of *Stonord v Demelin*, 2 Camp 314, *Hawes v Watson* 2 B & C 540, *Gosling v Burne* 7 Bing 339, in which *Findal C J* stated 'the defendant is estopped by his own admissions, for unless they amount to an estoppel, the word estoppel will be blotted from law'. The admission in the present case, namely the statement by the defendant that he held the sugar at the plaintiff's order and disposal is certainly no less strong than in *Gosling v Burne*, and lastly, in the case of *Knight v Wiffen* L R 5 Q B 660 in which the principle upon which an estoppel *in pais* arises is again enunciated, and it is again pointed out how it applies'. The general rule is that a buyer of goods who has acknowledged that they belong to a particular person cannot afterwards question the title of that person. *Hawes v Watson* 2 B & C 540. *Gosling v Burne*, 7 Bing 337. Where a wharfinger agreed to hold goods under a delivery order for certain persons and transferred the goods into their names in his books, it was held that he could not resist an action for the conversion of those goods on the ground that they had not been separated from the bulk, and that no property passed to the person who lodged the order. *Woodly v Coventry*, 32 L J Ex 185. A having goods in his possession, sold a quantity of them to B, who then sold part of that quantity to C. C paid the price, and forwarded the delivery order of B to A who assented to it, and B subsequently became

- S. 118** bankrupt It was held that A by so assenting, had estopped himself from denying C's right to such part of his goods *Knight v Whiffen*, L R 5 Q B 660 Again, W assigned to the plaintiff an order on the defendant, a wharfinger, to deliver goods to the plaintiff which had not yet come into the defendant's possession The defendant, on sight of the order, promised to deliver them on arrival It was held that the plaintiff might maintain trover against him on his refusal to deliver them after arrival *Hall v Griffin*, 10 Bing. 246 A delivery order by vendors, who also carried on the business of wharfinger, directed to the superintendent of their business in the latter capacity, has been held to be a mere promise to do some thing in future, and not a representation upon which to found an estoppel *Gillman v Carbutt*, 61 L T 281

## CHAPTER IX

### OF WITNESSES

**118** All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind

*Explanation*—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them

**Witness must be competent** Incompetency denotes the legal incapacity to give evidence The ground of incompetency were formerly numerous and many circumstances which are regarded as affecting only the weight of a witness's testimony were treated as reasons for disqualifying him altogether *Gilbert Ev 4th Ed 119 144 Wills Dc 2nd Ed 122* Formerly there were several grounds of exclusion of witnesses, the chief being (1) incompetency from religion or interest and (2) incompetency from mental capacity On the former ground, not only were parties themselves and their husbands and wives excluded but also all persons who were in *pari puer* with either party or otherwise substantially interested in the proceedings Successive statutes have abolished this kind of incompetency leaving the fact of interest in the proceedings to affect credibility merely *Cockle Cas Ev 243* The only common law rules of exclusion prevented the following classes of persons from testifying (a) Those who by reason of peculiar religious belief, or lack of any religious belief were not supposed to be amenable to the binding force of an Oath (b) Parties to the suit (c) The husband or wife of a party to the suit except where a crime was charged by the husband against the wife or vice versa (d) Pecuniarily interested (e) Naturally incapacitated persons (f) Those guilty of certain crimes Speaking generally, the trend of those exclusions was absent in the same direction as the present rules excluding persons from acting as juror thus giving another illustration of the influence of the old jury system The substantial disappearance of these rules of exclusion may be traced between the years of 1823 and 1853 *Mckelvey's Ev § 212*

**Infidels and Atheists** In England formerly all persons not Christians were excluded from testifying but at the present time there is no exclusion upon the ground of religious belief, or the lack of it The theory of the oath has always been that it gave a peculiar sanctity to testimony, and that without the oath there was no guarantee of truthfulness Under these circumstances (and the law recognized no substitute for the oath), it was quite natural that persons who by reason of their religious belief, felt no force in the oath, should have been excluded from testifying In fact without a change in the theory it would have been inconsistent and absurd to have allowed a person who



refused to take an oath, or if taking it, took it only as a matter of form, to give his testimony. The broadening of the form of the oath, with the recognition that other religious beliefs besides the belief of the established church might exercise the same influence over the mind and furnish the same guarantee of truthfulness resulted in the final disappearance of this rule of exclusion. The change came by degree, however. It was hard for the English Courts to break away from the predominant idea of the English people that *there was the only true religion and to concede that other forms of worship might exercise a solemnizing influence on the mind of equal force.* But the change finally came about, and to-day little is left of the old rule. In 7 Coke, 17 b it is laid down that infidels—and by this he means all persons not Christians,—have no standing in the English Courts. But this doctrine was exploded as early as in 1739 when it was held in the case of *Onychund v Buler*, 1 Ark 21, 43, that the testimony of three witnesses whose depositions had been taken under oath administered in accordance with the *Gentoo* religion should be received. There Lord Chief Justice Willes at p 45 says ‘There is nothing in the argument that as Christianity is the law of England no other oath is consistent with it, and for the reasons already given this argument carries no weight with it. Though I have shown that an infidel cannot be excluded from being a witness and though I am of opinion that infidels who believe in a God and future rewards and punishments in his other world may be witnesses yet I am as clearly of opinion that if they do not believe in God or future rewards and punishments they ought not to be admitted as witnesses.’ The principle of this case was subsequently approved by Lord Mansfield in *Itcheson v Evesitt* 1 Cowp 382, and thereafter reaffirmed in other cases *Rex v Gilham* 1 Esp 285, *Edmonds v Rowe*, Ry & Moody 77. It is evident from this that at that time the Courts had found no way to admit the testimony of *atheists.* In the case of the *suit of Quakers* so obnoxious to the early English Churchman, whose members refused to take oath no little difficulty was experienced in bringing them within the rule of competency so much in fact, that a special statute was required to extend this privilege. Stat 7 & 8 William III, C 34 allowed Quakers to affirm where other persons were required to take the oath. But this did not extend their competency in criminal cases. Later, however all restriction was removed, and a form of affirmation established for any person not competent or desiring to take the oath. (Vide Stat 31 & 32 Vict C 69.) The last mentioned enactment was repealed by the Oaths Act, 1888 (51 & 52 Vict C 46) which provides (s 1) that ‘Every person upon objecting to being sworn and stating as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath.’ But a person cannot be allowed to affirm under this statute unless he expressly objects to being sworn on one or other of the grounds specified. *Reg v Moore*, 61 L J M C 80, *Nagh v Ali Khan*, 8 T R 441. As regards the question how far it is necessary to follow a statutory form of oath or affirmation, reference may be made to *Salomons v Miller* 8 Ex 778, *Lancaster v Heaton* 8 El & Bl 952, *Wolsely v Worthington*, 13 Ir Ch R 341, *Camp* *Rul Cas* Vol XI p 141.

**Parties to the suit.** The old rule as to the incompetency of parties to the suit to be witnesses was founded upon the prejudice supposed to exist on account of personal interest in the result. At the present day it has been entirely abolished except in the one case of an accused person upon trial for the crime charged against him.

**Husband and wife of party.** The husband and wife of a party may testify in all cases, but is not compellable to disclose private or confidential conversations and communications. (*Vide s 120 infra*)

**Pecuniary interest of a witness.** Originally persons pecuniarily interested in the suit were not permitted to testify. In *Bent v Baler*, 3 T R 27, 38 *Buller J* defined the rule of exclusion on the ground of interest to be whether ‘the witness is to gain or lose by the event of the cause.’ This however, has entirely changed except with respect to a witness to a Will, who is also a

**S. 118** beneficiary under the Will. This has been said to be the "sole survival of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest" *Best, 10 (Chamberlain Jur Id)* p 173 note. To day a person interested in the outcome of a suit is allowed to testify the same as a disinterested person but the adverse party may show by cross-examination the nature and extent of that interest is affecting the credibility of the witness. *McClays I* § 216

**Sex** In spite of the example of the surrounding peoples, notably of Scotland, there seems never to have been in the law of England any general testimonial disability based on sex. *Wigmore* § 517

**Scope of the section** Under this section all persons are competent to testify unless the Court considers that they are incapable of giving evidence or understanding the questions put to them by reason of tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. Even a lunatic if he is capable of understanding the questions put to him and giving rational answers is a competent witness. The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency the Court under this section has not to enter into enquiries as to witnesses religious belief or as to the knowledge of the consequences of falsehood in this world or the next. It has to ascertain in the best way it can, whether, from the extent of his intellectual capacity and understanding he is able to give a rational account, of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements his competency as a witness is established. *Queen Empress v Lal Sahai* 11 A 183. According to English law every sane person is a competent witness in both civil and criminal cases except a child who does not understand the nature of an oath. *Pouell Et* 197. But in India, where a person is competent to testify according to the provisions of this section but is unable owing to his tender age, to comprehend the nature of an oath or affirmation section 13 of the Oaths Act relieves the Court of the necessity of administering an oath or affirmation to him and the evidence of such a person recorded without oath or affirmation may be admitted. *Ram Samy v Emperor* 10 O C 337=7 Cr L J 89. In *Nafar Sheikh v Emperor* 13 C W N 117 at p 149 Mr Justice Mukherjee said "In fact the Sessions Judge deliberately did not give them an opportunity to make an affirmation. The Judge appears to have assumed without investigation, that the children were of so tender an age that they could not appreciate the value and significance of an affirmation. It is plain that the Judge should not have adopted this course. As was laid down in the case of *King v Brasier* 1 Leach 199=1 East P C 443 an infant, even though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath. In other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and impropriety of falsehood. The course pursued by the Sessions Judge has led to the result that these witnesses were examined in contravention of the provisions of section 6 of the Indian Oaths Act. On behalf of the Crown, however, it was suggested that the irregularity in the proceeding, if any may be shown if necessary, to have been cured by the provisions of section 13 of the Indian Oaths Act. Section 13 lays down that no omission to make any affirmation shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. In support of this view reliance has been placed upon the decision of a majority of the Full Bench in *Queen v Shew Bhogtee*, 14 B L R 291=23 W R Cr 12. On behalf of the Appellant, this position has been controverted and it has been argued that where there is an omission by a witness to take an oath or to make an affirmation by reason of the deliberate act of the Court section 13 is of no assistance. The question raised is by no means free from difficulty, as is amply indicated by divergence

of judicial opinion on the subject. In this Court, the judicial opinion has not been uniform, as appears from an examination of the decisions in *Queen v Ilwaria*, 14 B L R 51=22 W R Cr 14 *Queen v Annunto*, 14 B L R 295 (note)=22 W R Cr 1 and *Queen v Shew Bhogta*, 14 B L R 294. It is further worthy of note that in the case of *Nandolal v Nistarani*, 27 C 428 440, when it was argued on the authority of some of the decisions first mentioned that section 13 of the Indian Oaths Act applied to cases where the omission to take the oath or affirmation was the result of the deliberate act of the Court or of the witness *Sir Francis Maclean, C J* with the concurrence of *Mr Justice Macpherson* and *Mr Justice Hill*, described the contention as at once novel and startling. There has been a similar divergence of judicial opinion in the other High Courts, as is indicated by the cases of *Queen v Visu*, 10 A 207 *Queen v Lal Sahai*, 11 A 183, *Empress v Shara*, 16 B 359 and *Empress v Vnaperumamah*, 16 M 103. In view of this divergence of judicial opinion and of the course we propose to take with regard to the second ground urged by the appellant, I reserve my opinion upon the difficult question of the true scope and effect of section 13 of the Indian Oaths Act.

This section makes no distinction between prosecution and defence witnesses *Joseph v Emperor*, 3 Rang 11=85 Ind Cis 236=3 Bur L J 265=26 Cr L J, 492=A I R 1925 Rang 122. The only test of competency is that the witness should not be prevented from understanding the questions put to him or from giving rational answers to these questions by tender years or other cause *Ram Jolaha v Emperor*, 102 Ind Cas 349=28 Cr L J 541=8 Pit L 594. Under this section a husband is a competent witness to prove non-access *Hoore v Hoore*, 25 M L J 594.

**How to ascertain competency** Incompetency in a witness will not be presumed. It comes in the shape of an exception or objection to the witness, and if the facts on which it rests are disputed they must like all other collateral questions of fact, be determined by the Judge (*Bartlett v Smith* 11 M & W 483, *R v Hill*, 2 Den L C 251), who, in cases of doubt, is always disposed to receive the witness and let the objection go to his credibility rather than to his competency *Best Ev* § 133. Mental competency to give evidence depends not upon age but upon understanding or intelligence. There is no fixed limit of age under which an infant is excluded as a witness *R v Brauer*, 1 Leach C C 199. Before examining a child of tender years as witness, the Court should satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of opinion that by reason of tender years and defective or immature understanding, the child could not have perceived the particular incident to prove which he is produced as a witness the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness. On the other hand, if the child though of tender years is sufficiently intelligent to understand the question put to him and to give rational answers to those questions then his capacity to give evidence is on the same footing as that of any other adult. But in such cases it would be desirable if the Court, before examining the child as a witness tests his intellectual capacity by putting a few simple and ordinary questions to him and to record a brief proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence *Tulsi v Emperor*, 110 Ind Cis 799=29 Cr L J 767=A I R 1928 Lah 903.

**Duty of Court in cases of witnesses of tender years** In *Nafar Sheikh v King Emperor*, 18 C W N 147 at p 150, *Mr Justice Moolajee* said "It has further been argued that under section 118 of the Evidence Act, he was bound to ascertain, before those children of tender years were examined as witnesses whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Fakir v Emperor*, 11 C W N 51, which it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness

**S 118** before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement, but in my opinion, the proposition thus widely formulated is not justified by the terms of section 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact the case of *Queen v Whitehead* L R 1 C C R 33 shows that the incompetency of a witness may very well appear in the course of his examination in-chief and that the evidence of a witness so found to be incompetent may at any stage be withdrawn from the jury. The true rule on the subject is concisely stated by *Breuer J* in *Wheeler v United States*, 159 U S 523 in the following terms: "The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. The mere circumstance that the sessions Judge did not interrogate the witnesses before their examination began with a view to test their capacity does not in the view I take of the true effect of section 118 of the Indian Evidence Act invalidate the trial. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such witness." *Queen v Hossein*, 8 W R Cr 60. A Judge can act on the evidence of a child of tender years if he is impressed by its intelligence and demeanour and the evidence given bears no marks of tutorage. *Ghulam Hussain v Crown*, 6 Lah L J 474=1925 Lah 94. It is of very great importance that when the evidence of a child of tender years is adduced the judicial officer should for the sake of precaution ascertain as a preliminary measure by means of a few simple questions whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is fit of credit, and it is desirable that something should at the commencement of the record of the evidence of the witness of this character be entered to show that such a test has been in fact made. It may turn out in the course of the examination at the trial that the test has been a fallacious one and that the evidence which the child gives is not intelligible and in such a case it is always open to the judicial officer to say that he cannot accept the evidence which the child is giving. On the other hand there is no obligation imposed by law upon a Judge definitely to make on the record any endorsement of his own as to a child's capacity, and when he has clearly relied upon the evidence given it is idle to suggest that he could have been other than thoroughly satisfied as to the capacity of the child to give intelligible testimony. *Panchu v Emperor* 1923 Pat 91=3 Pat L T 649=66 Ind C S 73=23 Cr L J 233. In the case of a child of tender years produced as a witness the Court should examine it after being satisfied that the child is intellectually sufficiently developed to enable it to understand what it has seen and to afterwards inform the Court thereof. *Dham Ram v Emperor* 13 A L J 1072. *Ghulam v Emperor* A I R 1950 Lah 337, contra, *Nafar v Emperor*, 41 C 406. The Judge must form his opinion as to the competency of a witness before his actual examination commences. *Fakir v Emperor*, 11 C W N 51.

**Child witness** Children of six or even five years of age have been allowed to testify upon the Court being satisfied as to their capacity to give rational testimony. *R v Holmes* 2 F & F 788, *R v Perkins*, 2 Moody C C 135,

*R v Brasier*, 1 Erst P C 443 Where in a murder case, a small boy, who was an eye witness to the murder, was not examined in the Sessions Court on the ground of his youth, held that the Sessions Judge, especially considering the importance of the witness ought not to have refrained from examining him unless, under the words of section 118 of the Evidence Act, he considered that the boy was prevented from understanding the question put to him, or from giving rational answers to those questions by reason of tender years. *Queen Empress v Ram Seval*, 23 A 190=A W N 1900, 211 A child of tender years is a competent witness when such child is intellectually sufficiently developed to understand what it has seen and afterwards to inform the Court about it, this sufficiency may be tested even in examination in-chief, understanding is thus the sole test of competency. *S Rasul v Emperor*, 1 I R 1930 Sind 129=120 Ind Cas 514, *Nafar Sheikh v Emperor*, 41 C 406=18 C W N 147, *Dham Ram v Emperor* 38 A 49=13 A L J 1072

**Oath** A witness who has taken oath in the usual form may be asked whether he thinks such oath binding on his conscience but not whether he considers any other form more binding. *The Queen's Case*, 2 Br & Bing 284 A person who does not believe in the sanctions of religion will not be bound by an oath. Thus, where a witness who had been sworn on the *vow due* stated in answer to the opposing counsel that she did not believe in a future state of rewards and punishments and regarded the obligation of an oath as no higher than that of her word, it was held that the Judge had acted properly in rejecting her evidence. *Muden v Catanack*, 7 H & N 360 It is not enough that a person has a religious belief unless he is able to say what form of oath is binding on his conscience. *Naghi v Ali Khan*, 8 I L R 444 Where in a trial for murder the Sessions Judge deliberately abstained from administering an oath or affirmation to the only eye witness to the murder on the ground that she was only 6 or 7 years of age the evidence is still admissible. In every case where a witness is a competent witness within section 118 of the Evidence Act, the provisions of ss 5 and 6 of the Oaths Act should be complied with. The only cases in which an oath or affirmation should not be administered are cases in which it clearly appears that the witness does not understand the moral obligation attaching to an oath or affirmation or the consequence which may arise from giving false evidence or the inequity of so doing, and in such cases the evidence of such a person would be practically valueless. *Fatu Santal v Emperor* 6 Pat L J 147=2 Pat L 1 288=61 Ind Cas 705=22 Cr L J 417 The evidence of a boy witness even if taken without any solemn affirmation in the prescribed form, is admissible under section 13 of the Indian Oaths Act though it should be received with due care and caution. It is necessary that before proceeding to examine a witness of tender years the Court should satisfy itself that the witness was competent to testify, that he was capable of understanding the questions put to him and of giving rational answers to these questions, and that thereafter the Court should proceed to administer the oath or affirmation as required by the Oaths Act. If the witness is found to be incapable of understanding the obligation of such an oath or affirmation provided he is found to be a competent witness, these facts may be noted so that the record may show that before taking the statement of a witness of that character the trial Court had ascertained that the witness was a competent witness under section 118 of the Evidence Act and that the omission to administer an oath or affirmation was due to want of understanding the obligation of an oath. *Emperor v Han Ramji*, 20 Bom L R 365=45 Ind Cas 497=19 Cr L J 593 see also *Queen Empress v Viraperumal*, 16 M 10 A Sessions Judge who had no doubt as to the competency of certain boy witnesses ought to have administered an affirmation to them. The word "omission" in section 13 Oaths Act includes any omission and is not limited to accidental negligent omissions. *Empress v Sambha* 11 C P I R Cr 16 Whether a child understands the nature of an oath or not, he should when examined as a witness be examined on oath or affirmation. *Queen Empress v Sheoratan* S C 242 Oudh, *Queen v Inuntia*, 22 W R Cr 1 *Pua v R E* 2 L B R 322 see also *Queen Empress v Marsu* 10 A 207=A W N 1988 86, *contra Golla Chama v Emperor*, 15 Cr L J 161=22 Ind Cas 737, *Queen v Sena* 23 W R Cr 12=14 B L R (F B)

S ' 18 294 *Queen v. Hurry* 22 W. R. Cr. 11-11 B. L. R. 51, *Queen v. Perumal* 7 Weir, 827, *Nandlal v. Nandram* 27 C. 110

**Insanity.** There was a period (and it has not long passed away) when the lunatic and idiot, in the superstitious belief of the times, which regarded madness as an infliction sent from heaven, were treated as incapable of being witnesses at all. (a) *Fitt* (b) *Comyns Digest Testimonia* A, 1, 178; *White's case* 2 Leach Cr. C. 3rd ed., 182 Wigmore § 192. Sir Edward Coke, in his notes upon Littleton and *Non compos mentis* is of four sorts: (1) An idiot which from his nativity by a perpetual infirmity is *non compos mentis*. (2) He that by sickness, grief or accident wholly loses his memory and understanding. (3) A lunatic, that hath sometime understanding and sometime not, '*aliquando gaudet luculitate interualle*' and therefore he is called *non compos mentis* so long as he hath not understanding. (4) Lastly he that by his own vicious act for a time deprives himself of his memory and understanding, as he that is drunk. (Coke on Littleton 216 (b).) So also Professor Greenleaf, in his Evidence laid down in 1812. It makes no difference from which cause this defect of understanding may have arisen, nor whether it be temporary and curable or permanent whether the party be hopelessly an idiot and maniac, or only occasionally insane as a lunatic or be intoxicated, or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists be the cause of what nature so ever the person is not admissible to be sworn as a witness. But this indiscriminate rule of exclusion, since the progress of our intelligence respecting mental derangement and defect, has been modified and rationalized. The question being, whether the person is trustworthy as a witness, the law now asks whether in each case the derangement or defect is such as to make the person untrustworthy as a witness, it no longer excludes absolutely. Wigmore § 192. In *R. v. Hill*, 2 Den. & P. C. C. 251-5 Cox. Cr. C. 259, *Campbell L. C. J.* said 'It has been argued that any particular delusion commonly called *monomania*, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence it might also cause serious difficulties in the management of lunatic asylums. I am therefore of opinion that the Judge must in all such cases, determine the competency and the jury the credibility. The rule which has been contended for would exclude the testimony of Soerites, for he had one spirit always prompting him. In the same case *Talfour J.* said 'It would be very distressing if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had a particular delusion.' This broad and rational principle—that the derangement or defect, in order to disqualify must be such as substantially negatives trustworthiness upon the specific subject of the testimony—is now practically every where accepted. In three particular respects this rationalization of the rule affects its present content, in two of them the field of competency becomes broader in one of them narrower. First, the mere fact of derangement or defect does not in itself exclude the witness, the various forms of monomania are no longer treated as equivalent to complete lunacy. Secondly the enquiry is always as to the relation of the derangement or defect to the subject to be testified about. If on this subject no aberration appears, the person is receivable however untrustworthy on other subjects. Thirdly the mere fact of soundness at the time of trial is no longer sufficient, for derangement or defect at the time of the event to be testified to may make the person untrustworthy. The inquiry looks to the capacity to observe as well as to the other elements, the capacity to recollect and to narrate. Wigmore § 492.

**Idiocy.** A person incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness is incompetent. Naturally incapacitated persons are not permitted to testify. This rule has always existed, and exists to day. The question of whether a person has sufficient capacity to testify is a question of fact for the Judge to decide, and he may hear testimony on the point as well as examine the person himself. *Melchey's Ev* § 217.

**Drunkenness.** It follows from modern theory of mental derangement that intoxication even habitual, does not in itself incapacitate a person offered as a

witness The question is, in each instance whether the witness was so bereft of his powers of observation, recollection, or narration that he is thoroughly untrustworthy as a witness on the subject in hand First, then, the capacity of observation at the time, of the events to be testified to may be such as would exclude the witness as untrustworthy Yet there is found a tendency, to forget this requisite and to declare that the time of taking the stand is that which alone is to be considered Secondly the capacity of recollection may appear to be so affected that the witness is untrustworthy Finally the capacity of intelligent and truthful narration may appear to be destroyed temporarily *Wigmore* § 499 But that a witness was drunk on the occasion to which he is called upon to testify goes to his credibility and the weight of his evidence, and not to his competency to testify Drunkenness at the time of testifying is *per se* not sufficient to disqualify the witness from testifying It is for the Court to determine from the present conduct and appearance of the witness whether he is in such a state as to comprehend the obligation of oath, and to testify intelligibly or whether he should be excluded *Burr Ions* § 724 'To render the witness incompetent it must be shown that, at the time of his examination, he was *non compos mentis* deranged in mind from some cause, the effect of liquor, or any other cause No drunken man should be permitted to give evidence, but this never can apply to drinking men even though incapable of managing their estates The point of enquiry is the moment of examination is the witness then offered so besotted in his understanding, as to be deprived of his intelligence? If he is, exclude him, if he be a hard drinker or habitual drunkard, yet, if, at that time he is sober and possessed of a sound mind he is to be received' *Gebhost v Shultz* 15 Serg & R (Pa) 235 In that case *Duncan* I added "Men of the brightest intellect have fallen victims of this vice, who when the effect of hard drinking has subsided possess, in their sober moments their understanding, if not in its full vigour, yet sufficiently unimpaired to recollect and to state the facts where they do recollect with clearness and intelligence" So a drunkard is a competent witness, when he is free from the influence of liquor *Banks v Goodfellow*, L R 5 Q B 549, *R v Hill*, 2 Den 254, *Spittle v Walton*, L R 11 Eq 420

**Accused whether competent witness** Section 342 (4) of the Criminal Procedure Code provides that no oath shall be administered to the accused See also section 5 of the Indian Oaths Act As no oath can be administered to an accused person so he can not be examined as a witness Thus where several accused are tried jointly, one accused cannot be sworn and therefore cannot be examined as a witness against other co accused till he is convicted or discharged *Reg v Hanmantha* 1 Bom 610 *Empress v Ashgar Ali* 2 A 260 *Wheeler v King Emperor*, 45 C 720, *Queen Empress v Dala Jua* 10 B 190, *Nga Ngue v King Emperor*, 20 Cr L J 342 But an accused can make affidavit on oath in support of an application for transfer of the case under section 526 *Ghulam v Emperor*, 3 Lah 46=23 Cr L J 399, see also *Gallagher v Emperor*, 54 C 52 So in India an accused person is not entitled to give evidence on his own behalf In England the disqualification of the accused in criminal cases to testify for himself seems not to have been questioned in policy until Bentham's time But his arguments in this respect took longer for their fruition in legislation than any other of his proposals for abolishing witnesses' incapacities By the Criminal Evidence Act, 1898 (61 & 62 Vict C 36) the disability of the accused to appear as a defence witness has been removed Before that time, it had become customary in England to allow the accused to make a statement to the jury *ie* to tell his story, not on oath and not as a witness, but in the guise of an address or argument on the testimony and the whole case *R v Malings* 8 C & P 242, *R v Walking* 8 C & P 243 *R v Dyer* 1 Cox Cr 113 *R v Williams* 1 Cox Cr 363, *R v Shumam* 15 Cox Cr 122, *R v Millhouse* 15 Cox Cr 622 (That the formal grant of competency then, was so long withheld was due rather to a hesitation founded on the supposed interest of the accused himself His failure to use the right of testifying would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law But chiefly, his exercise of the right to testify would (it was believed), in subjecting

**S. 119** him to the ordeal of cross-examination, place him in a situation in which even an innocent man would show at a disadvantage, and would injure more than assist his own cause." *Wigmore* § 579, see also *State v. Cameron*, 10 Vt 533, 60, *People v. Fayler*, 36 Cal 522 528 (Am), 11 American Law Rev 752 But in England the preponderance of opinion seems to be on the side that an accused should be competent to testify for himself Sir James Stephen in his history of Criminal Law Vol I, p 112 said "I am convinced by much experience that questioning the accused, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men and I do not see why in the case of the guilty there need be any hardship about it" Similar remarks also occurred in *Lord Alerton's* Recollections of Bar and Bench, where at p 176, he said "It will be convenient here to refer to the effect of the passing of the Act which enables prisoners to give evidence I had long been impressed with the absolute necessity of such a measure in the interests of justice, for the protection of the innocent and (it may be) for the more certain conviction of the guilty" So in England every person charged with an offence is a competent witness for the defence at every stage of the proceedings but he cannot be called except on his own behalf *Criminal Evidence Act* [61 & 62 Vict C 36, s 6(1)] There it is the duty of the presiding Judge, to inform him that he has a right to give evidence if he wishes so to do *R v Warren* 20 T L R 623 The counsel for the prosecution may comment upon any evidence given under the Act by a person charged, (*H v Gardner*, (1899) 1 Q B 150), but he must not comment upon the failure of any such person or of the wife or husband of such person to give evidence *Stat* 61 & 62 Vict C 36, s 1(b) But it has been held that the Judge may comment upon such failure *R v Rhodes*, (1899) 1 Q B 77, *H v Smith* 81 T J K B 2153=31 T L R 617 There are however many cases in which it would not be expedient or calculated to further the ends of justice so to do *Kops v The Queen*, (1894) A C 653 A person discharged by the police and not brought before the Magistrate is not an accused person In India the evidence of such a person is admissible although he has been illegally discharged by the police *Queen Empress v Mona Pina*, 16 B 661

**Counsel engaged in a case** A police officer or advocate conducting a prosecution should never be sworn, unless he is called as a witness, and if so called he should be allowed to depose only to those facts which he knows and of which he is in accordance with the provisions of the Evidence Act a competent witness *Empress v Kendu* 6 C P L R Cr 1 in this connection see also *Heston v Peary* 40 C 895, *Lodd Gourdass v Ralmani* 20 Ind Crs 135=17 M L T 382, *Chandreshwar v Bisheswar* 5 P 777

**119** A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court Evidence so given shall be deemed to be oral evidence

**Scope** At the time when unscientific ideas prevailed concerning mental derangement and defect the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown *Hale*, Pl Cr I 31 *R v Ruston* 1 Leach 3 C & P 127 *Morrison v Lennoid* 3 C & P 127 To day this presumption has disappeared *Wigmore* § 498 In *People v Mc Gee* 1 Den 21 *Jenett J* said "The woman was of sense sufficient to have intelligence conveyed to her and to communicate intelligence to T by signs and motions If she had sufficient reason to have intelligence conveyed to her by T and to communicate facts to the understanding of T although she was not able to talk or write, she could have been sworn and testified through him by signs" See also *Harrod v Harrod*, 1 Key & J 9 Persons affected with these calamities have been found by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed.



Still, when a deaf mute is addressed as a witness, the Court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the Judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method. *Morrison v Lennond* 3 C & P 127, *per Best C J*. But if his knowledge of that method is imperfect, he will be permitted to testify by means of signs. *Morrison v Lennond*, 3 C & P 127, *R v Ruston* 1 Lev 408, *R v Steel* 1 Lev 452. *The State v De Wolf* 8 Coun 93, *Com v Hill*, 14 Mass 207, *Taylor* § 1376. The gesticulation of a deaf mute at the place where a dead body was found during the police enquiry and subsequently in Court cannot be used in evidence against an accused person, as he is not a competent witness under s 116 of the Evidence Act. *Samadin v King Emperor*, 5 O C 246. A witness who is so deaf and dumb that it is impossible to make him understand the questions put in cross-examination, is not a competent witness and his evidence, if taken ought to be struck out and a conviction based solely on his evidence must be quashed. *Venkattan v Emperor* 14 Ind Civ 655=(1912) M W N 100. In this connection see also *Requ v Abdulla* 7 A 385 (F B).

A deaf mute's testimony may be taken by the use of written questions to which he replies in writing. The questions and answers are then read to the Court and jury. But it must appear that the deaf mute is able to understand intelligently communications made to him by signs or otherwise and that he is able to communicate his thoughts in an intelligent manner. And where a deaf mute is able only by means of descriptive signs to picture the happening of certain events and cannot understand questions or communicate the details of the events that he is attempting to tell about his testimony cannot be taken. When the witness, by reason of physical injuries to the throat was unable to speak, the Court was justified in permitting her to nod for yes and shake her head for no, and to write answers for which the simple affirmative and negative signs were inappropriate. *Buri Jones* § 719.

**120** In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Parties to civil suit,  
and their wives or  
husbands. Husband  
or wife of person  
under criminal trial

**Reason of the rule** It was a favourite doctrine of common law that husband and wife were one person in the law. Since parties were incompetent to testify in their own behalf it followed that, if the legal identity of husband and wife was conceded, they are not competent witnesses for or against each other. *Buri Jones* § 733. Blackstone thus stated this ground of exclusion. "But in trials of any sort, they are not allowed to give evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of the persons, and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law '*nemo tenetur seipsum accusare*.'" *Black Com* 443, see also section 3 of Act XV of 1852 and s 14 of Act II of 1855. This section does away with this rule of the common law. In India that bar has been removed by this section. The rule of exclusion in England is merely a rule of positive law and not one depending upon the fundamental principles of natural justice. *Per Sir Barnes Peacock J in Queen v Khayyoolah*, 6 W R 21 (25) Cr. Mr Livingstone in his Introductory Report to the Code of Evidence, prepared by him for the state of Louisiana says "The exclusion of interested testimony having been examined and found to be injurious to the investigation of truth, and its admission to be attended with the inconvenience which may

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not be reduced to one of a quantity that has no assignable value, it, of course finds no place in the proposed code, and with it disappears one of the most fruitful sources of uncertainty, expense, delay, and inconvenience in the law. If the search after truth requires that interested witnesses, and even the parties themselves should be interrogated to discover it, are there any relations in which the offered witness may stand to the parties that exclude his testimony? (1) The code now offered does not contain the exclusion of husband or wife as witnesses, for or against each other, because the reporter did not find any one sufficient among the reasons by which it is supported in the English Divisions or Commentaries. The first of these alleged reasons is that their interests are identical. But in a system which directs interests as an objection to competency, this reason fails of course.

**Civil cases.** Even before the passing of the Indian Evidence Act, it was held in *Queen v Ahpooallah* 6 W R 21 Cr (I B) by the majority of Court, that in India upon trials in the Mofussil a wife was competent to give evidence for or against her husband or for or against any person tried jointly with her husband. This rule has been incorporated in this section. Bastardy proceedings under section 493 Criminal Procedure Code are civil proceedings within the meaning of section 120 of the Evidence Act, and the defendant thereto may give evidence on his own behalf. *Aur Mahomed v Bisnulla Jan*, 16 C 781, see also *In re Toke v Ibdool*, 5 C 536. A person against whom an order for maintenance under section 483 of the Code of Criminal Procedure is sought is a competent witness on his own behalf in such proceedings. *Hiralal v Sahib Jan* 18 A 107. In *Rosario v Ingles* 18 B 468, 473, the Court observed. Proceedings under section 488, Criminal Procedure Code have been held to be of a civil nature. *Aur Mahomed v Bisnulla Jan*, 16 C 781. By section 120 Evidence Act, in civil proceedings the parties to the suit shall be competent witnesses. *Mrs Rosario* is a party and a competent witness. If she states in the witness box that her husband had no access to her at any time when the children now in question could have been begotten her statement may be taken for what it is worth. If her evidence of this alleged fact cannot be excluded as inadmissible, then there is no provision of law determining at what stage of the proceedings her evidence may be recorded. See also *John Howe v Charlotte Howe* 38 M 466. There is no inflexible rule that if a party, plaintiff or defendant gives his testimony, he must be disbelieved because he is a party to the suit. Such a rule, if adopted, would nullify the provisions of section 120 of the Evidence Act, which provides that in all civil proceedings the parties to the suit shall be competent witnesses. *Jogendra Krishna v Karpal Harshu & Co*, 49 C 345=35 C L J 175=68 Ind Cas 993.

**Criminal cases.** The theory of disqualification by interest was merely one variety of the general theory which underlies the extensive rules of incompetency at common law. The law on the subject is thus laid down by *Mr Starkie*, in his Evidence at page, 83. 'The law will not receive the evidence of any person even under the sanction of an oath, who has an interest in giving the proposed evidence, and consequently whose interest conflicts with his duty. This rule of exclusion, considered in its principle requires little explanation. It is founded on the known infirmities of human nature which is too weak to be generally restrained by religious or moral obligations when tempted and solicited in a contrary direction by temporal interests. There are no doubt, many whom no interest could reduce from a sense of duty and their exclusion by the operation of this rule may in particular cases shut out the truth. But the law must prescribe the general rules and experience proves that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion.' For the reception of evidence of parties to suits the following reason is urged in the Second Report of the English Common Law Practice Commissioners. Plain sense and reason would obviously suggest that any living witness who could throw any light upon the fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to the truth.

The law of England, however, at least until a recent period, proceeded on a very different principle. Acting apparently on a distrust both of the integrity of witness and of the discernment of the tribunals, it sought to protect the latter from the possibility of being misled, by carefully excluding from giving testimony not only the parties to the cause, but any one who had any, even the most minute, interest in the result. Every person so circumstanced, however small and insignificant the amount of his interest, was presumed to be incapable of resisting the temptation to perjury, and every Judge and jury man was presumed to be incapable of discerning perjury under circumstances peculiarly calculated to create suspicion and witchfulness. It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into Court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which the parties silently submitted to wrongs from inability to avoid themselves of proof which though morally conclusive, was in law inadmissible. From the time, however, when the late Mr Bentham first turned the attention of the public to the defects of the English law of evidence, the system of exclusion has been crumbling away before the power of discussion and improved legislation. [After noting the general statutes between 1843 and 1851, which had by successive steps removed incompetency for interest], it continued. Such is the gradual progress of opinion and intelligence. A quarter of a century ago such a measure if proposed would doubtless have been treated as a wild and dangerous innovation, altogether unfit to be entertained by the Legislature. The new law has now been in practical operation for eighteen months, and according to the current testimony of the bench, the profession and the public, is bound to work admirably and to contribute in an eminent degree to the administration of justice. *Vide English Common Law Practice Commissioners Second Report* p 10. In England, this disqualification of the parties in civil suits except in actions for adultery and breach of promises was removed by Stat 14 & 15 Vict C 99, s 2. Stat 16 & 17 Vict. C 83, s 1 states that husbands and wives of parties shall be competent and compellable to testify on behalf of either or any of the parties. Section 6 of Stat 22 and 23 Vict C 61 provided that on wife's petition for divorce founded for adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to cruelty or desertion. Section 2 of Stat 32 & 33 Vict C 68 enacts that parties to an action for breach of marriage promise, are competent witnesses. Stat 40 & 41 Vict C 14 enacted, on indictment or in proceeding to try or enforce a civil right only, the defendant, and the defendant's wife or husband to be competent and compellable witness. In 1898 the English Criminal Evidence Act was passed. Section 36 of that Act (Stat 61 & 62 Vict. C 36) states 'Every person charged with an offence and the wife or husband, as the case may be of the person so charged, shall be a competent witness for the defence at any stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application, (b) The failure of any person charged with an offence, or of the wife or husband as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution, (c) The wife or husband of the person so charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged (d) Nothing in this Act shall make a wife compellable to disclose any communication made to her by her husband during the marriage, etc. Under this section in criminal proceedings against any person (i.e. where the person is in the position of an accused) the husband or wife of such person, respectively, shall be competent witnesses. But the accused is not a competent witness in a criminal case. The complainant or the husband or wife of such complainant is incompetent witness in a criminal proceeding, although this section in the same provision for it, because in all criminal cases the crown is always the nominal prosecutor.

**Proceedings under Divorce Act.** By section 52 of the Indian Divorce Act (IV of 1869) any party may offer himself or herself as a witness, and shall be

**S 121.** examined, and may be cross examined and re examined, like any other witness. The word 'party' includes a co respondent. *De Linton v De Bretton*, 4 A 49 (51). Section 52 of the same Act enacts "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty or of adultery coupled with desertion without reasonable excuse the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion" See also *Kelly v Kelly* 3 B L R App 6, Stat 22 & 23 Vict C 61 s 6

**121** No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate but he may be examined as to other matters which occurred in his presence whilst he was so acting

#### Illustrations

(a) A, on his trial before the Court of Session says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B a Sessions Judge. B may be examined as to what occurred.

**Principle.** A Judge is not bound to leave the bench and testify as to anything. Public policy would authorize his refusal. If the Judges are made competent witnesses, it would lead to embarrassment, and would have a tendency to lower the standard of Courts and bring them into contempt. *Burn Jones* § 764. In *Dule of Buccleuch v Metropolitan Police* L R 5 E & I App 429, 433 *Cleasby B* and 'With respect to those who fill the office of Judge, it has been felt that there are grave objections to their conduct being made subject of cross examination and comment (to which hardly any limit could be put) in relation to proceedings before them and as everything which they can properly prove can be proved by others the Courts of law discountenance and I may say prevent them from examining. This section clears up an uncertain point of English law by exempting a Judge from answering questions as to his own conduct in Court, or as to anything other than actual occurrences in his presence, which came to his knowledge in Court as such Judge, unless with the special order of the Court above. *Cun Lo* 352 illustrations (a) (b) (c)

**Scope of the section.** Calling the Judge as a witness is an exceedingly rare event. Nevertheless, it has sometimes happened that a presiding Judge or Magistrate has temporarily left the bench to assume the role of witness in the pending cause. But the two functions are so inconsistent that the function is obviously improper. If a Judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance that he may, for reasons sufficient for himself, but not sufficient for another of equal authority in Court, decline to answer a question put to him or in some other way bring himself in conflict with the Court. Who shall decide what course shall be taken with him? Shall he

return to the bench and take part in disposing of the interlocutory question thus arising and upon the decision being made, go back to the stand, or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The latter would disorganise the Court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings. *Reg v Gaillard*, 3 Cr & P 595. But nevertheless a Judge may give testimony as a witness in a trial before a Court of which he is a member. *Mitchell v Justices*, 4 B, 30 L R 526. Judicial officers are not exempted from giving evidence upon matters which they saw, when sitting as Judges, unless they arrive at such knowledge by virtue of investigation which they were making as Judges. A Munsiff should not be called upon to depose to what took place before him in the course of a trial which he was conducting as a Munsiff. *High Court Proceedings* 27th Nov 1871, 2 Weir 777=6 M H C App 42. The privilege given by this section is the privilege of the witness, i.e., of the Judge of whom the question is asked. If he waives such privilege it does not lie in the mouth of any other person to assert it. A committing Magistrate who is cited as a witness in a Sessions Court cannot be compelled to answer questions as to his own conduct in Court, except under the special orders of the Court to which he is subordinate. If he does not object to answer such questions there is no prohibition to his doing so. *Empress v Clendon* 3 A 573=A W N 1551 37.

**Judge, whether competent witness.** In arguing a question as to the duty of the Court not to have rendered a certain judgment counsel put this case.

Sir let us put the case that one man kills another in your presence you observe it and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death you ought to respite the judgment against him, for you are knowing to the contrary, and should make further report to the king to give him pardon. No more should you give judgment in this case, before causing those to appear by whose hands the king was paid. *Goscoigne C* said. "Once the king himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so." *Year Book*, 7 H IV 41 pl 5. In Sir John Fenwick's trial before the House of Commons, 13 How St Tr 663, 667, Mr Haules, Solicitor General, on Mr Newport having cited the above story of *Goscoigne*, replied. 'It is said, though a Judge do not think in his conscience a person guilty, yet he ought not to make use of that private knowledge, and a case was quoted out of Henry IV. But I think that Judge might have behaved himself something better than he did, and sure I am, now he would be blamed. I do not say that a Judge upon his private knowledge ought to judge, he ought not. But if a Judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sits, and go to the bar and give evidence of his knowledge, and so the Judge in Henry IV's time ought to have done and not to have suffered the prisoner to have been convicted and then get a pardon for him for a pardon will not always do the business.

'A Judge says Mr Taylor 'before whom the cause is tried, must conceal any fact within his own knowledge unless he be first sworn (*Li v Anderson*, 7 How St Tr 871, *Hunpurshad v Sheo Dajal*, 3 I A 259 286) and consequently if he be a sole Judge, it seems that he cannot depose as a witness (*Ross v Buhler*, 2 Mart N S 312), though if he be sitting with others, he may then be sworn and give evidence (*Trial of Regicides*, 5 How St Tr 1181). In this last case, the proper course appears to be that the Judge who has thus become a witness should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony or of weighing it against that of another. *Ross v Buhler*, 2 Mart N S 312 *Taylor* § 1379. So a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent evident judgment of other persons exercising similar judicial functions sitting with him at the same time. So also a Sessions Judge is a competent witness, and

- S 121. the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part *Queen v Moolta Singh*, 13 W R 60 Cr In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly and where he tried them on that charge, *Phear J* said 'It has been held by this Court and in accordance with the general principles which govern the conduct of an English Court of criminal justice that while a person is not necessarily disqualified from presiding as a Judge or acting as a jurymen upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation if he does do so he so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to, is bound to state to the prisoner or other person concerned, or to make known to him, so far as he can, what are the facts which he himself observed to which he himself can bear testimony. And moreover the prisoner who is being tried by a Judge in this situation has a right if he thinks it desirable to cross examine the Judge who, under these circumstances and to this extent, must be viewed as a witness, and his evidence should be recorded. It is quite erroneous in our opinion, to suppose on the contrary, as the Deputy Magistrate appears to have supposed that he was bound to keep out of sight altogether the part which he has played in the matter and to pretend (we cannot use any other word than that) that he knew nothing about the facts excepting so much as the witness told him in Court. It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this. It is most specially dangerous for a Judge who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind. The Deputy Magistrate if he thought it right, as he did to take upon himself the duty of trying the prisoners in this case ought to have made no pretence whatever of any sort he ought to have frankly avowed and openly stated in his Court all the part which he had taken and the facts which he had observed and made his own evidence part of the record in the case. The awkwardness of a Criminal Judge being the principal witness in the case which he has to try is, no doubt most apparent this however is reason for his declining to try the case not for his endeavouring to assume an unreal character' *Hurro Chunder Paul and ors* 20 W R 76 Cr

In *Empress v Donnelly*, 2 C 405 the question arose whether a Magistrate can himself be a witness in which he is the sole Judge of law and fact. In answering the question in the negative *Markby J* said 'As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence that question seems to me to resolve itself in to this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been strongly contended on the part of the Crown that he is so and that there is no impediment in law to a Judge giving evidence and then disposing himself of the case by his sole opinion. No instance of this kind has however been found and no authority of any Judge or text writer has been cited in support of such a proposition. The English cases (they are very bad and very old) do not go farther than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time (per *Norman C J* in *Queen v Mukta Singh* 4 B L R 1 Cr 15). No case in England is cited in which even under the circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of *Lord Stafford*. Two cases are cited as having occurred in this country—one the case of *Queen v Tara persad Bhattacharjee* S 1 Rep 1857 pt ii p 83, and the other case before *Mr Justice Norman* above referred to. That learned Judge went into the matter on that occasion very fully and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down is the result of the English cases. In the absence therefore of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness,

I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives his evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding, no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated. In the same case *Prinsep J* added: 'On the second point, I consider that the authorities quoted in the judgment of Mr Justice Norman in *Queen v Mulia Singh* 4 B L R A Cr 15 are conclusive that one who is sitting as a sole Judge is not competent also to be a witness. See also *Queen v Hanukam* 19 M 263.

Although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution. *Queen v Bholanath* 2 C 23 see also *Sudhania v Queen Empress*, 23 C 328, *Gurish v Queen Empress* 20 C 857, In the case of *Imud Chunder Singh v Basu Mudh* 24 C 167 *Sardar Khan v Emperor* 21 P R 1904 Cr = 27 P R Cr 1904, *Alimuddin v Emperor*, 29 C 392 = 6 C W N 590.

It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as Judge in a case in which he has a substantial interest. This is the law of this country as much as it is the law of England. *Queen v Bholanath*, 2 C 23 (27), *Queen v Hiratal* 8 B L R 422 (F B) *Queen v Meyer*, 1 Q B D 173, *Seagut v Dale*, L R 2 Q B D 508, *Gurish v Reg* 20 C 857, *Wood v Corporation of Calcutta*, 7 C 322. It is not at all proper for a Magistrate, in disposing of a case, to rely on statements made to him on oath of Court. *Reg v Sahadev* 14 B 572 see also *Sri Balusa v Sri Balusa* 22 M 427. A Judge is not justified in acting chiefly on his own knowledge and belief. *Muthun Bhee v Busher Khan* 11 M I A 213 (221), *Harproshad v Sheo Dyal*, 4 I A 259 *Housseau v Pinto*, 7 W R 190, *Sooraj Kant v Khorlee Narain*, 22 W R 9, *Durga Prasad v Ram Doyal*, 38 C 153, *Sathughan v Emperor*, 40 Ind C is 357, *Ashore v Ganesh*, 9 W R 252, *Kallomass v Ganga*, 25 W R 121.

Where a Magistrate, trying a case of riot, made a local inspection of the scene of the alleged offence and was influenced by such inspection in arriving at a conclusion in the case, he is a witness in the case and is such was incompetent to try the case. *Queen Empress v Mauckem*, 19 M 263 = 2 W R 725 = 6 M L J 143, see also *Gaya Singh v Mahomed* 5 C W N 864, *Har Ashore v Abdul* 21 C 920, but see *In re Fatpi* 19 A 302. The rule is that the same person cannot both be prosecutor and Judge. *Queen v Nali*, 24 W R Cr 1, *Queen v Gangadhar*, 3 C 622, *Queen v Deoki*, 2 A 806, *Gurish v Queen Empress*, 20 C 865, *In re Het Lal*, 22 W R Cr 75.

**Jurors.** It was formerly held that jurors could not be asked to state the testimony of a witness given before them for the purpose of impeaching him at the trial. 12 *Im Abr* 20 (*lit Evidence*). But under s 118 of the Evidence Act they are competent witnesses to give evidence of material facts. But where it was alleged that the verdict of the jury was arrived at by casting lots and the Sessions Judge held an enquiry into the matter in the course of which he examined, besides other persons, all jurors, held that the statement of the juror as to what happened in the jury room is inadmissible. *Emperor v Hariumar*, 17 C W N 787 = 40 C 693 = 14 Cr L J 392 = 20 Ind C is 216. "The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehension of injury from the person charged by them,

- S 122.** demands a guarantee that by no legal process will the disclosure of their votes and expressions of opinion in the jury room be compelled. It forbids that any grand juror shall be compelled to disclose his own utterances or permitted to disclose the utterances of his fellows."

**122** No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other

**General Principle of Privileged communications** Looking back at the principle of Privilege as an exception to the general liability of every person to give testimony upon all facts required in a Court of Justice and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation (1) The communications must originate in a confidence that they will not be disclosed (2) This element of confidentiality must be essential to the full satisfactory maintenance of the relation between the parties (3) The relation must be one which in the opinion of the community ought to be sedulously fostered and (4) The injury that would result from the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. These four conditions being present a privilege should be recognized, and not otherwise *Wigmore* § 2285

**Principle underlying this section** The policy which should lie at the foundation of every rule of privileged communications is amply satisfied in the present privilege. The communications originate in confidence, the confidence is essential to the relation, the relation is a proper object of encouragement by the law and the injury that would ensue to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth. There seems therefore to be no reason for objecting to the recognition of the present privilege. *Wigmore* § 2332. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife and this confidence the law secures by providing that it shall be kept for ever inviolable and nothing shall be extracted from the bosom of the wife which was confided there by the husband. *Green D.* § 214

**Husband and wife—Old rule of excluding their evidence** The principle underlying this section must not be confused with the old disability of husband and wife to be witness against each other. The record of judicial ratiocination says *Prof Wigmore* defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of evidence. It is curious because the variety of ingenuity displayed in the invention of reasons *ex post facto* for a rule so simple and so long accepted could hardly have been believed, but for the recorded utterances. *Wigmore* § 2229. The reason of the privilege is thus given by *Buller J* in his trials at *Assizes*, 256. "Husband and wife cannot be admitted to be a witness for each other, because contrary to the legal policy of marriage." In *Barker v. Dixie* *Lee C* is *t Hardwicke* 264. *Lord Hardwicke L C J* said "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families. The following reasons are stated by *St William Blackstone* in his commentaries. If they are admitted to be witnesses for each other, they would contradict one maxim of law *nemo in*



*propria causa testis esse debet*, and if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*. A new reason is ascribed by Lord Kenyon, *L C J* in *Davis v Dimmock*, 41 R 678, where he said 'Their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence for or against each other' "Most of these reasons says *Prof Wigmore* "do not call for particular dissection, their very statement is void of force" "Hard", 'hardship', 'policy', 'peace of families', 'absolute necessity'—some such words as these are the vehicles" says Mr *Jeremy Bentham* "by which the faint spark of reason that exhibits itself is conveyed There are the leading terms, and these are all you are furnished with, and out of these you are to make an applicable, a distinct and intelligible proposition, as you can [As to the 'policy of the situation, it is precisely the opposite, for] if a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them, and (if that were not enough) betrayed and exposed to punishment by his wife, injustice in all its shapes, and with it the suits and the fees of which it is prolific would in comparison with what it is at present be rare Let us, therefore, grant to every man a licence to commit all sorts of wickedness, in the present and with the assistance of his wife, let us secure to every man in the bosom of his family and in his own bosom, a safe accomplice let us make every man's house his castle, and, so far as depends upon us let us convert that castle into a den of thieves! A rule like this protects and encourages inculcates fraud For falsehood is but one modification of fraud, concealment, a sort of negative falsehood is another, I mean concealment of any facts of which for the protection of their rights individuals or the public have a right to be informed By authorizing an individual to conceal it in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts, of the mischievousness and criminality of which it shows itself sufficiently sensible on other occasions,—the principal crime, and that concealment of it, which when the act so concealed is criminal, is itself a crime To the legislators of antiquity the married state was one object of favour they regarded it as a security for good behaviour, a wife and children were considered as being (what doubtless they are in their own nature) so many pledges Such was the policy of the higher antiquity The policy of feudal barbarism of the ages which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime The reason now given was not I suspect, the original one Drawn from the principle of utility though from the principle of utility imperfectly applied, it favours of a late and polished age The reason that presents itself as more likely to have been the original one is the gringribbler nonsensical reason—that of the identity of the two persons thus connected *Biron* and *Feme* are one person in law On questions relative to the two matrimonial conditions this quibble is the fountain of all reasoning *Bentham's Rationale of Judicial Evidence* 6 IX Pt IV, C V *Wigmore* § 2238 But this section deals with a different subject The Commissioners on Common Law Procedure in their second report at p 13 said The question how far communications of married persons *inter se* should be a matter of testimony in Courts of Justice stands on a different ground (from that of compelling one to testify to facts against other) So much of the happiness depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute Hence all communications between them should be held to be privileged" So this privilege rests on the obvious ground, that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life *Taylor* § 909

Scope of the section This section is based upon section 3 of Stat 16 & 17 Vict C 83, which runs as follows 'No husband shall be compellable to

**S 122** disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." The protection afforded by this section is greater than that conferred by the English Statute. There only the husband and wife are protected from disclosing any communication made to him to her by his or her marriage partner. But in India he or she is not permitted to disclose that communication. *Steph Dig Fc art 110, Maraby Li p 93*. As according to the rule of interpretation, words importing the masculine gender includes feminine the word he includes the word 'she' and the word him includes the word 'her'. So this section confers the same privilege on the wife that it confers on the husband. *Maraby Li p 93, General Clauses Act (X of 1897) s 13*. The words "compelled to disclose or 'permitted to disclose' clearly imply that the party concerned is not made or allowed to say or do something by way of disclosing a communication made during marriage. *Per Subramanya Iyyar J in Queen Empress v Donaghine, 22 M 1 (4)*. In the same case *Boddam J* said. We think the Sessions Judge was wrong in declining to receive in evidence the letter, exhibit V — a letter from the first defendant to his wife which had been found by the police when searching her house under a search warrant. Section 122 of the Evidence Act does not apply to such a case. A document even though it contains a communication from a husband to a wife or *vice versa* in the hands of third persons, is admissible in evidence, for in producing it there is no compulsion on or permission to the wife or husband to disclose any communication. The section protects the individuals and not the communication if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made. For these reasons we think the exhibit V was rightly received in evidence. A third person, who has overheard a conversation between husband and wife while it was going on, may testify to it. *Greene Ev 15th Ed Vol I p 347, see also R v Pamerter, 12 Cox Cr 177*. The principle applies quite irrespective of whether either spouse is a party to the cause. Moreover the death or divorce of the other member does not affect the policy of prohibition. Again the other member may always waive the privilege. *Greeneleaf § 333 (C)*. A conversation with a third person is not excluded because the other spouse was also present. *All bright v Hannah, 103 Ia 98*. The common law privilege protects only conversations or communications, and the question may thus arise whether certain conduct by one spouse in the presence of the other—such as the payment of money or the signing of a note—is to be treated as a communication. *Greene Ev § 254*.

The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. *O'Connor v Mayonbanks 4 M & Gr 435-11 L J C P*. It extends also to cases in which the interests of the strangers are solely involved as well as to those in which the husband or wife is a party on the record. It is however, limited to such matters as have been communicated during marriage. *Taylor § 909 A*. This section is limited to such matters as have been communicated during the marriage, and consequently if a man were to make the most confidential statement to a woman before he married her and it were afterwards to become of importance in a civil suit to know what that statement was the wife, on being called as a witness and interrogated with respect to the communication would as it seems, be bound to disclose what she knew of the matter. *Taylor § 909*. In interpreting the rule it is not material that the relation of husband and wife should be still subsisting at the time when the evidence is required to be given. So where a woman, who had been divorced by Act of Parliament and had married another person was offered as a witness against her former husband to prove a contract which he made during the coverture. *Lord Altonley* held her clearly incompetent adding with his characteristic energy. It never can be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations shall be broken whenever, by the misconduct of one party, the relation has been dissolved. *Monroe v Twissleton, Pea Add Cas 221* explained and confirmed

by Lord Ellenborough in *Avegon v Ld Humand*, 6 East, 192, 193. Where there is no "representative in interest" who can consent, under this section to the disclosure of communications made by a deceased husband to his wife during marriage the wife should not be permitted, even if willing, to disclose such communications. The widow of a deceased husband is not his "representative in interest" for the purpose of giving such consent. The prohibition enacted by the section rests on no technicality that can be waived at will but is founded on a principle of high import which no Court is entitled to relax. *Nauab Hauladar v Emperor*, 40 C 891. No statement of an incriminating nature made by the appellant as to her guilt under section 302 I P Code to her husband could be received in evidence. *Ishanan v Emperor* 1923 Lah 40. In *Mussamat Fatima v Crown*, 10 P R 1914 Cr = 261 P L R 1914 = 15 Cr L J 613 = 25 Ind Crs 525. F, wife of A, was convicted of murdering her stepson on the strength of a confession by her to her husband and the pointing out by her to him alone of the body of the stepson floating in a pond. Held that such evidence is not admissible as the crime was not committed by the wife against the husband within the meaning of s 122 Evidence Act. Statements alleged by the wife of an accused person to have been made to her in respect of the offence with which he is charged, without the accused or his representative in interest consenting to these statements being disclosed are inadmissible under this section. *Mulla v Emperor*, 218 P L R 1913 = 19 Ind Crs 705 Cr = 14 Cr L J 273. An offence against a person is an offence calculated to injure his person or property or reputation, as in cases of defamation and does not include an offence against a son though such offence may cause to the father grief in mind. *Mussamat Fatima v Crown*, 10 P R 1914 Cr = 261 P L R 1914 = 15 Cr L J 613 = 25 Ind Crs 525. Under this section no communication between husband and wife can be disclosed by the one against the other without consent of the party concerned. The consent can not be implied. It is incumbent upon the Court to ask the party, against whom the evidence is to be given. *Bishen Das v Emperor*, 244 P L R 1913 = 19 Ind Crs 1004 = 14 Cr L J 316 = 41 P W R 1913 Cr = 27 P R 1913 Cr. So evidence given by the wife of one of the accused as to certain communications between her and her husband is inadmissible under this section. *Jouala Salua v Crown*, 34 P R 1914 Cr = 27 Ind Crs 664 = 16 Cr L J 184. The communication made by an arbitrator to his wife shortly before his death admitting that he had accepted bribe from a party can be permitted to be disclosed in evidence only if the requirements of this section, have been fulfilled. *Kulobad v Khambatta*, A I R 1930 Lah 280.

**Communication does not include acts.** The privilege has for its object the security from apprehension of disclosure,—a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, i.e., utterances, not acts—the reasoning being analogous to that which establishes a similar limitation for communications between attorney and client (*vide s. 126 infra*). It follows, therefore, on the one hand that the privilege does not apply to domestic conduct as such. On the other hand, it is equally true that any particular act or conduct may in fact become the subject of a special confidence in the wife alone, i.e., may become a communication to her. For example, the husband, bringing home a package of valuables, and calling his wife's attention, "Note that I place this in the fourth desk drawer," in effect communicates to her not only the words but also the act of placing the package. While his domestic acts are ordinarily not to be treated as communications nevertheless it is always conceivable that they by special circumstances be made part of a communication. To formulate a precise test would perhaps be impracticable. It is clear however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him for it is done for the sake of the doing, not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written. *Wymore* § 2337.

**123** No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the Officer at the head of the department concerned, who shall give, or withhold such permission as he thinks fit

**Evidence as to affairs of State** Evidence as to affairs of State

**Principle** On the principle of public policy, the official transactions are in general treated as privileged communications. *Greenleaf 1v § 251*. In *Beatson v Slene* 5 H & N 838, 53 *Pollock C B* said: "We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them and all communications to the heads of departments are to be produced and made public whenever a suitor in a Court of justice thinks that his case requires such production. It is manifest to think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of state. As an instance, we would put the case of a British minister at a foreign court writing, in that capacity a letter to the Secretary of State for Foreign Affairs in this country, containing matters injurious to the reputation of a foreigner or a British subject can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a state paper would be injurious to the public service the general public interest must be considered paramount to individual interest of a suitor in a Court of Justice."

**Scope of the section** This section follows the English law as laid down by the majority of the Court in *Beatson v Slene* 5 H & N 838 instead of the view of *Martin B* in the case of *Field J* in *Hennessey v Wright*, 21 Q B D 509 and makes the public officer the Judge of whether a communication made to him in official character should or should not be disclosed. *Jadub Lal v Khemani*, 21 Q B D 509. So under this section the Judge is bound to accept, without question the decision of the public officer referred to. This view is confirmed by s 162 which forbids the Judge even to inspect the documents. *Mark Ev* p 91. The term "evidence" in this section refers to both oral and documentary evidence. *Whately Stoles*, Vol II p 919. This section is in accordance with *Beatson v Slene* 29 L J Ex 430, in which *Pollock C B* said: "We are of opinion that, if the production of a state paper would be injurious to the public service the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice, and the question then arises, how is this to be determined? It is manifest that it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without determining what the document was, and why the publication would be injurious to the public service—an enquiry which cannot take place in private and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us therefore, that the question whether the production of the document would be injurious to the public service, must be determined not by the Judge, but by the head of the department having the custody of the paper and if he is in attendance and states that, in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. See the *Rajah of Coorg's case* 20 Jur 407. *Not Ex* 309."

Affairs of state would no doubt, be held to include any matters of a public nature with which the Government is concerned. *Can Ev* 354. So no person will be required to testify with regard to state secrets, or as to correspondence between Government officials on matters of public business, if in the opinion of the head of the department, such disclosure would injure

ously affect the public interest *Best Lt* 537 But any officer having the custody of records, not being records of which the production may, on special grounds be refused, is bound to produce them on receiving summons to that effect 2 *Weir* 781 Statements made by witnesses in the course of departmental enquiry into the conduct of police officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under s 123, 124 or 125 of the Evidence Act *Harbans v Emperor*, 16 C W N 431=15 Ind C 15 77 Statements made before the Income Tax Collector do not relate to affairs of state and so are not governed by section 123 of the Evidence Act. *Venkatu chela v Sampathu Chettier*, 4 M L T 317=32 M 62=19 M L J 263=1 Ind Cas 705 A report made to the Inspector General of Prisons under the jail manual is an unpublished official record relating to affairs of state within the meaning of this section and privilege can be claimed by the head of the department *Emperor v Nandha* 12 O L J 387=26 Cr L J 387=A I R 1925 Oudh 540=89 Ind Cas 387

**Official records relating to affairs of state** The protection of documents from discovery upon broad ground of state policy and public convenience is not limited to public official documents of a political or administrative character. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official which alone is no reason for their non production *Asiatic Petroleum v Anglo Persian Oil Co* (1916) 1 K B 822=85 L J K B 1075 A libel case by a lieutenant-colonel, who was engaged in a mining company against one of a Court of enquiry appointed by the Commander-in-Chief to enquire into the plaintiff's conduct in the mining adventure and reporting his misconduct, the military secretary of the commander was held privileged from producing the minutes of the Court of enquiry containing the alleged libel, on the ground that the report was made under lawful orders and was confidential *Home v Bentinck*, 2 B & B 150, 151, see also *Laird v Fars* 1 Shaw 229 236, *Beatson v Stone*, 5 H & N 838, 853 *Hennessey v Wright*, L R 21 Q B D 509, *contra Robinson v May*, 2 J P Smith 3 *Dickson v Wilton*, 1 F & F 419 Where the document itself is privileged no extract from the same could be produced *Anderson v Hamilton* 2 B & B 156 note The votes or speeches of members of the House of Commons or the proceedings of the House of Commons cannot be disclosed *Wigmore* § 257b The military and international affairs including proceedings before a military Court of inquiry cannot be disclosed *R v Watson*, 2 Stark 116 148 In *Mercer v Deane* (1904) 2 Ch 535 514, *Farwell J* said 'It would be most dangerous to admit confidential report made to the war office' In affirming the rule in the Court of Appeal in (1905) 2 Ch 385, 360 *Vaughan Williams J* said 'I agree although not perhaps exactly on the same grounds'

State-papers, despatches, minutes or documents of any such description which relate to the carrying on of the government and are connected with the transaction of public affairs are privileged *Wader v East India Co* 25 L J Ch 345=8 Deg M & G 182 187, see also *Bishop v Burgh* *Frial* 16 How St Tr 495 In *R v Russell* 7 Dowd Pr 693 papers of a public nature and in the possession of Lord John Russell, in his public character as Secretary of State were held not producible In *Smith v East India Company* 11 L J Ch 71 correspondence on the subject of freight between defendants' directors and the royal commissioners, was held privileged on account of the company's governmental duties

**Who determines the necessity of secrecy** Although the party who relies upon a public document may be prepared to lay before the Court the original or such secondary evidence of it as has been raised by statute to the rank of an original nevertheless it is in the power of the head of any public department of state, whether a party to the action or not (*Admiralty Commissioners v Aberdeen Steam Trawling Co* 1909 S C 335), to represent to the Judge that in his opinion it would be prejudicial to the interests of the state that the document should be produced in open Court and thereupon the Judge will order that the document shall not be put in evidence *Pouell Ev* 273 As the head of the department is alone competent to judge whether the disclosure of a document

**S 124.** will be injurious to the public interest he alone is competent to take this objection *Beatson v Shene* 5 H & N 838 On a proper construction of section 124 of the Evidence Act it is quite clear that it is for the Court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the Court decides that it was so made, then it has no authority to compel the public officer to produce it, for according to the section the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests. *Collector v Jaunpur*, 44 A 360=20 A L J 140=66 Ind Crs 171, see also *Hughes v Vargas*, 9 T L R 551, *Williams v Star Newspaper* 24 T L R 297. But "the truth cannot be escaped" says *Prof Wigmore* "that a Court which abdicates its present function of determining the facts upon which the admissibility of evidence depends will furnish to the designing officials too ample opportunities for abusing the privilege. The lawful limits for the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it is to shield his wrong doing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Judge." *Wigmore* § 2379. But unfortunately this section following the English law makes the public officer the judge as to whether a communication made to him in his official confidence should or should not be disclosed. If he thinks that the public interest would suffer by such disclosure he is entitled to refuse to disclose the communication. *Bulku Bhutan v Hari Nath* 7 C W N 246, *Secretary of State v Samnatha Nadar* 119 Ind Crs 718. Where certain statements were made to a station master of a State Railway, but there was nothing to show that they were made to him in official confidence the communications are not protected. *Emperor v Bhagwati* A I R 1929 Oudh 543=6 O W N 937. In a recent Madras case the Court observed. The question for decision is whether certain documents, items 1 and 7 are open to the lower Court's inspection. The point is concluded by *Irum v D J Reid* 48 C 304 which follows the English Law see *Halsbury's Laws of England* Vol II pp 84 and 137. The public officer concerned and not the Judge is to decide whether the evidence referred to shall be given or withheld. If the objection is taken by the proper person the Court will not go behind it. *Secretary of State v Samnath Nadar* A I R 1930 Mad 342.

**124** No public officer shall be compelled to disclose Official communications made to him in official confidence when he considers that the public interests would suffer by the disclosure

**Principle** In *Hennessey v Wright* L R 21 Q B D 309, 512, *Field J* said. There are two aspects of this question. First the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the crown to each other by superiors to inferiors or by inferiors to superiors, in the discharge of their duty to the crown, were liable to be made public in a Court of Justice at the instance of any suitor who thought proper to say *fiat justitia ruat cælum* an order for discovery might involve the country in a war. Secondly, the publication of a state paper may be injurious to servants of the crown as individuals there would be an end of all freedom in their official communications if they knew that any suitor that as in this case any one of their own body, whom circumstances had made a suitor, could legally insist that any official communication of no matter how secret a character should be produced openly in a Court of Justice. (1) The thrust of the argument' says *Prof Wigmore* is that an official should be secured from liability based on his official communications made in the course of duty. No body can dispute this general principle. But it signifies nothing for the law of Evidence. It signifies an exoneration from tortious or criminal liability. Whether and how far such exoneration should be conceded is a question of substantive law and is now solved by that law liberally in favour of officials. But wherever that law has declined to concede an exoneration,

and his predicted liability, all this reason for protection ceases; by hypothesis it is a mockery to reserve, against righteous claims, a privilege of testimonial secrecy. This much seems plain. All the argument based upon hardship to officials may be conceded but for the purpose of testimonial privilege all such cases are irrelevant being duly safeguarded by other means. (2) The reason under the argument consists in involving secrecy for acts of pending international negotiations or military precautions against foreign enemies. This too may be conceded. There ought to be a protection for 'secrets of State' in this narrow sense. But this done, what remains? In only three or four of the precedents has there been even a pretence that the matters actually preserved from disclosure concerned international facts of negotiation or defence. If they do not, then this reason is insufficient, for it is vain to claim secrecy on the ground that something else might have been asked for which it is in fact not asked for. (3) The question is then reduced to this whether there are any matters of fact, in the possession of officials, concerning solely the internal affairs of public business, civil or military, which ought to be privileged from disclosure when material to be ascertained upon an issue in a Court of Justice? Ordinarily, they are not. In any community under a system of representative Government and removable officials there can be no facts which require to be kept secret with that solidity which defies even the inquiries of a Court of Justice. 'To cover with the veil of secrecy' said *Patrick Hurry* in *Elliots Debates* III, 170 'the common routine of business, is an abomination in the eyes of every intelligent man and every friend to this country'. Such a secrecy can seldom be legitimately desired. It is generally desired for the purposes of partisan politics or personal self-interest. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. To concede to them a sacrosanct secrecy in a Court of Justice is to attribute to them a character which for other purposes is never maintained—a character which appears to have been advanced only when it happens to have served the interest of some individual to obstruct investigation into facts which might fix him with a liability'. *Wigmore* § 2378.

**Scope of the section.** There is a marked difference between this section and section 123. This section is confined to public officers, though who are such is not defined. Section 123 embraces every one. This section makes the officer himself the judge of the propriety of waiving the privilege. In no case has the Court any authority if the objection is raised by proper authority. Section 123 is confined to unpublished records. Section 124 has no such restriction, though it is hard to see how privileged communications once published by the Government—e.g. by placing them in the editor's room—could be excluded. *Not Fv* 310. Statements whether oral or written, made by an officer summoned to attend before a Military Court of Inquiry are not part of the minutes of the proceedings of the Court which when reported and delivered to the Commander in chief, are received and held by him on behalf of the sovereign, and on grounds of public policy cannot be produced in evidence. *Dankins v Lord Rolobey*, L.R. 8 Q.B. 257. In *Wyatt v Gore*, Holt 299, *Gibbs C.J.* said 'No office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney general who is the only person upon whom such governor can lean for advice were suffered to be disclosed'. See also *M. Etheney v Connellan* 17 Ir C.L. 55, 69. Section 123 excludes only unpublished official records relating to any affairs of state except with the permission of the head of the Department while under section 124 in the other official matters the public officer claiming privilege may exercise his own discretion in giving or refusing disclosure. *Ichangur v Secretary of State*, 6 C.W.N. 131. The words 'communication in official confidence' used in this section import no special degree of secrecy and no pledge or direction for its maintenance but include generally all matters communicated by one officer to another in the performance of duties. *Nagaraja Pillai v Secretary of State*, 26 Ind. Cas. 723=39 M. 304. In English law the privilege as to the production of public documents before Courts of law extends even to those which pass from hand to hand in a public office, in the usual course of business with no special work of secrecy upon them, and the ground upon which the privilege

S 124

tests is that it would be detrimental to the public interest to produce it. *Ind*  
A resolution of a Government exciting various opinions of Government officers  
including their legal advisers on a question of land tenures is a privileged docu-  
ment under s 121. *Sursingya v Secretary of State*, 23 Bom L. R. 1213 = A I R  
1926 Bom 590

When he considers that the public interest would suffer by the disclosure  
This section follows the English law and makes the officer the judge as to whether a communication made to him in official confidence should or should not be disclosed. If he thinks that the public interest would suffer by such disclosure, he is entitled to refuse to disclose the communication. *Budhubhusan v Hari Nath*, 7 C W N 246. An officer's refusal to disclose a document on grounds of public policy is final. It is not competent to the Court to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. *Lala Tribhuban v Deputy Comm* 17 Ind Cas 225 = 5 O L J 291, but see *Collector of Jaunpur v Janina* 11 A 360 where the Court observed 'It is for the Court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence'. The Judge is not allowed even a private perusal of the document. *Beatson v Skene* 5 H & N 838. On principle the rule is ludicrous. Is it to be said that even thus much of disclosure cannot be treated? Shall every subordinate in the department have access to the secret, and not the presiding officer of the justice? Cannot the constitutionally co-ordinating body of Government share the confidence? It is ridiculous to observe a Chief Magistrate as in *Beatson v Skene*, *supra* solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread abroad by the hundred tongues of scandal. *Wigmore* § 2379. In *Gugy v Maguire*, 13 F W Can 33 38 (Am) *Mondelet J* said "Conceding that the privilege may exist, are you to compare the discretion the unbrassed mind the position of the Judge who is free independent of the Crown and of the people, who is free from party spirit who knows or should know no one to the brassed mind—naturally necessarily, brassed mind—of a politician, not independent as the Judge is but dependent upon a party who knows or must know, the contending parties, and may have the most cogent reasons for supporting one party, in preference to another, who has to bear and does bear the external pressure which the Judge is or should be inaccessible to whose interest it may be, under the flimsy pretence under the transparent veil of pretended public interest, to screen some petty minion in office? The comparison cannot hold for a moment. In the case of the Judge you have sacred guarantees, in that of a politician you have none. External pressure will curb down the politician whilst you will behold the Judge more erect than ever calmly and firmly resisting and baffling its brineful influence. Clearly then manifestly should it be left to the Judge on the Bench in his discretion to determine the question instead of allowing a secretary or any member of the Government, to silence him to interfere with the administration of justice and to become the Judge."

When the officer says that the production of the document is not in the interest of public service the document is privileged. *Nagaraja v Vythuanatha*, (1911) 2 M W N 369. If a public officer to whom communications are made in official confidence considers that the public interest would suffer by their disclosure, such communications could not be produced (in evidence). But if it is not established that they were made in official confidence the opinion of the officer before whom they were made is not relevant. *Emperor v Bhagwati*, Ind Rul (1930) Oudh 174.

**Confidential official business.** On principle of public policy the official transactions between the heads of the departments of state and their subordinate officers are in general treated as privileged communications. *Chaitan v Secretary of State*, (1905) 2 Q B 189. Thus communications between a provincial governor and his attorney general on the state of the colony or the conduct of its officers (*Wyatt v Gore Holts* N P Cas 299) or between such governor and a military officer under his authority (*Cooker v Maxwell*,



2 Stark 183), the report of a military commission of inquiry made to the commander in chief (*Horne v Lord F C Bentinck* 2 Bro & Bing 130), and the correspondence between the agent of the Government and a Secretary of State (*Indeson v Hamilton*, 2 Bro & Bing 156n *Mobury v Madison*, 1 Cranch 141) are confidential and privileged matters, which the interest of the state will not permit to be disclosed *Greenle* L<sup>v</sup> § 251. The correspondence between the Directors of the East India Company and the Board of Control, under the old law (*Smith v E India Co* 1 Phil 70, *Rajah of Coorg v East India Co* 25 L J Ch 315, *Wadur v East India Co*, 8 Deg M & G 182), or between an officer of the customs and the Board of Commissioners, (*Black v Holmes*, Fox and Sm 28)—are confidential and privileged matter which the interest of the state will not permit to be revealed *Taylor* § 947. But communications though made to official persons, are not privileged, when they are not made in the discharge of any public duty, such for example, as a letter by a private individual to the chief secretary of the postmaster general, complaining of the conduct of the guard of the mail towards a passenger *Blake v Pilford* 1 M & Rob 193, *Greenle* L<sup>v</sup> § 251. Where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect namely, receiving secondary evidence of their contents. *Gray v Pentland*, 2 S & R 186, 137, *Greenle* L<sup>v</sup> § 251 *Abdul v Gouri*, 5 P W R Cr 1913=5 Ind Cis 714. The customs superintendent could not claim privilege as to the admission made to him by the Inspector although what took place between the two superintendents might probably be privileged *Ruku mah v Emperor*, 22 C W N 451=45 Ind Cis 284=19 Cr L J 521. Where the secondary evidence of certain documents had been admitted in the Court below without Government's sanction it is not open to the Government to object to their admissibility in appeal under section 121 of the Evidence Act. *Rathnamasuri v Secretary of State for India*, 44 M L J 102=17 L W 415=12 Ind Cis 214. A Magistrate who came across certain document during the trial of a criminal case consulted the District Magistrate and declined to allow the document to be produced and confiscated it on the ground that it was a document of state, *Held* that the action of the Magistrate was correct *Wumanray v Emperor* 22 N L R 31=91 Ind Cis 899=A. I R 1926 Nag 304. Privilege under this section can be claimed under this section in correspondence between president of Municipal Council and Secretary to the Government *Padmana bhush v Town Council Thimur* 6 Mys L J 453. It is doubtful whether a Railway station master is a public officer within the meaning of this section *Emperor v Bhagwati*, Ind Rul (1930) Oudh 174.

**125\*** No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenues.

**Explanation**—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

**Principle** A genuine privilege for communications, on the fundamental principle of privilege must be recognized for communications made by informers to the Government, because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity *Wigmore* § 2374. In *Hind's Trial*, 24 How St Tr 99,

\* This section was substituted for the original s 125 by the Indian Evidence Act (1872) Amendment Act, 1887 (3 of 1887)

**S 125** *Earle C J* said "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner, but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not unnecessarily be disclosed, if it can be made to appear that really and truly it is necessary for the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it but it does not appear to me that there is any necessity for it in this particular case. So it is absolutely essential to the welfare of the state, that the names of parties who interfere in situation of this kind should not be divulged, for otherwise be it from fear or shame, or the dislike of being publicly mixed up in inquiries of this nature—few men would choose to assume the disagreeable post of giving or receiving information respecting offences and the consequence would be that many great crimes would pass unpunished. *Per Dallas C J in Home v Bentinck* 2 B & B 162, *Laylor* § 941, see also *Watsons* 1141 32 How St Tr 102, *R v O Connell* 5 State Tr N S R v *O'Brien* 7 How St Tr 1 123, *Ill Gen v Bryant*, 15 L J N S Lxch 260. These matters are either those which concern the administration of penal justice or those which concern the administration of government but the principle of public safety is in both cases the same and the rule of exclusion is applied no further than the attainment of that subject requires. *Greenl Ev* § 250.

**Scope of the section.** The law recognizes the duty of every citizen to communicate to the government and to its officers such information as he may have concerning the commission of offences against the laws and for the purpose of encouraging the performance of that duty without fear of consequences, the Courts have long held that when the Government is immediately concerned, a witness cannot disclose the names of persons by whom and to whom information has been given which led to the discovery of the offence. Thus, in revenue cases a witness is not compelled to disclose the name of the informer [*Re v Alers* 6 Esp 125 (n)] or to state whether he himself was the informer. *All Gen v Bryant*, 15 M & W 16=15 L J Ex 265. The same rule has been applied in cases of treason (*Re v Hardy* 24 How St Tr 199 *Re v Watson*, 32 How St Tr 1) counterfeiting (*United States v Moses* 4 Wash C C 726) larceny (*State v Soper*, 16 Me 293) and in actions for libel based upon communications sent to public officers charging the plaintiff with misconduct in office or with offences against law. *Gray v Pentland*, 2 Seig & R 23 *Home v Bentinck* 2 Br & B 130, *Robinson v May*, 2 Smith 3, *Burr Jones* § 763.

Accordingly where a witness possessed of such knowledge, testified that he related it to a friend not in office who advised him to communicate it to another quarter a majority of the learned Judges held that the witness was not to be asked the name of that friend, and they all were of opinion that all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice were upon the general principle of the convenience of public justice to be suppressed that all persons in that situation were protected from the discovery, and that if it was objected to it was no more competent for the defendant to ask the witness who the person was that advised him to make a disclosure than to ask who the person was to whom he made the disclosure in consequence of that advice or to ask any other question respecting the channel of communication, or all that was done under it. *R v Hardy* 24 How St Tr 808, *Greenl Ev* § 250. It may now be taken as settled rule that witnesses for the crown in criminal prosecution undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information (*R v Watson* 32 St Tr 1 *R v Richardson* 3 F & F 693, *A G v Bryant* 15 M & W 169, *Mails v Beyfus*, 25 Q B D 494) but it has been ruled that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted. *Webb v Catchlove* 3 T L R 159. In *R v Berrard* 11 & F 240 when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy Lord Campbell, allowed the objection to prevail on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again in *R v Smith O'Brien*,

S. 126.

7 St Tr N S 2, it was ruled that disclosures made by informers to the Government, the Magistrate or the police, with the object of detecting and punishing offenders, were privileged. So the defence cannot elicit from individual prosecution witnesses whether he was a spy or an informer also cannot discover from police officials the names of persons from whom they had received information *Amrita v King Emperor* 19 C W N 676=42 C 957

In *Weston v Peary Mohan Das*, 40 C 98 at p 920, *Woodroffe J* said I will only add as regards section 125 of the Evidence Act that though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the Judge apart from objection taken to exclude the evidence (see *Marks v Beyces* 25 Q B D 494 *Hennessy v Wright*, 21 Q B D 509) *A fortiori* if objection is taken, it cannot since the law allows it, be made the ground of adverse inference against the witness.

In England this rule does not apply to private prosecutions *Phips* 182 On an indictment for poisoning, the police having, in consequence of certain information, found the bottle containing the poison, in a place used by defendant, a policeman declined to state from whom he had received the information, but *Cochburn C J* ordered him to answer the question, which in the particular instance turned out to be material the information having been supplied by two girls not called, "they could have stated," said the Judge "how it was they had come to know that the bottle was where it was found, and perhaps could have given some clue to the person who put it there" *R v Richardson*, 3 F & F 693 So in England the line between public and private prosecutions not being clearly drawn for this purpose, it is for the Judge to decide whether the information is protected or not *Roscoe Cr Ev* 181 The English rule was followed in an Indian case before the passing of the Indian Evidence Act *In re Mohesh Chandra*, 13 W R Cr 1(10) But under this section the rule is applicable both in cases of public and private prosecutions. A mere suggestion that the complaint would show that the house ruled was not the one referred to in the complaint is not sufficient to justify any departure from the rule embodied in this section and the Magistrate was right in refusing to order the production of the complaint *Laladhar v Crown*, 8 S L R 303=16 Cr L J 447=29 Ind Cas 79

The words 'information as to the commission of any offence' in this section, only enacted the rule which, as said by *Eyre C J* in *Hardy's case*, 24 How St Tr 808, has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed *Queen Empress v Dyana Happa*, Rat Un Cr C 937 But having regard to the distinction drawn throughout Act VII of 1873 (Bombay) between a police officer and an officer of the salt department, the latter cannot be considered a Police officer within the meaning of s 125 Evidence Act, and may, therefore, be compelled to say whence he obtained the information as to the commission of an offence *Reg v Gowla* Rat Un Cr C 183 So also a superintendent of the Post office is not privileged under this section *Queen Empress v Rana Dhan*, 2 Bom L R 329 followed in *Harbans v Emperor*, 16 C W N 431=15 Ind Cas 77 A distinction should be drawn between questions which a witness cannot be compelled to answer and those which he cannot be permitted to answer. The latter class of questions might properly be forbidden, but questions of the former class are in no way barred, a witness has merely the right of referring to answer to such questions, without any hostile inference being drawn from his refusal. *Mahomed Ali v Emperor*, 10 Ind Cas 917=12 Cr L J 277

126 No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister,

Professional communication

S 126. pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [illegal] purpose

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment

It is immaterial whether the attention of such barrister, † [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client

*Explanation*—The obligation stated in this section continues after the employment has ceased

#### *Illustrations*

(a) A, a client says to B, an attorney—"I have committed forgery and I wish you to defend me

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure

(b) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue

The communication being made in furtherance of a criminal purpose is not protected from disclosure

(c) A being charged with embezzlement retains B an attorney, to defend him In the course of the proceedings B observes that an entry has been made in A's account book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure

*Principle* At common law in very early times a privilege was recognized as to matters between an attorney and his client, and this privilege has continued in the strictest form to the present day An attorney is neither compelled nor permitted, without consent of his client, to disclose communications made to him by his client *McElvey v Evans* 236 In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed and hence the law must prohibit such disclosure except on the client's consent *Wigmore* § 2291 *Phipps v Unwin* 170, *Per Mountney B in Annesley v Earl of Anglesea*, 17 How St Tr 1225, *Jones v Great Central Railway*, (1910) A C 45, *Lyell v Kennedy* 9 App Cas 86 In

\* This word in s 126 was substituted for the original word 'criminal' by the Indian Evidence Act Amendment Act (18 of 1872) s 10 II

† This word in s 126 was inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 10

S 126.

*Anderson v Bank*, L R 2 Ch D 644 649 *Jessel M R* said "The object and meaning of the rule is this. That as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others, that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation. This is the meaning of the rule." See also *Per Lord Chancellor Brougham*, in *Greenough v Gasell* 1 My & K 98, 103, where his lordship said "The foundation of this rule, is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interest of justice, which cannot be upheld and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." If such communications were not protected, no man, is the same learned Judge remarked in another case, would dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights and no man can safely come into a Court either to obtain redress, or to defend himself. *Bolton v Corporation of Liverpool* 1 My & K 94, 95. No privilege can be thus required for any communication which is made for the purpose of committing a criminal or fraudulent act or of aiding a contempt of Court, since that can be no part of the client's interests nor within the scope of the professional duties of a legal adviser were the rule otherwise, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose. *Wills Et 2nd Ed* p 277, *Russell v Jackson*, 9 Hare 392, *Follett v Jefferyes* 1 Sim N S 3, 17, *R v Cox* 14 Q B D 153, *Williams v Quebrada* (1895) 2 Ch 751, *Bullivant v G for Victoria*, (1901) A C 196, *Ramsbotham v Senior*, (1869) 8 Lq 575n. *In re Postlethwaite* (1857) 35 Ch D 722.

**Scope of the section.** In regard to professional communications the reason of public policy which excludes them, applies solely, to those between a client and his legal adviser, and the rule is clear and well settled, that the confidential counsellor, solicitor, or attorney of the party cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him, in that capacity. *Greenough v Gasell*, 1 My & K 101, In this decision, the Lord Chancellor Brougham was assisted by consultation, with Lord Lyndhurst *Tindal G J* and *Paule J* 4 B & Ad 876, and it is mentioned as one in which all the authorities have been reviewed in 2 M & W 100 per Lord Abinger and is cited in *Russell v Jackson* 15 Jur 1117 as settling the law on the subject. *Greene Et* § 237, see also *Berd v Lovelace* 19 Eliz in Chancery, Cary's R 88, *Austen v Vesey*, Cary's R 89, *Kelway v Kelway* Cary's R 127, *Dennis v Codrington* Cary's R 143, *Wilson v Eastall*, 1 T R 753, *R v Wilkes* 2 Camp 578, *Wilson v Froux* 7 Johns Ch 25, *Wills v Oddy* 6 C & P 728, *R v Shaw* 6 C & P 372. This protection says Lord Chancellor Brougham, 'is not qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business, or which amounts to the same thing if they commit to paper in the course of their employment on his behalf matters which they knew only through their professional relation to the client, they are not only justifying in withholding such matters, but bound to hold them, and

**S. 126.** will not be compelled to disclose the information, or produce the papers, in any Court of law or equity, either as a party or as a witness." *Greenough v Gaskell* 1 My & K 101. In *Pearce v Pearce* 1 Deg & Sm 25, Knight Bruce V C said "And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into those communications which must take place and which unless in a condition of perfect security must take place uselessly or worse are too great a price to pay for truth itself." "Nevertheless," says Prof Wigmore "the privilege remains an anomaly. Its benefits are all indirect and speculative, its obstruction is plain and concrete. It is worth preserving for the sake of a general policy, but it is none the less an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principles." Wigmore § 2291. *Broad v Pitt* 1 W & M 283 = 3 C & P 518. *Foster v Hall*, 12 Pick Mass 69 97. Communications made by a client to his pleader expressly for the purpose of incorporation in the pleadings are not confidential and are not privileged. *Bibi Soni v Mir Abdul*, 6 S L R 1. Under this section a pleader cannot disclose the contents of a document confided to him by a client in the course and for the purpose of his professional employment without the express consent of the client. The privilege is not by the fact that the client had offered to produce the document in Court when necessary. *Bailanta v Bhailal*, 1930 Ind Rul Bom 88. An executor of a client cannot be presumed to give his consent to the pleader stating the contents of it from the mere fact that the executor, had deposed to its contents as a witness. *Ibid*.

**Privilege is irrespective of litigation begun or contemplated.** Under the original theory of privilege the confidences of the client were respected only when given for the purpose of securing aid in litigation and in the very litigation in which they were given. It is obvious however that this limitation would be wholly inconsistent with the modern theory of the privilege. This principle applied equally to communications made in contemplation of a suit or even after dispute arises though not directly with a view to litigation. *Gainsford v Grammar* 2 Camp 9. *Wadsworth v Hamshaw*, 2 B & B 5. In *Williams v Bludie* 1 C & P 158. *Ibbott C J* said "Whatever is communicated for the purpose of bringing or defending an action is privileged but not otherwise. I have considered the subject a great deal, and my mind is made up upon it." So in *Broad v Pitt*, 3 C & P 518, *Best C J* held that communications made not for the purpose of a suit or proceeding intended or apprehended were not privileged. In *Clark v Clark* 1 Mo & Rob 3. *Abbott C J* (Lord Tentersden) further expanded his view by recognizing the privilege for consultations "with respect to a matter then in dispute and controversy although no cause was in existence with respect to it. Within a short time after Lord Tentersden's death, the present rule was judicially accepted and has never since been doubted to be law. Wigmore § 2294. Now the protection is not qualified by any reference to proceedings pending or in contemplation. Per Lord Brougham, L C in *Greenough v Gaskell* 1 Myl & K 88, 101. see also *Moore v Terrell* 4 D & Ald 870, 876. *Doe v Harris* 5 C & P 592. In *Cromack v Heathcote* 2 B & B 4. *Dallar C J* said "I know of no such distinction as that arising from the attorney being employed or not employed in the cause. In *Pearse v Pearce* 1 Deg & Sm 12. *Knight Bruce V C* said "I suppose *Cromack v Heathcote* to be now universally acceded to, as far as any discovery by the solicitor or counsel is concerned, the question of existence of any suit claim or dispute is immaterial." Wigmore § 2294. In *re an Attorney* 84 Ind Cas 303 = 26 Bom L R 887, *Muel v Morgan* 1875, L R 8 Ch 361, *Bullock v Corrie* 3 Q B D 306.

**Advice sought for miscellaneous non legal purpose.** A lawyer is sometimes employed without reference to his knowledge and discretion in the law,—as where he is charged with finding a profitable investment for trust funds. In such a case the privilege is held not to apply. *Walker v Widdman* 6 Madd 47. *Bramucl Lucas* 2 B & C 745, but see *Furquand v Knight* 2 M & W 98,

Ch 96 But it is not § 126.

Ch 96 But it is not from non legal advice. litigation a particular on itself it were merely a shareholder is dis against a corporation of generalization, is is *prima facie* so com e more or less decs in the privilege, unk as advice If ignore § 2296 corresponds to section

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**S 126.** Analogue to a muktear, the Indian Legislature having regard to the conditions of this country has purposely included in the term 'pleader' all persons who plead for clients in any legal proceeding in a Court of Justice." Now by the amendment of section 1 (r) by Act XXXV of 1923 'pleader' used with reference to any proceeding in any Court, means a pleader, or a muktear authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any person appointed with the permission of the Court to act in such proceeding. Now the word 'pleader' includes not only muktears but also an advocate, a vakil and an attorney as well as any person appointed with the permission of the Court to act in any proceedings." On principle communications made to a muktear should be privileged but it is not free from doubt whether the interpretation of the word 'pleader' given for the first time in Act X of 1882 should be accepted in interpreting the Indian Evidence Act which was placed in the Statute Book as early as in the year 1872. The question is whether the communications to muktears during 1872 and 1882 were privileged. If we are to accept the interpretation of the Court in *Abbas Padda v Queen Empress*, *supra*, even in that case such communications were not privileged. The reason given by *Glover J* in *Queen v Chandra Kant Chaurasthy* 1 B L R Cr 8 in holding that communications to muktears are not privileged is thus expressed "Section 24 Act II of 1855, says that barristers, attorneys and vakils shall not disclose any communications etc, etc. From the position of the word 'attorney' in the sentence it is clear that attorneys of the High Court only are meant and not muktears who if included in the privilege, would naturally follow in their proper order after vakils. There is therefore by law no privilege as to communications between muktears and their principals, and the witness's testimony ought to have been received and laid before the jury. "The reasons given for this decision seem equally to apply to the language of the present section." *Woodroffe's Evidence Act* 8th Ed p 901. But on principle such communications should be excluded and it is anomalous that provisions of this section apply to interpreters and the clerks or servants of barristers pleaders, attorneys and vakils whereas muktears and revenue agents who are legal advisers should be excluded by giving a strict interpretation of the section. It is highly desirable that this doubt should be set at rest by legislative intervention, as in municipal Courts all confidential communications are generally made to muktears [*Vide Wigmore* § 2300 and *Bean v Quamby*, 5 H N 94 (97)] There are professional legal advisers in India" says *Mr Justice Markby* who are not included in this section, and one very important class of persons who are called muktears. They are recognized by the Courts and though not mentioned in the section they would probably obtain the same protection as the persons mentioned. *Markby* p 96.

According to English law the privilege attaching to confidential professional disclosures is strictly confined to the case of legal advisers and does not protect those made to clergy men (*Norman Shaw v Norman Shaw* 69 L T 468. *Wheeler v Le Marchant* L R 17 Ch D 631 *R v Gilham* 1 Moo C C 186, but see *R v Griffin* 6 Cox 219 *Broad v Pitt* 3 C & P 518) doctors (*R v Duchess of Kingston* 20 How St Tr 510 *R v Gibbons* 1 C & P 97) patent agents (*Mosely v Victoria Co*, 55 L T 482), clerks (*Lee v Birrell Camp* 3, *Webb v Smith* 1 C & P 337) and friends (*Wheeler v Le Marchant* 17 Ch D 675) *Phup* Lr 170. There is no ground for encouraging the relation of client and legal adviser except when the adviser is one who has been formally admitted to the office of attorney or counsellor as duly qualified to give legal advice. That the person consulted is in fact practising without formal sanction of the Court is certainly not sufficient. *Slade v Tucker* L R 14 Ch D 824. 827. Communications made to foreign solicitors are also protected, when they act for their foreign clients. *Laurence v Campbell* 4 Drew 480. A legal adviser may render his services without charge if he pleases and hence the mere circumstance that the advice is given gratuitously does not nullify the privilege. *Wigmore* § 2302.

Shall at any time be permitted etc. In every case the privilege is the right not of the legal adviser but of the client, it exists for his protection and



he can alone waive it, without his express consent his legal adviser will not be allowed to disclose any fact or document that is privileged *Power v Foster*, 15 Q B D 114. The legal adviser is not competent to waive the privilege *R v Leveson*, 11 Cox 152, *Wilson v Rastall*, 4 F R 753, *Lyell v Kennedy*, 27 Ch D 1. *Kay v Poorum Chaul*, 1 B 631. But it is a client and not as party to a cause, that he is entitled for the reason of the privilege applies to all clients as such, whether or not they are parties when the disclosure is sought from them. Hence, the privilege equally forbids disclosure by the attorney of a client not in any way concerned in the cause *Wilson v Rastall* 4 F R 753, *R v Withers* 2 Camp 578. Conversely when the client is not a party then on general principles the party cannot invoke the privilege *Mertle v Moore*, 2 C & P 275, *Wigmore* § 2321. The client may claim the benefit of the rule, although no fee has been paid, or although there has been no formal retainer. The privilege has been recognized even in cases where the attorney did not consider that he was acting as counsel, when the circumstances were such as to show that the relation of attorney and client actually existed *Burr Jones* § 749. But a waiver of a separate part of a privileged communication does not deprive him from insisting on it as to the residue *Lyell v Kennedy* 27 Ch D 1. And subject to such waiver when once communications or statements are privileged they always remain so (*Pearce v Foster*, 15 Q B D 114, *Bullock v Carry* 3 Q B D 356 *Hoslam Foundry etc v Hall*, (1887) 3 T L R 776) as the privilege is not destroyed by death but may be claimed by the personal representatives of the client who was entitled to it. *Bullivant v A G for Victoria*, (1901) A C 196 *Wills* *Ev* 2nd Ed p 235. But although the rule "once privileged always privileged" (*Bullock v Carry* 3 Q B D 356, *Calcraft v Guest* (1898) 1 Q B 761) undoubtedly prevails to this extent that a document does not lose its privilege by anything short of waiver, this does not affect the admissibility of other evidence to prove the matters to which the privileged documents relate, if for example the party requiring production has at some previous time obtained a copy of the privileged document or has perused its contents he is at liberty to give secondary evidence of them, if due notice to produce the original has been given *Wills* *Ev* 2nd Ed 285, see also *Mines v Morgan* 8 Ch 361 *Lloyd v Mostyn*, 10 M & W 478 481 482 *Calcraft v Guest* (1898) 1 Q B 759.

**Anytime** The word "anytime" in this section is significant. When a communication is once privileged it is "always privileged" *Per Coelburn C J* in *Bullock v Carry* 3 Q B D 356 *Per Imdley L J* in *Calcraft v Guest*, (1898) 1 Q B 761. The privilege continues for the purpose of future litigation (*Bullock v Carry*, *supra*) notwithstanding a change of solicitors or that the solicitor is struck off the rolls (*Cholmondeley v Clinton*, 19 Ves 268) or the solicitor becomes personally interested (*Chant v Brown*, 7 Hare, 79), or the client dies *Bullivant v Att Gen* (1901) A C 196, *Pouell* *Ev* 233. The subjective freedom of the client, which it is the purpose of the privilege to secure, could not be vitiated if the client understood that, when the relation ended or even after the client's death the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosure might not be used to the detriment of the client or his estate *Wigmore* § 2323, *Pearce v Foster* L R 15 Q B D 114, 118. In *Attorney, Ime*, 81 Ind Cas 353—A I R 1925 Bom 1 (F B) *Wilson v Rastall* (1792) 4 F R 759, *Parlet v Yates*, 12 Moo P C 520, *Explanation to the section*.

**Express consent** The privilege is designed to secure the client's confidence in the secrecy of his communication, hence, the privilege is not violated by receiving such disclosures as the client by his own will permits to be made *Wigmore* § 2327. In England, it has always been recognized that a waiver may be made. *Captain Baillies Trial* 21 How St Tr 1, 341 *Mertle v Moore*, Ry & Mo 390. Such waiver belongs to the client and not to the attorney. But such waiver can be express or by implication. As regards waiver by implication there is some conflict of decisions *Woldram v Ward*, Style 449 *Alacken v Yeo* 2 Curt Eccl 866, 876. In India the matter is set at rest by use of the words "client's express conduct" The question in this

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connection may well arise whether there can be a waiver by a deceased client's representations. That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in interest of that estate, to waive the privilege concerning confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It is generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor, the administrator the heir the next of kin or the legatee. *Wigmore* § 2319. *Doe v. Hertford* 13 Jar 632. *Russell v. Jackson* 9 Hare 387, 42, *Greenlaw v. King* 1 Beav 137 135. So the word clients in this section includes representatives of the clients. But it is doubtful whether the executor of a client can waive this privilege in respect of a Will when there are various beneficiaries having conflicting interests under the Will. *Bulanta v. Bhatnagar*, 1930 Ind Rul Bom 58.

The consent required by this section should be given on each occasion when a communication of the kind described is sought to be made admissible in evidence. A consent given to the disclosure of some privileged matters in civil suit is not sufficient authority for the disclosure of the same matters in a criminal case arising out of the suit. *Queen Empress v. Gullshan*, A W N 1890 172. The statement of a pleader that his client is a benamidar of a certain person without the consent of his client, cannot be admitted in evidence. It is very improper on the part of the pleader to disclose that communication without his client's consent. *Balulla v. Deburiddhi* 16 C W N 712.

Communication made to him in the course and for the purpose of his employment. It is a familiar and long established rule of common law that an attorney or a counsel cannot disclose communications made by or on behalf of his client to him or the advice given by him in the course of his professional employment without the consent of the client, such communications were privileged and not admissible in evidence. *Greenough v. Gaskell* 1 Myl & K 98, *Dennis v. Codrington Cary* 100 Keluay v. Keluay Cary, 89, *Burr Jones* 748. This privilege protects from disclosure two classes of communications (i) confidential communications which have passed at any time between the party or witness and his legal adviser in his professional capacity for the purpose of the former obtaining legal advice for the protection of his interests, information procured in pursuance of such communications for the same purpose and notes and other records of such communications and information made for the same object (ii) similar communications information notes and records, made or procured with a view to litigation whether commenced or only contemplated including therefore instructions to counsel or solicitor cases to advise reports evidence briefs etc, prepared on the client's behalf. *Hills* 2d Ed 276. *Greenough v. Gaskell* 1 Myl & K 98. *Minet v. Morgan* 8 Ch 361. *Anderson v. Banl of British Columbia* 3 Ch D 641. *Wheeler v. Le Marchant* 17 Ch D 675, *Soutpuonk, etc, Co v. Quick* 3 Q B D 315.

If the protection was confined to proceedings begun, says Lord Chancellor Brougham in *Greenough v. Gaskell* 1 Myl & K. 98 102 or in contemplation then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would be insufficient if it only included communications more or less connected with judicial proceedings, for a person often times requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry. The communications may be either oral or written. *Perce v. Foster*, 15 Q B D 114. *Greenough v. Gaskell* 4 Myl & K 98. A communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation provided it be a communication made to the solicitor in that character and for that purpose. *Per Jessel M R in Wheeler v. Le Marchant*, 17 Ch D 682. *Minet v. Morgan*, L R 8 Ch 361. Absence of litigation or prospect thereof at the time the

confidential communications are made is no excuse for disclosure. In *Attorney, In re* 84 Ind Cts 353=A I R 1925 Bom 1 (F B) It is misconduct from a professional point of view for an advocate after being consulted in his capacity of advocate about a case and after learning particulars of the case as stated by one side to undertake the case in the interest of the opposite party. The fact that there was no definite agreement by the first party makes no difference. *Maung Mya U v Sun Sungh*, U B R 1897—1901 Vol II, 368

By or on behalf of his client. Neither client nor solicitor need act personally in their communications with each other in order that the privilege may be claimed, it exists equally when they act by means of clerks, interpreters, or other agents. *Wills Ex* 278, *Anderson v Bank of British Columbia*, 2 Ch D 644, *Wheeler v Le Marchant*, 17 Ch D 675. In the former case *Jessel M R* said "He may employ a third person to write the letter, or he may send the letter through a messenger, or he may give a verbal message to a messenger." In the second case the same learned Judge also observed "The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation." See also *Du Barre v Livette*, Peake N P 77, *Wilson v Rastall*, 4 T R 753, 756 *Wall v Wildman*, 6 Madd 47, *Bunbury v Bunbury*, 2 Beav 173, *Reid v Longlois*, 1 Mc N & G 627, 638, *Glyn v Gaulfield*, 3 Mac N & G 463 473, *Carpmael v Pouis*, 9 Beav 16, *Ford v Fennant* 32 Beav 162, 168, *Goodall v Little*, 1 Sum N S 155 163, *Steel v Stewart* 1 Phil Ch 471, 475

Contents or condition of any document with which he has become acquainted. The client's disclosure of the contents of a pre-existing document will almost always be an act of communication and a part of the matters voluntarily committed to the notice of the attorney. It is impossible, in the language of *Ab Justice Bronson* (*Coveney v Tannahill*, 1 Hill N Y 33, 35), to perceive "any solid distinction between the oral statement of a fact to counsel and a communication of the same fact by delivering to him a deed or other written instrument." Unless, therefore, a particular communication of this sort is not confidential, it is within the privilege, and the testimony of the attorney on the stand cannot be required. *Wigmore* § 2308, see also *Bulstrode v Letchmere*, Freem Ch 5, *Anon*, Skin 404, *Bottomly v Osborne*, Peake Add Cts 99 101, *R v Upper Boddington*, 8 Dowl & R 726, *Bate v Kinsey*, 1 Cr M & R 38, *Masston v Downes* 6 C & P 381, *Wheatley v Williams*, 1 M & W 533, *Doe v Watkins* 3 Bing N C 421, *Hurring v Cloberry*, 1 Phil Ch 91, *Hubberd v Knight*, 2 Exch 11, *Davies v Waters* 9 M & W 608, 612. A solicitor is not bound to produce, or to answer any questions concerning the nature or contents of, a writing entrusted to him professionally by his client. The mere statement of the solicitor that he received the document from his client professionally is enough to protect it. *Volant v Soyer* 13 C B 231. Although a document may not be such as passed directly between the legal adviser and the client, yet it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the Court will not compel the production of such a document. *Vishnu v Newyork*, 7 Bom L R 709. Where a pleader became acquainted with a Will in the course and for the purpose of his professional employment, he cannot be examined in a subsequent suit with reference to the Will. *Bailanto v Bailat*, 31 Bom L R 1046=A I R 1929 Bom 414

Relevancy or necessity of the communication. The Courts have not always used consistent language in answering the question whether the privilege is limited in some way to communications necessary or material or relevant to some purpose of the consultation. In *Gillard v Bates*, 6 M & W 547, the Court observed "The test is, whether the communication is necessary for the

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purpose of carrying on the proceeding in which the attorney was employed. This is laid down in *Letten v Kenrick* 11 B 131 as that the Court should see "whether the communications were made by the client to his attorney confidentially as instructions for conducting his cause or as a mere *priae debuit*." In *Homesly v Earl of Inchester* 17 How St Tr 1229 *Boyle L v B* said "Now a limiting the policy of the law in protecting communications by the client to his attorney to be as has been said in favour of the client, and principally for his service and that the attorney is in loco of the client, and therefore his trustee, does it not follow from thence that everything said by a client to his attorney falls under the same reason?" I own I think not because there is not the same necessity upon the client to trust him in one case as in the other and of this the Court may judge from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent and in another as a common acquaintance. But where the client talks to him at large as a friend and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets though in the breast of an attorney. In the same case *Mountney B* added "If this original principle be kept constantly in view I think it cannot be difficult to determine either the present question or any other which may arise upon this head, for upon this principle whatever either is or by the party concerned can naturally be supposed necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained,—that the attorney shall involuntarily keep secret. On the other hand whatever is not, nor can possibly by any man living be supposed to be, necessary for that purpose—that the attorney is at liberty, and in many cases—as particularly, I think, in the present case—the attorney ought to disclose. It is thus further elucidated by *Danson B*—'Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed. I will suppose an unknowing man to have twenty deeds by him and he delivers them all to his attorney to see which were relative to suit—he looks them over and finds not half of them relative thereto. I apprehend the attorney is not compellable to disclose the contents of any one of these deeds neither do I think it necessary and I think the Court must in this case be satisfied first that what came to this man's knowledge was not necessary to his client's affairs and in the next place, that the client could not think it necessary. The test is therefore not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation but whether the statement is made is a fact for the purpose of the client to obtain advice on that subject. *Wigmore* § 2310

**Communication must be confidential** The moment confidence ceases' said *Lord Eldon*, 'privilege ceases' *Paulhurst v Louten*, 2 Swanst 191 216. *Greenough v Gaslett*, 1 Myl & K 98, 101. Letters in order to be privileged must be professional communications of a confidential character for the purpose of getting legal advice. *Gardner v Inim*, L R 1 exch D 49 53, *Oshea v Wood*, (1891) P 237, 286. The privilege assumes, of course, that the communications are made with the intention of confidentiality. *Wigmore* § 2311. The law in India on this point is practically the same as in England and that in interpreting section 126 of the Evidence Act a Court may rightly refer to English cases, as shown by *Westropp C J* and *Sargent J* in the case of *Munon Haji Harun v Maulvi Abdul Kasim* 3 B 91 in which Chief Justice Sir *W. Westropp* said "Communications to be protected by that section (126) of the Evidence Act must we think, be confidential." The word "disclose" shows, that common sense seems to demand, that the privileged communication must be confidential or private. *Sargent J* said "The use of the word 'disclose' in section 126 of the Evidence Act shows that the communications to be privileged must be of a confidential nature between a solicitor and his client." Both Judges in the course of their judgments quoted English cases. This was exactly the principle followed in England in *Ex parte Campbell*, *In re Cathcart*, L R 5 Ch 703. *Frampt v Mohan Singh* 18 B 263 272. See also *Bursill v Tanner* 16 Q B D 1. *Lyell v Kennedy* 23 Ch D 387 S C 9 App Cas 81, *R v Rodrigues* 5 Bom L R 122. *Oriental Bank v Brown*, 12 C 265. In *Dwyer v Collins*, L R 7 Ex 646, Baron Parke said

"The privilege does not extend to matters of craft which the attorney knows by any other means than confidential communications with his client, though if he had not been employed as attorney, he probably would not have known them" The case of *Paulhurst v Louton*, 2 Sw 191 and *Bussell v Turner*, 16 Q B D 1 show that when a solicitor claims the privilege, he must state the name of the client on whose behalf he claims it. *Per Kulton J in Framji v Mohan Singh*, 15 B 263 (278) Communications made to legal advisers in order to be protected by this section must be confidential. A communication made to a pleader, in order that it might be communicated to the Court is one of the statements in a plaint and in order that a decree might be obtained, is not such a communication, but, on the contrary, is one made expressly for the purpose of disclosure and express consent to the disclosure was therefore actually given by client. *Abdul Hussein v Bibi Sona Dera* 1 S L R 85

Communication, distinguished from acts, client's conduct, Appearance Abode, etc The question is, does the privilege cover only that knowledge of the attorney which is obtained from hearing the client's utterances or also that which comes from seeing the client's acts? The question has given rise to a difference of opinion more apparent than real. It is sometimes discussed as if the word 'communications' was synonymous with 'utterances of words' that is, those who favour its largest answer repudiate the limits of the word "communications" as if it included no more than "utterances", and yet it is of course conceivable that an act or a bodily condition may be voluntarily disclosed and willingly made known to the attorney by the client without any utterance of words. The problem is also sometimes discussed, from the point of view of the attorney, as involving the inquiry whether the privileged knowledge of the attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing, and this mode of statement corresponds more closely to the distinction between utterances and acts of the client. *Wigmore* § 2306. In *Robson v Kemp*, 5 Esp 52, 53 Lord Ellenborough, L C J said "The act (of destroying a power of attorney) cannot be stripped of the confidence and communication as an attorney, the witness then acting in that character. One sense is as privileged as another. He cannot be said to be privileged as to what he hears but not to what he sees, where the knowledge acquired is to both has been derived from his situation as an attorney." But in *Greenough v Gasell*, 1 Myl & K 98, 104, Lord Chancellor Brougham said "(the privilege does not exist) where there could not be said, in any correctness of speech, to be a communication at all,—as where for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being attorney, but of which fact any other man if there would have been equally cognizant." Similarly in *Brown v Furter*, 1 H & N 736, Pollock C B said "A legal adviser may give evidence of a fact which is patent to his senses." *Martin B* said "With respect to matters which the counsel sees with his eyes, he cannot refuse to answer." *Bulger J* in his trials at *Nisi Prius* 284, said "The privilege does not cover a fact of his own knowledge and of which he might have had knowledge without being counsel or attorney in the cause, as, suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution, so, if the question were about an *examine* in a deed or a Will, he might be examined as to the question whether he had ever seen such a deed or Will, he might be examined as to the question whether he had ever seen such deed or Will in other plight, for that is a fact of his own knowledge, but he ought not to be permitted to discover any confessions his client may have made to him on such head." The marked contrast says *Prof Wigmore* 'is between the statement of Lord Ellenborough, in *Robson v Kemp*, and that of Baron Martin, in *Brown v Foster*, can they be reconciled? And is either of them consistent with Mr Justice Bronson's distinction between a communication and an act? The truth is that each is right, under some circumstances and all are harmonious, when the proper allowance is made. Looking back at the reason of the privilege, it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge. It is designed to influence him when he might

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be hesitating, between the positive action of disclosure and the inaction of secrecy. There is therefore by hypothesis, always some voluntary act of disclosure,—some removal of that secrecy which would otherwise have existed as between the client and the attorney. On the one hand, then, those data which would have come to the attorney's notice in any event, be mere observation, without any action on the client's part—such as the colour of his hat or the pattern of his shoe—and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his attorney as his adviser—such as the style of his handwriting or the amount of money in the roll of bills from which he pays his retainer—these are not any part of the communications of the client in the language of *Lord Chancellor Brougham* and *Mr Justice Buller* they are 'facts of which any other man if there, would have been equally cognizant.' On the other hand almost any act, done by the client in the sight of the attorney and during the consultation may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case it was intended to be done as such. The client, supposedly may make a specimen of his handwriting for the attorney's information or may exhibit an identifying scar or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential, the privilege comes into play. Ordinarily then it is true as *Chief Baron Pollock* said that a legal adviser may give evidence of a fact which is patent to his senses, that is of anything which he either sees or even hears, so far as it is otherwise patent,—in other words, is not the subject of an express disclosure. Yet, in a given case, any of these things may be committed to the attorney in such a way as to be within the privilege. It is to be noted, however, that many such acts which thus become the subject of a communication may still not be confidentially committed to the attorney and thus be not privileged. Obviously no fixed form of rule can be stated for the present application of the principle. In the ordinary case it is only the expressed communications of the client that will be privileged." *Wigmore* § 2306. For the purposes of section 126 of the Evidence Act it is immaterial whether the communication which is sought to be protected was verbal that is to say, by word of mouth, or by demonstration. In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant the plaintiff tendered in evidence a vakil who had been employed by the defendant in some previous proceedings and had, in the course and for the purpose of his employment, visited the defendant's premises at the latter's invitation in order to make himself acquainted with the working of the stove. *Held* that the knowledge acquired by the vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purpose of his employment and that therefore, his evidence was admissible under section 126 of the Evidence Act. *Gopi Lal v Lakhpat Rai*, 44 Ind Cas 605=16 A L J 987.

**No adverse reference from claims of Privilege.** If a client party claims the privilege no inference should be drawn against him as to the unfavourable nature of the information sought. *Per Lord Chelmsford in Wentworth v Lloyd* 10 H L C 591, *Pouell Ev* 233. *Wigmore* § 2322. *Weston v Peary Mohan* 40 C 898 (919). *Dulhan v Haranandan*, 20 C W N 617 P C. Whatever the reasoning may be for other privileges it is plain that here the drawing of such an inference would virtually disclose the communication and it is thus very disclosure against which the privilege protects. *Wigmore* § 2322.

**Judge to determine the privilege.** The claim of privilege being made, the trial Judge determines whether the facts justify the allowance of the claim. This follows from the general principles of the judicial function. Its application is usually of no difficulty except sometimes in determining what weight to give to the party's oath in answering a bill of discovery. *Wigmore* § 2322. Ordinarily an attorney's statement that a document is privileged is sufficient. *Volant v Soyce*, 13 C B 231. But in *Lyell v Kennedy*, L R 27 Ch D 1, 21,

*Cotton L J* said 'The Court must be satisfied, clearly satisfied, either from admissions or from other documents, that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which it is put forward' *Wigmore* § 2323

**Third person over hearing** The law provides subjective freedom from client by assuring him of exception from its process of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication whether with or without the client's knowledge is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy *Wigmore* § 2326

**Joint interest—No privilege** 'No privilege attaches to communications between solicitor and client as against persons having a joint interest with the client in the subject-matter of the communication—e.g., as between partners (*Re Pickering* 25 Ch D 247, *Gourant v Edison* 59 L T 813), directors and shareholders (*Gowand v Edison supra*, *Woodhouse v W* 30 F L R 559), trustee and cestui que trust (*Talbot v Marshfield* 2 Dr & S 519, *Re Mason*, 22 Ch D 609, *Re Portlethwaite* 35 Ch D 722,) even though the party resisting production has paid for the communication (*Bacon v Bacon* 34 L T 319), lessor and lessee as to production of the lease (*Doe v Thomas*, 9 B & C 289), reversioner and tenant for life as to common title (*Doe v Date* 3 Q B 609), two persons stating a case for their joint benefit (*J G v Berkeley* 2 J & W 291) or a husband and wife who are only collusively in contest (*Ford v De Pontes* 5 Jur N S 993 *aliter* if the contest is genuine). Nor does any privilege attach as between joint claimants under the same client—e.g., between claimants under a testator as to communications between the latter and his solicitor (*Russell v Jackson* 9 Har., 387). But where communications relate to matters outside the joint interest, they are privileged even as against a person bearing the expense of the communications—e.g. communications between a plaintiff corporation and its solicitors, as against a defendant ratepayer as to matters not connected with the rates (*M of Bristol v Cox*, 26 Ch D 678), or between a trustee and his solicitor as against the cestui que trust where the communication is not made for the former's guidance in the trust but to enable him to resist litigation by the latter (*Thomas v Secy of State*, 18 W R 312). In cases of joint interest it is sufficient, as against third persons if one only of the interested parties claims privilege (*Neuton v Chaplin*, 19 L J P C 371, *Hearsey v Phillips* 10 Q B D 465, *Rochefoucauld v Boustead*, 65 L J Ch 794)—*Phip Ev 3rd Ed* p 178. Where the consultation was had by several clients jointly, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements, yet neither should be able to obstruct the other in the disclosure of the latter's own statements *Wigmore* § 2328 *In re an Attorney*, 84 Ind Cis 353 (F B)—26 Bom L R 887

**Joint Attorney** There may be a relation, not of an absolute confidence. The chief instance occurs when the same attorney acts for two parties having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of third persons. Yet they are not privileged in a controversy between two original parties, in as much as the common interest and employment forbade concealment by either from the other *Wigmore* § 2312, *Baugh v Crodocke* 1 M & R 182, *Perry v Smith* 9 M & W 681, *In re an Attorney* 84 Ind Cis 353 (F B)—26 Bom L R 887. But if a solicitor be employed for two parties as for mortgagor and mortgagee and peruse on behalf of the former his abstracts of the title, he cannot, as against him, disclose their contents (*Doe v Watkins*, 3 Wing, 4 C 421), and where a professional man was engaged by vendor and purchaser to

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prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, it was held that he could not produce it at the trial against the interest of the purchaser's devisees though with the consent of the vendor *Doe v Seaton* 2 A & E 171. Where two persons, having a dispute about a claim made by one of them upon the other went together to a solicitor, when one of them made a statement and instructed the solicitor to write a letter to a third party on the subject of the claim,—it was held that in a subsequent action between these two persons both the statement and the letter were admissible in evidence *Shore v Bedford*, 5 M & Gr 271 *Griffith v Davies* 5 B & Ad 502. In all these cases the question would seem to be, was the communications made by the party to the witnesses in the character of his exclusive solicitor? If it was the bond of secrecy is imposed upon the witness if it was not the communication will not be privileged *Perry v Smith*, 9 M & W 682 *Raynoll v Sprye*, 10 Beav 51, *Taylor* § 926. A communication to the opposing party's attorney, as such is clearly without the privilege, since no confidence is reposed, nor if reposed, could be accepted *Wigmore* § 2312, see also *Memon v Abdul Karim* 3 B 91 *Marston v Downes* 6 C & P 381 *Ripon v Davies* 2 Nev & M 310, *Insworth v Wilding* (1900) 2 Ch 315, *R v Avery*, 8 C & P 596, 598.

**Time of consultation.** The privilege exists not for the sake of the legal profession in general but for the sake of clients needing legal advice. It therefore assumes that the relation of client and adviser has been formed (or is forming) for a particular person as client: i.e. communications are protected not merely when the person consulted is a professional legal adviser, but when the person consulting is seeking the benefit of that relation. Hence a communication to an attorney is without the privilege if made before the relation was entered into or after it was ended *Wigmore* § 2304 *Greenough v Gaskell*, 1 Myl & K 101. An interesting question, however arises when the communication is made pending negotiations for the retainer. Here it would seem plain by reason of the privilege that since the would be client cannot certainly predict the attorney's acceptance of the employment, the former must be protected in his preliminary statements when making the overtures, even if the overture be refused. It would further be immaterial that the refusal was due to a disagreement as to fees and to the clients' own withdrawal by reason of the fee demanded for upon none of these matters could he predict the result until the preliminary statement has been made. Obviously, too if the retainer is accepted the privilege covers the preliminary statement *Wigmore* § 2304.

**Any advice given by him.** No legal adviser is permitted whether during or after the termination of his employment as such unless with his client's express consent to disclose any advice given by him to his client during in the course and for the purpose of such employment *Steph Dig Ev* art 115. So not only communications made to an attorney but any advice given by him to his client is also privileged. That the attorney's communications to the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question. The reason for it is not any design for securing the attorney a freedom of expression but the necessity of preventing the use of his statements as admission of the client or as leading to inferences of the tenor of the client's communications although in this latter respect, being hearsay statements they could seldom be available at all *Wigmore* § 2320.

**Proviso (1).—Communications in furtherance of any illegal purpose.** Professional communications are not privileged when such communications are for an unlawful purpose having for their object the commission of a crime. Then they partake of the nature of a conspiracy or attempted conspiracy, and it is not only lawful to divulge such communications but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime *People v Van Rostine* 37 M Ch 69. Moreover no such interposition



falls within the just scope of the relation between legal adviser and client. The case of *William v Quebrada Ry etc Co*, (1895) 2 Ch 751 was considered one of unusual gravity and importance, and *Kelouch J*, in delivering the opinion of the Court said "It is of the highest importance in the first place that the rule is to privilege of protection from production to an opponent of those communications which pass between a litigant or an expected or possible litigant, and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases long experience has shown that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is nothing of an underhand nature, or approaching to fraud, especially in commercial matters, where there should be the veriest good faith with the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court. It is no part of the lawyer's duty to advise his clients in what manner they may commit crime or fraud with impunity, hence, the privilege does not extend to communications made in furtherance of prospective criminal acts. If the witness is employed as an attorney in any unlawful or wicked act his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of society to disclose every design which may be formed contrary to the laws of society to destroy the public welfare, *Annesley v Lord Anglesea* 17 How St Tr 1229 (1240). In *Gaiside v Outram*, 3 Jur N S 39, *Sir W Page Wood V C* said there can be no confidence in iniquitous secret." In *Russell v Jackson* 9 Hure 392, *Turner L J* said "I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. Where a solicitor is a party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor and I think it can be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law. Similarly *Sir W Page Wood V C* said I should first beg leave to consider whether an attorney may be examined to any matter which comes to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of the society, to discover every design, which may be formed contrary to the laws of the society, to destroy the public welfare. For this reason, I apprehend that, if a secret which is contrary to the public good—such as a design to commit treason murder or perjury—comes to the knowledge of an attorney, even in a case where he is concerned, the obligation to the public must dispense with the private obligation to the client."

"But the difficulty has been to define the boundaries of this limitation. It has not always been kept in mind that the privilege, in its very fundamentals, presupposes what Bentham so drastically censured,—the furnishing of legal advice to the culpable client, as well as to the worthy one. If a client who, if the law were duly enforced would lose in the litigation. How, then, can the privilege continue to exist at all if any exception is to be made by which the confidences of the guilty are to be disclosed? It is possible, of course, to take merely the practical point of view, and to declare that the privilege must at least cease to be a cloak for criminal conspiracy regardless of its logic, and to contrive an arbitrary limit for this exception. But it seems hardly necessary thus to do violence to the theory of the privilege looking at the reasons of policy upon which it rests they appear by their natural limits to end with the same conclusion. They predicate the need of confidence on the part not only of injured persons but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected wrongdoers though they may have been, because the element of wrong is not always found separated from an element of right, because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress, and because the legal adviser must not habitually be placed in the position of an informer. But the elements all cease to operate at a certain

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point, namely, where the desired advice refers not to prior wrongdoing, but to future wrong doing. From that point onwards, no protection is called for by any of these considerations. Upon this much there has been a fair consensus among all who have declared themselves upon the subject. But certain minor points of detail still remain, if a practical rule for disclosure is to be settled upon. (1) Must not the advice be sought for a knowingly unlawful end? (2) Must not that unlawfulness be either a crime or civil wrong involving a moral turpitude? (3) Must not the attorney have so far abandoned his professional attitude as to have become, by assent to the design, a partaker in the client's intended wrong? *Wigmore* § 2298. The law on the subject is thus laid down by *Brouson J* in *Coreney v Tannahill*, 1 Hill N Y 33, 35, 41. 'It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defence, but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as a counsel to see, or aid in the transaction. Indeed, I think there can be no such relation is that of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes. Now if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may perhaps, be privileged, and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another either in his person, his fame or his property, may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness.' In *Annesley v Earl of Anglesea*, 17 How St Tr 1229. *Mountney B* said. A man (without any natural evil to it) promotes a prosecution against another for a capital offence, he is desirous and determined, at all events, to get him hanged, he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake), he happens to be too honest a man to engage in such an affair, he declines the prosecution, but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry his iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove this, in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both.

"Looking at the reasons for the privilege, says *Prof Wigmore*, "and construing it as strictly as possible, the first of the above three questions should be answered in the affirmative, but the second and the third in the negative. The decisions apparently reach this general result: except in the second respect, where there is an inclination to mark the line at crime and civil fraud, yet it is difficult to see how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be." *Wigmore* 2293. In this section also the word 'illegal' has been substituted for the word "criminal" by s. 10 of the Indian Evidence Act Amendment Act (XVIII of 1872), see also *Russell v Jackson*, 9 Hare 329, *Kelly v Jackson* 13 Ir Eq R. 129, *Taylor* § 912.

Statements and communications regarding the commission of a crime already committed, made by the party who committed it to an attorney, consulted as such, are privileged communications whether a fee has or has not been paid and whether a prosecution or litigation is pending or not. The question was raised in the United States Supreme Court in *Alexander v United*

*States* 138 U S 353, which was a trial for murder of a partner, and reliance was placed on a leading English case (*Reg v Cox*, L R 14 B D 153) as holding the doctrine that where a communication is made to counsel in furtherance of a scheme to commit a crime, the client is not entitled to the privilege. "This case, however" said *Mr Justice Brown* "is clearly distinguishable from the one under consideration in the fact that the solicitor was consulted with regard to a scheme to defraud, for which his clients were subsequently indicted and tried and the testimony was offered upon that trial, while in this case the consultation was had after the crime was committed, and was offered in evidence as an admission tending to show that the defendant was concerned in the crime or rather is a statement contradictory to one he had made upon the stand. Had he been indicted and tried for a fraudulent disposition of his partner's property, the case of *Reg v Cox* would have been an authority in favour of admitting his testimony, but we think the rule announced in that case should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." *Vide illustrations* (a) and (b). So the privilege mentioned in this section is subject to the limitation that no Court can be called upon to protect communications which are in themselves part of criminal or unlawful proceedings. *Bullivant v Atkinson* (1901) A C 196. So this privilege cannot be claimed where the consultation with the attorney was for the purpose of raising money on a forged Will. *R v Avery*, 8 C & P 596, see also *Rothwell v King* 2 Swinst 221 note. *R v Farley* 2 C & K 313, *R v Haywood*, 2 C & K 234, *R v Jones* 1 Dn Cr 166. So a solicitor is not privileged when he acts as *particeps criminis*, *Reynell v Sprye*, 10 Beav 51 56. But in *Follet v Jeffreys*, 1 Sm N S 3, 17 Lord Cranworth V C held communications respecting an attempt to dispose of property in evasion of creditors, privileged. In *Charlton v Coombs*, 32 L J Ch N S 284, it was held that an attorney need not be privy to the fraud in order that the privilege should cease. See also *R v Douner* 14 Cox 486. *Williams v Quebrada Ry* (1895) 2 Ch 751, *R v Cox and Bullon* L R 14 Q. B D 153, 164, *Posle the waste v Rielman* L R 35 Ch D 723, 724. Communications made with a view to carry out a fraud are not privileged. *O'Rourke v Danbushire*, (1920) A C 581.

**Proviso (2)** This proviso is based upon the following observation of *Sir W Page Wood V C*, "No private obligations can dispense with that universal one which lies on every member of the society to discover every design, which may be formed contrary to the laws of society, to destroy the public welfare. For this reason, I apprehend that, if a secret which is contrary to the public good—such as a design to commit treason, murder or perjury—comes to the knowledge of an attorney, even in a cause where he is concerned, the obligation to the public must dispense with the private obligation to the client." *Vide illustration* (c).

**Communications which are privileged—Cases** A solicitor is not at liberty without his client's express consent, to disclose the matter of the employment. This section protects from publicity not merely the details of the business, but also its general purpose, unless it be shown *abunde* that such business or the communication made in respect of it falls within proviso (1) or (2). Where in an interview between a solicitor and his client a third person in his client's company makes a statement to him in the course and for the purpose of his professional employment, the solicitor is not privileged from disclosing the name of the person making the statement, unless the name was made the subject of a special confidence, and it was stipulated by or on behalf of his client that it was not to be disclosed. *Framji Bhucan v Mohansing Dhan Singh* 18 B 263. A pleader is prohibited from disclosing any communication made to him in the course and for the purpose of his employment as such pleader by his client, without the client's express consent any such communication volunteered by the pleader is inadmissible in evidence even if offered upon oath. *Ma Paw v Maung Keyun* L B R (1893—1900), 358.

**Communications which are not privileged** A solicitor may be examined like any other witness to a fact which he knew before his retainer, that is,

**S 127.** before he was addressed in his professional character (*Cuts v Pickering*, 1 Vent 197, *Jord Say* and *Sele's Case*, 10 Mod 11) or where he was made himself a party to the transaction (*Duffin v Smith*, Pick 103, *Robson v Kemp*, 1 Esp 52), or where he is questioned as to a collateral fact which he might have known without being entrusted as the solicitor in the cause (*Bull v P* 251). An attorney may prove his client's handwriting, though the knowledge was obtained from witnessing his execution of the bail bond in the action (*Hurd v Moring*, 1 C & P 172). If he is a subscribing witness to a deed he may be examined concerning the execution (*Doe v Andrews*, 2 Cowp 816). Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr G or any other solicitor whether the punishment of forging a bill is the same where the names of the parties are entirely fictitious as where the names are those of real persons, it was held that his letter was not a privileged communication (*R v Breuer*, 6 C & P 363). A solicitor conducting a cause in Court may be called as a witness by the opposite side and asked who employs him, in order to shew the real party, and so let in his declarations (*Levy v Pope* M & M 10, *Russell on Crimes*, pp 2310-2311). The privilege is also confined to communications to the solicitor in his character of solicitor, and therefore a communication made to him or a question asked him by his client, not for the purpose of getting his legal advice, but to obtain information as to a matter of fact is not privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors called on the attorney's suggestions and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested, it was held that the attorney might prove all these facts, in order to shew an act of bankruptcy, in an action by his client's assignees (*Brannell v Lucas* 2 B & C 715, *Russ Crimes* 2343). A pleader cannot claim privilege under this section from disclosing a statement made to him by a person, if the same was not made to him in the course and for the purpose of his employment as a pleader, and the fact that the pleader has been acting as a professional adviser to the party makes no difference (*Emperor v Bala Dharma* 4 Bom L R 160). This section has no application where the statement made by a client to his solicitor was not made in confidence, but for the purpose of communication (*Emperor v Maime*, 5 Bom L R 122). A communication to an attorney to be privileged must be of a confidential or private nature. Such a communication made in the presence and hearing of the opposite party or made to the attorney not exclusively in his character as attorney of the party making it but addressed to him also as attorney of the opposite party is not privileged (*Memon Husein v Moulvi Abdul* 3 B 91). Section 126 of the Evidence Act deals with professional communications. Where one defendant had written a letter to a co-defendant and the document came into the hands of the plaintiff, it was held that there was no rule relating to privileged communications preventing its production in evidence (*Paicheappa v Ma U* L B R (1872-1892) 412).

## 127 The provisions of section 126 shall apply to inter-

Section 126 to apply to interpreters etc  
 interpreters, and the clerks or servants of  
 barristers, pleaders, attorneys and vakils

**Principle.** It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents for rendering services (*Taylor v Foster* 2 C & P 195, *Bouman v Norton* 5 C & P 177, *Lyell v Kennedy* L R 27 Ch D 1 (19)). The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as attorney's agents (*Wigmore* § 2301).

**Scope of the section.** The privilege is applicable to a person acting in the capacity of an attorney and apparently to an attorney's clerk (*Louderberger v Gorham* 5 Cal 450, (Am) *Gibley v Haffley* 16 N Y 180 183). So where a communication is made to a pleader's clerk he is not at liberty to disclose the communication. Though a communication contained in a letter is not addressed to a pleader direct but to his clerk, this section extends to such a communication, the same confidential

character that attaches to a communication to a pleader under s. 126. *Amanullah v Amanullah*, 26 C 53=2 C W N 619. The evidence of the advocate's clerk is also inadmissible. *Maug Mya U v Sun Singh U* L R (1897 1901), Vol II, 363. In *Ibbis Prata v Queen Empress* 25 C 736, it was held that communications to a mukhtar's clerk is also privileged. But the privilege does not extend to a mere student at law in the attorney's office nor the attorney's clerk although the client supposed he was an attorney. *Barnes v Harris*, 7 Cush 576.

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**128** If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126, and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence

**Privilege** The privilege mentioned in section 126 is designed to secure the client's confidence in the secrecy of his communications, hence the privilege is not violated by receiving such disclosures as the client by his own will permits to be made. So in respect of this privilege it has always been recognized that a waiver may be made. *Captain Bullock's Trial*, 21 How St Tr 1, 311 360, 480. *Merle v Moore*, Ry & Mo 390. Now the question is what constitutes a waiver by implication? Judicial decision gives no clear answer to the question. In deciding it, regard must be had to the double elements that are predicted in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure fairness requires that this minority shall arise, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final. *Wigmore* § 2327.

**Scope of the section** Under s. 21 of Act II of 1855, a party who gave evidence in a suit at his own instance was deemed to have waived his privilege, and to have consented to disclosure by his professional adviser of any relevant matter which the professional adviser would, but for such privilege, be bound to disclose. *Cum Ex* 361. Under the present Act the client's offer of his own testimony in the cause at large is not a waiver, for the purpose either of cross-examining him to the communications or of calling the attorney to prove them, otherwise the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand. The client's offer of his own testimony as to specific facts about which he has happened to communicate with the attorney is not a waiver. *Wigmore* § 2327, *Doolar Jha v Janyal*, 15 W R 340. The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as in ordinary witness. But the client's offer of his attorney's testimony as to specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter, for the privilege of secret consultation is intended only as in incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former. So also a client's offer of his own or his attorney's

\* This word in s. 125 was inserted by the Indian Evidence Act Amendment Act (15 of 1872), s. 10.

**S 129.** testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of complete ness *Higmore* § 2327, *Faylor* § 927, see also *McDonnell v Conry*, 1843, 1r Cir Rep 807. Once the privilege is waived, the waiver cannot be re-called. The evidence is made incompetent at the option of the client only, and if he elects at any time to remove the seal from the lips of the witness, the evidence may be received. The ban of secrecy having been removed by the client, and the information having lawfully been made public, the right to object further thereto is gone. The client cannot use the privilege both as a sword and a shield, to waive when it inures to his advantage and to wield when it does not. After its publication no further injury can be inflicted upon the rights and interests, which the law was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed. It is then open to the consideration of entire public, and the privilege of forbidding its reputation is not conferred by law. The consent, having been once given and acted upon cannot be recalled and the client can never be restored to the condition which the law from motives of public policy has sought to protect. *Burr Jones* § 756. "There is no principle or authority for holding after a consent to publish such information has been properly given, and the evil if any consummated that the privileged person can again raise the objection. The objection having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such case. The maxim of *cessante ratione legis cessat ipsa lex* is of frequent application, and is a sound rule of interpretation. It seems to us that this rule may properly be applied in determining the meaning of the word 'waived' as used in the statute, and as supporting the conclusion that when once waived and made effectual by publication it is waived for all time." *McKinney v Grand Street etc* 104 N Y 352 (Am). Waiver in one trial is a waiver in subsequent ones. *Burr Jones* § 756.

**129** No one shall be compelled to disclose to the Court any Confidential communication which has taken place between him and his legal advisers, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

**Principle** The privilege being for the protection of the client in his subjective freedom of consultation, it would plainly be defeated if the disclosure of the confidences though not compellable from the attorney, was still obtainable from the client. Accordingly under the modern theory, it has never been doubted that the client's own testimony is equally privileged. *Higmore* § 2324.

**Scope of the section** Under the old law (*i e* Act II of 1855 section 22), a party to a suit who offered himself as witness was bound to produce any confidential writing or correspondence that had passed between himself and his legal adviser. The reason for this rule is not very clear and the present section abrogates it so far that such correspondence need be produced only if it is necessary to explain the witness's evidence. The English law at present is identical with the rule laid down here. *Minet v Morgan* L R 8 Ch App 361, *Cun Ev* 362. So the client as well as the attorney, may refuse to testify to communications of the character under discussion, as the rule would be of no value if it might be evaded by compelling the client to disclose that which the attorney is bound to withhold. *State v White*, 19 Kan 415 (Am). This privilege extends even to those cases where the client offers himself as a witness in his own behalf. *Birmingham R & E Co v Wildman*, 119 Ala 347. It would be absurd

to protect professional communications, and to leave them unprotected at the examination of the client. The true view seems to be that communications which the lawyer is precluded from disclosing the client cannot be compelled to disclose. This privilege is essential to public justice, for if it did not exist, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his right. *What Ev* § 583. 1 *Greenl Ev* §§ 236—240. The rule is not limited in its application to advice given or opinions stated, but extends to all communications by either party, whether oral or documentary, properly relating to the business in hand, and to all documents, books, papers or instruments which may be properly used by the client to convey professional information of his attorney. *Crosby v Berger* 11 Page (N Y) 377. On the same principle the privilege extends to a state of facts or a case prepared for the purpose of obtaining the advice of counsel, and to the opinion of counsel based upon such statements. *Burr Jones* § 750.

In *Munchershaw Bevan v The New Dhumsay S & W Co* 4 B 576, which was a suit for wrongful dismissal in which the defendant pleaded justification by reason of the plaintiff's misconduct, the defendant alleged that the plaintiff while in their employment had taken *sookri* (i.e., a percentage on payments made by customers). The plaintiff stated that he had done so with the permission of the agents who were his official superiors. He said that he had had a letter from them expressly allowing him to accept *sookri* that he lost the original document, which in the year 1878 he had submitted to counsel with a case for opinion upon matters connected with it. He now produced a translation of the document. *Mr Interarity* for the defendant called for the production of the case submitted to counsel. *West J* in disallowing the production said 'In drawing up the Indian Evidence Act, chiefly from Taylor on Evidence Sir James Stephen plainly intended to adopt in section 129 the principle contended for in sections 846, 847 of the work, he was condensing but with this qualification not expressed at that place that if a party becomes a witness of his own accord he shall, if the Court requires it be made to disclose every thing necessary to the true comprehension of his testimony. The argument that albeit the document may not be such that the Court can properly order its production as evidence yet the opposite party may demand a perusal of it, is I think opposed to all principle. If a communication is protected by its confidential character it is protected in an especial degree against an adversary in litigation. Here the document which the plaintiff is asked to produce, is in its nature a confidential communication. The plaintiff wanted advice for his personal guidance in fulfilling a contract of service. The statement which he had before counsel, with this view is his own property in substance as well as form, it not being suggested that the consultation was in furtherance of any fraud. I do not find it necessary to compel a disclosure of it, in order to explain the evidence given by the plaintiff and in the absence of such necessity it would be wrong to put pressure on the plaintiff. It is obviously desirable that communications with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to. Cunning men could easily evade a rule which would make frank communications unsafe. Truthful men would be placed at a disadvantage by their candour. Advice would have to be given on muted and distorted statements, and unless litigation would thus be promoted in numberless cases in which an exact knowledge of facts would have enabled a counsel or solicitor to nip it in the bud by timely warning or suggestion. Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point that it would lead to frequent falsehoods as to what had really taken place. The rule of protection seems to me to be one which should be construed in a sense, most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise and disclosures made under section 129 should not be enforced in my case except when they are plainly necessary.' Letters written by one of the defendants servant for the purpose of obtaining information with a view to possible future litigation are not privileged even though they might, under the circumstances, be required for the use of the defendants solicitor. *Brpro Das v*

**S 130.** *Secretary of State*, 11 C 655 In this section "compelled" cannot mean "sub poenaed" and it uses the words "compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness box. *Mohar Sheikh v Queen Empress*, 21 C 392 Statements of witnesses recorded for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good cause to go to the Court are privileged under this section. *Dunlop v Bromley*, 13 Ind Cas 71 The documents for which privilege could be claimed would be those only which are in the nature of communications between the lay clients and their professional legal advisers. This statement made by the defendant's servants to the defendant with reference to the subject matter of the suit must be disclosed at the request of the plaintiff and no privilege can attach to them. *Control India Spinning v Gr I P Railway*, 29 Bom L R 111-102 Ind Cas 125-A I R 1927 Bom 567

**130** No witness who is not a party to a suit shall be compelled to produce his title deeds to any property or any document in virtue of which he holds any property as pledge or mortgage or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims

Production of title deeds of witness not a party

**Principle** The title deeds to land in England were always a secret of extraordinary importance. The landed interests, at the time of the common law's formation and until recently were overwhelmingly dominant in politics, religion and social intercourse. The safety of those interests was a paramount object. Now, under any title system not founded on compulsory public registration, the secrecy of the title instruments comes to be a vital (if selfish) consideration for the occupants of the land. Their possession may be unquestioned but the instruments under which they claim are constantly defective in some important feature. A boundary may vary, a release be missing, a recital be incorrect, — a score of defects of one sort or another might be discoverable in the chain of title. But the possession and the title are yet unquestioned, and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim who might be only too glad to take advantage of them. It comes therefore to be a fundamental maxim of the dominant class that each occupant is entitled to keep secret his documents of title. Without this, almost any title in the country might lie in jeopardy. It is an absolute demand of self interest that the appearance shall pass for the reality. *Wigmore* § 2211. Those who register their deeds have no need for such protection: their title in general strands or falls by what is publicly recorded, not by what they privately possess, and there is no appreciable motive for demanding a privilege of secrecy for that which can neither hurt nor help them. Where a person holds a document, not his own, but subject to a lien which would be lost by his surrender of possession, or owns and holds a document, such as a bill of exchange, whose continued possession is necessary for the enforcement of his rights under it, he may fairly claim not to be compelled to surrender it for evidential purposes in litigation between other parties. *Wigmore* § 2211.

**Production of title deeds by persons not party to a suit** No witness who is not a party to a suit can be compelled to produce his title deeds to any property. *Pickering v Noyes*, 1 B & C 263, *Adams v Lloyd* 3 H. & N 351, *Doe v Dale* 3 Q. B. 609, *Egremont v Egremont*, 11 Ch D 158. Where an attorney is called upon, whether by subpoena duces tecum or other wise, to produce deeds or papers belonging to his client, who is not a party to the suit, the Court will inspect the documents, and pronounce upon their admissibility according as their production may appear to be prejudicial or



not to the client, in like manner as where a witness objects as to the production of his own title deeds *Copeland v Watts*, 1 Stark 95, *Imry v Long*, 9 East 473, *Reynolds v Rouley*, 3 Rob La 201, *Travis v January*, 3 Rob La 227. So, if the documents called for are in the hands of the agent or steward of a third person, or even in the hands of the owner himself, their production will not be required where in the judgment of the Court it may injuriously affect his title *R v Hunter* 3 C. & P 591, *Pickering v Noyes*, 1 B & C 262, *Roberts v Simpson*, 2 Stark 203, *Doe v Thomas* 9 B & C 288, *Bull v Loveland*, 10 Pick. 9, 14, *Doe v Langdon* 12 Q. B 711, *Doe v Hensford*, 13 Jur 632, *Doe v Clifford*, 2 C & K 448, *Kemp v King*, 2 Mo & Rob 437, *R v Woodby* 1 Mo & Rob 390, *Thompson v Mosely*, 5 C & P 501. This extension of the rule, which will be more fully treated hereafter, is founded on a consideration of the great inconvenience and mischief which may result to individuals from a compulsory disclosure and collateral discussion of their titles in cases where not being themselves parties, the whole merits cannot be tried *Green v Evans* § 469 (n). A Will, as well as the title deeds of an estate in mortgage to the party whose privilege is invoked, and the mortgage deed itself, would be within the protection. The object is to protect property by excluding the means of picking holes in the document under which it is held. Indeed it is not necessary that the deeds should be even those establishing the title. They would be within the protection of the rule, though called for to show the title's defeasance. Thus in a case in which the witness, an attorney, was required to produce a deed of assignment with a view of showing a departure with the interest in the property, but objected on the ground that it was the deed of his client, the objection was upheld by the Court *Creswell* I ob serving — 'The attorney was bound to exercise all the control over it which the law authorised him to do. He was fully justified in refusing to produce it or to answer any question respecting it. It was said that this was not a title deed. It was however, called for as such, and it was intended to shew that the title was no longer in the defendants.' It need not be even strictly a deed, — any document or paper having relation to the title would be within the protection. The document too must be one by the production of which title might be capable of being affected. Thus in an action of ejectment, where the title of the lessor of the plaintiff was disputed the solicitor of a gentleman, who had been in treaty with him for the purchase of the property, but which treaty had gone off was allowed to produce on behalf of the defendant, the abstract of title that had been delivered to his client, as furnishing secondary evidence of the contents of the deed relating to the property, which the lessor of the plaintiff had refused after notice to produce *Doe v Langdon*, 12 Q. B D 711, *Goodale v Evans* pp 150 151.

The protection against the production of the deeds would extend to all discovery of their contents. It was observed by *Baron Alderson*. It would be perfectly illusory for the law to say that a party is justified in not producing a deed but that he is compellable to give parol evidence of its contents, that would give him or rather his client through him, merely an illusory protection if he happens to know the contents of the deeds and would be only a round about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate. I am clearly of opinion, therefore, that when a party refuses to produce a deed, and is justified in so doing, he ought not to be compelled to give parol evidence of its contents *Dukes v Wales*, 9 M & W 606.

There have been cases in England in which the Court has taken on itself the inspection of the document, with a view to determining whether its production would be prejudicial to the client, but this course has been considered as objectionable, and would not, according to English law, it seems be now upheld and for the cogent reasoning advanced by *Maule J* in *Tolant v Sayer*, 13 Com B 236. 'Suppose' said his Lordship 'the Judge were bound to examine the document, and, upon doing so were to say that it was not a title deed, — his decision might be made the subject of an argument in open Court by bill of exception and thus the contents of the deed might be communicated to all the world.' But *Professor Wigmore* says. This principle, then,

**S 131.** that the disclosure of title deeds in litigation between other parties was not compellable appears to have been always accepted in English Courts, coming down as an unquestionable tradition, and it was occasionally extended to documents other than those affecting land, though it seems ever to have been regarded as limited by trial Court's discretion' *Wigmore* § 2211 see also *Miles v Dawson* 1 Esp 105, *Copeland v Watts*, 1 Stark 95, *Reed v James* 1 Stark 132 *Corson v Dubois*, Holt 239, *Roberts v Simpson* 2 Stark 203, *Harris v Hill* 3 Stark 140, *R v Hunter* 3 C & P 591, 592, *Mills v Oddy* 6 C & P 728, *Doe v Langdon*, 12 Q B 711 The rule appears to be the same in India Vide Order XVI r 6 of the Civil Procedure Code and s 162 of the Indian Evidence Act

Although a witness cannot be asked to testify to the contents of such a document, yet he could be required to describe the deed for identification *Doe v Clifford* 2 C & K 443 *Pheps v Piew* 3 E & B In the last named case, *Weightman J* said 'His privilege is only not to produce the instrument for the purpose of disclosing its contents' But the party could prove the contents by any other evidence available *R v Upper Boddington* 8 Dorol & R 726 *Murston v Dounes* 6 C & P 381 382, *Newton v Chaplin*, 6 C B 356 367, *Inuit v Sudhan* 15 C L J 9

Any document in virtue of which he holds the property as pledgee or mortgagee A mortgagee or a pledgee when not parties to a suit are not compellable to produce documents by virtue of which they hold any property as such These documents are title deeds of this property Vide *Doe v Ross* 7 M & W 103 explained by *Lord Justice Turner in Hope v Lidelell* 24 L J Ch 694, *Chichester v Marq of Donegall* 31 L J Ch 694 *Costa Rica Republic of v Erlanger*, 44 L J Ch 281 *Taylor*, § 458

Document the production of which might tend to criminate him Upon principles of reason and equity, a Judge will refuse to compel either a witness or a party to a cause to produce any document the production of which may tend to criminate him *Whitaker v Lord*, 2 Taunt 115 *Roe v New York Press* 75 L J Jo 31, *Spokes v Grosvenor Hotel Co* (1897) 2 Q B 124 But a book of account cannot be withheld on the ground that it tends to incriminate him

It is a novel, if not a somewhat startling, proposition that an officer of a corporation can refuse to produce its books when he is asked to account for property which has been committed to his charge, upon the ground that the production of the books may tend to incriminate him If such rule were to prevail, it is not difficult to see how a person who had once obtained possession of the books of a public or private corporation might evade account, for property which had come into his possession by doing what his witness did, viz claiming that the production of such books would incriminate him, even though the production was solely for the purpose of enabling him to refresh his recollection concerning questions asked him But there is no such rule' But the mere circumstance that the production of the document may render the witness liable to a civil action does not come within the protection of the rule *Doe v Data* 3 Q B 609 *Taylor* § 460 So also the privilege does not extend to public documents in the official custody of the witness *Badshaw v Murphy*, 7 C & P 612

Unless he agreed in writing etc It amounts to waiver on his part

**131** No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production

Production of documents which another person having possession could refuse to produce

**Principle** This section is intended for the protection of persons whose title-deeds and other documents happen to be in the hands of their attorneys,

stewards, &c., *Fulmonth v Moss* 4 Price, 455 In such a case the owner's consent is a necessary condition precedent to the production of the documents  
*Not Ev* 315

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**Scope of the section** Examples of persons having documents in their possession are agents, attorneys trustees, mortgagees, etc., *Whitley Stoles* Vol II p 922 Is the attorney compellable to produce the documents placed in his possession by the client? This is not a question of compelling the disclosure of the attorney's knowledge he may know nothing of the contents of the document, nor is he asked to testify about them The answer depends upon the other privileges of the client irrespective of the privilege under s 126 *infra* The attorney is but the agent of the client to hold the deed if the client is compellable to give up possession then the attorney is, if the client is not, then the attorney is not It is merely a question of possession and the attorney in this respect is like any other agent The extent of the client's obligation to produce must therefore be taken as determining the present question It follows then, that when the client himself would be privileged from production of the document either as a party at common law or as a third person claiming title, or as exempt from self incrimination the attorney having possession of the document is not bound to produce *Higmore* § 2307 An attorney is not required to produce vouchers of his client before the Grand Jury on a charge of forgery *R v Dixon* 3 Burr 1637 So also an attorney is not compellable to produce the client's documents nor to prove their contents, when the client is privileged as a party to the cause *Bothamley v Usborne* Perke Add Cas 99 101, see also *Lenny v Barclay* 3 Stark 38 1, *Harris v Hill* 3 Stark 140, *Nixon v Mayoh*, 1 Mo & Rob 76, *Mills v Oddy* 6 C & P 728 731, *Doe v Ross* 7 M & W 102, 122, *R v Hankins* 2 C & K 823, *Doe v Scaton* 2 A & E 171, 181, *Bate v Amsy*, 1 Cr M & R 38 The attorney is not to produce his client's title deeds nor to disclose their contents *Mills v Oddy* 6 C & P 728 731 In *Newton v Chaplin* 10 C B 306 *Maule J* said The privilege of W C as to the book was the same in the hands of (the attorney) as if he had kept the book in his own hands On the other hand, if the client would be compellable to produce, either by motion or by subpoena or by bill of discovery, then the attorney is equally compellable if the document is in his custody to produce it under the appropriate procedure *Pearson v Fletcher* 5 Esp 90 *Copeland v Watts*, 1 Stark 95, *Corsen v Dubois*, Holt 239 *Copen v Pempian*, 2 Stark 260, *Lowe v Fulms*, 11 Price 455, *Nauling v Howard* Ry & Mo 61, *Doe v Thomas* 9 B & C 288, *Doe v Langdon*, 12 Q B 711, 719, *Voeant v Sayer*, 13 C B 231

### 132 A witness shall not be excused from answering any

Witness not excused from answering on ground that answer will criminate question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind

**Provido** Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer

**Principle** According to the English Law it is a settled rule that a witness is not to be compelled to answer any question, the answering of which has a

- S 132.** tendency to expose him to a criminal prosecution or to proceedings for a penalty, or for a forfeiture (even of an estate or interest). *Nemo tenetur Scipsum accusare* (No one is bound to criminate himself). *Nemo tenetur Scipsum prodere* (No one is bound to betray himself). *Best* L. § 125. *Steph Dig* I c. 1rt 120. *Taylor* § 1153, *May v Haulins* 11 L. R. 210, *R v Garbet* 1 Den. C. 26, *Curright v Worcester* 6 M. & S. 191. *Paulhurst v Tenton* 1 Mar. 101. *Pye v Butterfield* 31 L. J. Q. B. 17. *Chester v Worthy*, 18 C. B. 291. *R v Lord George Gordon* 21 How. St. Tr. 533, *Ex parte Reynolds* 1 R. 29 Ch. D. 293. *R v Bopps* 1 B. & S. 330. Upon a principle says Mr Stalioe of humanity as well as of policy, every witness is protected from answering questions by doing which he would criminate himself. Of policy because it would place the witness under the strongest temptation to commit the crime of perjury and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors. It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances to be put to the torture for the purpose of extorting a confession. *Stalioe on Evidence* p. 11. This rule was criticised by Bentham in his *Rationale of Judicial Evidence* Bk. IX, pt. IV. C. III and by Sir James Fitz James Stephen in his *History of the Criminal Law* Vol. I pp. 312, 411, 535, 542, 565. In the Report of the Committee on Trial Procedure of the Wisconsin Branch American Institute of Criminal Law and Criminology (1910) the following remarks occur. A majority of our committee believe that the provisions in Section 8 Act 1 of our constitution that No person shall be compelled in any criminal case to be a witness against himself has outlived its usefulness and would be abolished and that thereby one hiding place of crime would be destroyed. We have obtained the views of many active lawyers and Judges on this question and a large majority of those consulted have expressed the opinion that no innocent person would suffer and that more guilty ones would be detected and convicted if this provision would be repealed. Commenting on the English rule, *Prof Wigmore* says. In preserving the privilege however we must resolve not to give it more than its due significance. We revere it rationally for its merits not worship it blindly as a fetish. We are not merely to emphasize its benefits but also to concede its shortcomings and guard against its abuses. Indirectly or ultimately it works for good,—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill—for the protection of the guilty and the consequent derangement of civil order. The current judicial habit is to ignore its latter aspect and to load it undiscriminatingly with false eulogy. A stranger from another land where might imagine in the perusal of our precedent that the guilty criminal was the fond object of the Courts doting tenderness, guiding him at every step in the path of unrectitude and lifting up his feet lest he fall into the pits digged for him by justice and by his own offences. The judicial practice now too common of treating with warmth and fostering respect every appeal to this privilege and of unavailingly feigning each guilty invector to be an unsullied victim bounded by the prosecutions of a tyrant is a work of traditional sentimentality. It invokes a confusion between the abstract privilege—which is indeed a bulwork of justice—and the individual entitled to it—who may be a monster of crime. There is no reason why Judges should lend themselves to confirming the insidious impression that crime in itself is worthy of protection. The privilege cannot be enforced without protecting crime but that is a necessary evil inseparable from it, and not a reason for its existence. We should regret the evil not magnify it by approval. *Wigmore* § 22-1. But in India the law is otherwise. By section 32 of Act II of 1855 a witness was not excused from answering any question relevant to the matter at issue, in any civil or criminal proceeding, upon the ground that the answer to such question would criminate or might tend directly or indirectly to criminate him or that it would expose, or tend directly or indirectly to expose him to a penalty or forfeiture. It contained, however, at the same time a provision that no answer the witness might thus be compelled to give should except for the purposes of punishment for false evidence, subject him to arrest or prosecution, or be used as evidence against him in any criminal proceeding. This section re-enacts the provision of section 32 of Act II

of 1855 The reason for the change in thus stated by *Turner C J* in *Queen v Gopal Das*, 3 M 271, 279 "(Under the English law) a witness was not bound to criminate himself, but if he thought fit to do so, his admission on oath was equally admissible in evidence against him as any other admission. This state of the law in some cases tended to bring about a fracture of justice for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision. To avoid this inconvenience, and to obtain evidence which a witness refused to give it was suggested that, 'when the question was material to the issue, it should be left to the discretion of the Judge whether or not he would enforce an answer having regard to the general interests of justice, provided always, that if an answer should be expressed it should either have the effect of indemnifying the witness from any punishment, etc., with respect to the subject to which the answer related, or at least such answer should not be admissible evidence in any future criminal proceedings instituted against the witness' (*Taylor* § 1309). The Indian Legislature did not adopt this suggestion as it stood. The Indian Act gives the Judge no option to disallow a question as to matter relevant to the matter in issue. The end desired the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse but while subjecting them to compulsion, the Legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against them except for the purpose of the Act declared. The object of the law was to secure evidence which theretofore could not have been obtained and it was not its object to afford any addition of protection to persons who, by an infraction of the criminal law, had exposed themselves to penalties." In the same case *Muthusami Iyyar J* said "The necessity under which the witness lay of explaining how the answer might criminate him amounted in some cases—as observed by *Baron Pollock* in *Adams v Lloyd*, 3 H & N 362 and *Maule J* in *Fisher v Ronalds*, 12 C B 762 since overruled by *R v Boyes*, 1 B & S 311—to a virtual denial of the privilege, and to an evasion of the rule that no one is to be compelled to criminate himself." Then citing the above extract from *Taylor* on Evidence, he continued "The principle suggested is when an answer is forced, that answer should be excluded in any future criminal proceeding instituted against the witness on the ground that no man shall be compelled to criminate himself and that such answer is analogous to an answer contained in the sworn examination of the accused in a criminal case. It seems to me that the legislature in India adopted this principle, repealed the law of privilege, and thereby obviated the necessity for an enquiry as to how the answer to a particular question might criminate a witness, and gave him an indemnity by prohibiting his answers from being used in evidence against him and thus secured the benefit of his answer to the cause of justice and the benefit of the rule that no one shall be compelled to criminate himself, to the witness when a criminal proceeding is instituted against him. That the English rule of absolute privilege does not apply *proprio vigore* in India is apparent from the proviso to this section *McGill v Byrne* 5 S L R 133=13 Ind Cis 217=13 Cr L J 25

**Scope of the section.** This section abolishes the law of privileges and creates an obligation in a witness to answer every question material to the issue whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that that answer shall not be admitted in evidence against him in criminal prosecution. Under this section it is not in the power of the Judge to excuse a witness from answering if the question is relevant to the issue. *Queen v Gopal Das* 3 M 171 Section 32 of Act II of 1855 is reproduced almost *verbatim* in this section. *Per Innes J* in *ibid* "Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made such statement, if relevant, may be used against him on his trial on a criminal charge. If a witness does not desire to give his answers used against him on a subsequent criminal charge he must object to answer, although he may know beforehand that such objection if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. *Ibid* Where a person

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is charged with an offence with which he is alleged to have incriminated himself in his deposition in a case, the fact that he was the person who gave the deposition should be proved. *In re Ramayyamar* 3 Weir 791. A statement containing defamatory matter against another, made by a witness in a judicial proceeding is a privileged statement under this section of the Act, for which such witness could not be proceeded against criminally. If the statement were false, he might be prosecuted for giving false evidence. *Maladin v Queen Empress*, 3 O C 80.

Taking a thumb impression of a witness by the Court is not equivalent to asking a question and receiving an answer within the purview of the proviso of this section, and therefore, such a thumb impression may be proved against the persons giving it in a criminal trial. *Lunoo Miah v King Emperor* 16 C W N 503=15 C I J 399=13 Ind Cr 925=39 C 348. Where an incriminating question is put to a witness, the Magistrate should explain to him his position and should advise him of his right; otherwise, he may be induced, through ignorance of the state of the law to deny the truth for fear of penal consequences. *In re Jaddonath Dutt* 2 C L J 181, but see 1 Weir 153=3 M H (App) 29. When a co-accused is cited as a witness his position is sufficiently protected by this section. *Raja Ram v Emperor*, 5 Lah L J 429=73 Ind Cr 521=24 Cr L J 633.

**Proviso.** This section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer and has given him a protection in the latter of those cases only. The words 'be compelled to clearly shows that the protection is afforded to answers which a witness has objected to give or which he has asked to be excused from giving and which then he has been compelled by the Court to give. *Queen Empress v Ganu Sauba* 12 B 440=Rat. Un Cr C 360. *contra per Buwood J in ibid* see also *per Taraporewala J* in 50 B 56 *infra*. The term 'shall be compelled' in section 132 appears to be the correlative of the term 'shall be excused' and they presuppose the rule that every person giving evidence on any subject before any Court or person authorized to administer oaths and affirmations shall be bound to state the truth and an authority competent at the time, to excuse or compel compliance with this rule. They also suggest that the witness has objected to the question and has sought and been refused excuse and even constrained to answer. The terms of this section when read with the rest of the Act afford protection only to answers to which a witness has objected or has been constrained by the Court to give. *Queen v Gopal Das* J M 371=2 Weir 781. *contra Chattin v Emperor* 18 A L J 940=58 Ind Cr 825. The mere subpoenaing of a witness or ordering him to go into the witness box does not compel him to give any particular answer or to answer any particular question. The words 'which a witness shall be compelled to give' in this section are not a mere surplusage but apply to pressure put upon witness after he is in the box and when he asks to be excused from answering a question. But if a person makes such a statement without any compulsion and voluntarily it may be if relevant used against him in his trial on a criminal charge. *Moher Sheld v Queen Empress* 21 C 392. *Haiden Ali v Abu Miah* 32 C 756=2 C L J 105=2 Cr L J 159=9 C W N 911, *Queen Empress v Voss* 16 A 88. *Queen Empress v Bhikaji Rat* Un Cr C 860. The proviso to this section does not apply unless the witness objected to answer the question. *Lunoo Miah v King Emperor* 16 C W N 503=15 C L J 399=13 Ind Cr 925=39 C 348. *Deputy Superintendent v Pimotha Nath*, 6 Ind Cr 782=14 C W N 957=11 Cr L J 403=37 C 878. *Queen Empress v Samappa* 15 M 63. Where on the evidence given by certain witnesses in a murder case to the effect that they assisted the accused in concerning the dead body after murder they were prosecuted under section 201, the only evidence being their deposition held that their conviction was not illegal as they had omitted to object, perhaps owing to the want of legal advice to answer the question, on the ground that the answers would criminate them. *In re Nalla Ramuddin* 2 Weir 792. When incriminating questions are put from the Bench to a witness who has become already entangled by self-contradictions, such questions should be put with the object of furthering the ends of justice.

in the judicial proceeding, in which such questions are put for elucidating the truth and not with a view to simplify any future proceedings which may possibly be taken against the witness in another Court. The position of such a witness under this section should be a rule be explained by the Court, before any incriminating question is put in the above circumstances. *M. M. M. v. Queen Empress*, L B R (1893 1900) 91. Where the accused had made in a previous enquiry under ss 162, 163 of Act VI of 1887, depositions on oath, without raising any objection to answer questions put to them under s 132 of the Evidence Act, the deposition of each of the accused is admissible in evidence against himself, but should not be taken into consideration against the other accused persons. *Queen Empress v. Moss*, 16 A 88=A W N 1894 23. After examination of plaintiff was over he was asked by the Judge why he was suing for his money to which he replied that he did not want to leave it with the defendant who was a Badmash and a thief. Held that the witness was compelled to answer the question put to him by the Judge under s 132 of the Indian Evidence Act and proceedings for defamation could not be taken against him. *Ganga Sahai v. Emperor* 42 A 257=18 A L J 112=74 Ind Cis 890=21 Cr L J 186. A witness must claim the benefit of the protection afforded by this section before he makes the statement in respect of which a question is subsequently raised. *Kalu v. Sital* 40 A 271=16 A L J 206=43 Ind Cis 823=19 Cr L J 231, *Emperor v. Channu* 22 Bom L R 1247=22 Cr L J 68=59 Ind Cis 324.

It is possible that a voluntary statement made by a witness may stand on a different footing from an answer to a question on oath. But where an answer is given by a witness in a criminal case on oath to a question put to him either by the Court or by the Counsel on either side especially when the question is not on a point which is relevant to the case he is within the protection afforded by section 132 of the Evidence Act whether or not the witness has objected to the question asked. *Emperor v. Chatur Singh* 43 A 92=18 A L J 940=2 U B L R 355=53 Ind Cis 825=21 Cr L J 825. "Compulsion" within the meaning of s 132 of the Evidence Act is a question of fact. Where in a criminal trial for wrongful possession of cocaine a witness for the defence made certain statements favourable to the accused with a view to convince the Court of the innocence of the accused and subsequently a prosecution was launched against the witness for such statements which proved to be false, held that the statements were not excluded by this section of the Evidence Act. *Emperor v. Banarsi*, 46 A 274=77 Ind Cis 829=22 A L J 144=25 Cr L J 477.

A statement made on oath by a person before a Coroner at an inquest held by him cannot be used against him in a trial for a charge based on such evidence as a statement tending to prove his guilt. *Emperor v. Kari Dawood* 50 B 76=93 Ind Cis 225=27 Cr L J 433=28 Bom L R 79=A I R 1926 Bom 141.

A person who answers questions put to him by counsel without seeking the protection of s 132 of the Evidence Act is not entitled to protection in a charge of defamation and all that he is entitled to is the limited privilege under s 199 I P Code. *Peddabha Reddy v. Varada Reddy*, 52 M 432=29 L W 210=116 Ind Cis 337=50 Cr L J 613=1929 M W N 84=A I R 1929 Mid 286=36 M L J 570. *Bai Shanta v. Umrao*, A I R 1926 Bom 111=50 B 162=28 Bom L R 1 (T B).

**133** An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

**Principle** It was frequently urged against an accomplice during the 1600's and 1700's that since by his own confession he was guilty of crime this turpitude thus acknowledged made him as incompetent as if it were proved by conviction for the crime. This argument is only broadly related to the maxim *ne mo turpitudinem suam allegans audietur*. The notion underlying the

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maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession, a liar and a villain, and therefore untrustworthy as a witness. The argument, however, was judicially repudiated from the very beginning—partly on the ground of necessity, partly on the ground that turpitude though self confessed, was no hindrance unless there had been a conviction of crime. *Wigmore* § § 525 526. In *Tong's Case* Kelyng, 18, the Court observed "It was resolved that some of these persons who were equally culpable with the rest may be made use of as witnesses against their fellows, and the law alloweth every one to be a witness who is not convicted or made infamous for some crime, and if it were not so, all treasons would be safe, and it would be impossible for any one who conspires with never so many others to make a discovery to any purpose." See also *Charmol's Trial* 12 How St Tr 1377 1403. Similarly in *Thistlewood's Trial*, 33 How St Tr 681, 921, *Abbott C J* said "Dark and deep designs are seldom fully developed except to those who consent to become participants in them and can therefore be seldom exposed and brought to light by the testimony of untainted witnesses. Such testimony is to be received on all occasions with great caution, it is to be carefully watched deliberately weighed, and anxiously considered. He who acknowledges himself to have become a party to a guilty purpose does by that very acknowledgment depreciate his own personal character and credit. If, however, it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible the most mischievous consequences must necessarily ensue, because it must not only happen that many heinous crimes must pass unpunished but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked projects and which often operates as a restraint against the perpetration of offences to which the co operation of a multitude is required." *Wigmore* § 526. At common law, when two or more persons were tried upon the same charge, each and all were naturally disqualified. Only by ceasing to be a party in the cause could one then become a witness, for or against his co-defendants. *Wigmore* § 580.

**Accomplice meaning of.** "An accomplice is a person who has concurred in the commission of an offence." *Per Manley J* in *R v Mullins* 3 Cox Cr 756. The term "accomplice" signifies a guilty associate in crime. *United States v Peterson*, Century Digest Vol 14 Cal 1779. Where the witness sustains such a relation to the criminal act that he would be jointly indicted with the defendant he is an accomplice. *White v Common Health* Century Digest Vol 14 Cal 1780. cited *Ramasami v Emperor* 27 M L J 271 (277). Spies that is, persons who take measures to be able to give to the authority information so as to prevent those who are disposed to break out from effecting their purpose, are not accomplices. In the case of an accomplice, he acknowledges himself to be a criminal in the case of these men, they do not acknowledge anything of the kind. *R v Mullins* 3 Cox Cr 756. *Queen Empress v Jayacharan*, 19 B 563. *R v Daspard* 28 How St Tr 189. If he only put himself to the scheme for the purpose of convicting the guilty, he is not an accomplice. *R v Boulton* 3 Cox C 509 (515). *Bulley's Case* 2 Cr App 53. *Hensers Case*, 6 Cr App 76. Where a witness is not concerned in the commission of the crime for which the accused is charged he can not be said to be an accomplice in the crime. *Ramasami v Emperor* 27 M L J 271-14 M L J 226. Spies do not partake of the criminal combination of accomplices who enter into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. *Queen Empress v Jayacharan* 19 B 563. The act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice. *Ibid*.

An accomplice confesses himself a criminal. No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or makes admission of facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not



an accomplice, and his testimony must be judged on principles applicable to ordinary witnesses. *Emperor v Percy Henry* 11 Bom L R 1158=4 Ind C 1568=10 Cr L J 530. A person offering a bribe to a public officer is an accomplice. No distinction can be drawn between accomplices who volunteer to assist in the receipt of illegal gratifications and those who assist under compulsion. *Queen Empress v Magantlal*, 14 B 115. *Queen Empress v Chagan Dayaram* 14 B 331, *King Emperor v Malhar* 26 B 193=3 Bom L R 694, *Emperor v Edward William Smither*, 26 M 1=2 Weir 521.

So an accomplice is a person who is in some way concerned in the commission of a crime for which the accused is on trial. This includes principals and accessories whether before or after the fact. A person against whom there is sufficient evidence to indict for the crime upon which the accused is standing trial is his accomplice. Mere knowledge or belief that a crime is to be committed or has been committed and the concealment of such knowledge does not render a witness an accomplice unless he aided or participated in the commission of the crime. Under the rule that participation in the crime is required to constitute an accomplice, the mere concealment of knowledge that a crime has been committed does not make the person concealing his knowledge an accomplice. This is the general rule and is sustained by the majority of cases. *Poll v State*, 36 Ark 117 (Am), *Gathin v State* 40 Tex Cr App 116. However this may be in the case of an accessory after the fact, it is well settled that all accessories before the fact if they actually participate at all in the preparation for the crime are accomplices within the rule but if their participation is limited to the knowledge that a crime is to be committed, they are not accomplices. *Walson v State*, 9 Tex App 237, *Underhill Cr Ev* § 69. But in *Ramaswami Gounden v Emperor*, 27 M 271, it was held that a person who after the murder was committed, assisted in the removal of the dead body from the place of murder to the pit in which it was buried, was not an accomplice.

A voluntary participation in the commission of the crime is required to constitute an accomplice. One who either by threats or coercion inciting in him a fear that he is in danger of losing his life or liberty under and by reason of such coercion and fear participates in a crime is not an accomplice. Whether a person is not an accomplice depends upon the facts in each particular case considered in connection with the nature of the crime. This is usually determined by the Court as a question of law. Parties to be accomplices must participate in the commission of the same crime. Thus a person who receives stolen goods, knowing them to be stolen, is not an accomplice of the thief where the receiver did not participate in the commission of the larceny. The receiving and the larceny are distinct crimes. In perjury all persons who with knowledge of the falsity of the statement aid in the commission of the crime have been held as accomplices. *Underhill Cr Ev* § 69. A person from whom a Police Inspector extorted money by a threat of implicating him in a charge of murder, is an involuntary accomplice. *Narayan v Emperor* 2 Weir 809. A person, who accompanies another in order to witness the payment of a bribe, must be treated as an accomplice. Further, the evidence of a person who was a witness to the payment of a bribe in April or May, but who did not give information about it till the 21st June, must be treated in the same way as that of an accomplice. *Nga Po That v Queen Empress*, 1 L B R. 29.

The mere fact that a person is cognizant of an offence and omitted to disclose it for six days is not sufficient to constitute him an accomplice, when it does not appear that he helped in the commission of the offence. *Ishan Chandra v Queen Empress*, 21 C 328. The Government are justified in employing spies and a person so employed does not deserve to be blamed if he investigates offences no further than by pretending to concur with the perpetrators. *Queen Empress v Jave Chand*, 19 B 363. One who is a spy of a detective, associates with criminals solely for the purpose of discovering or making known their crimes, and who acts throughout with this purpose and without any criminal intent, is not an accomplice, and it is immaterial that he encouraged or aided the commission of the crime. *Emperor v Chaturbhuy*, 8 Ind Cr 119=15 C. W. N 171=11 Cr L J 560.

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But where from the facts of the case it appeared that certain witnesses took an active part in carrying away the person whose death the accused had been charged with having caused, after he had been grievously assaulted and left him in the field where he was subsequently found dead, those witnesses are no better than accomplices. *Hamuddin v Queen Empress* 23 C 361. A bribe-giver is an accomplice. *Harsulh Rai v Emperor* 3 P W R Cr 1919. To constitute an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed. An indication of the meaning of the word 'accomplice' may be found in section 337 of the Cr. Pro. Code. *Surjya Kant v Emperor* 24 C W N 119. Where a witness is found from his own testimony to be privy to the crime alleged to be committed by accused his evidence is no better than that of an accomplice. *Aur Mahomed v Emperor* 6 I L L J 529 = A. I R 1925 Lah 253. A person who has knowledge of the commission of an offence but keeps quiet for some days is not better than an accomplice. *Uned Sheeth v Emperor* 27 Cr L J 1011 = 96 Ind Cas 867 = 30 C W N 816, see also *Huyatu v Emperor* A I R 1929 Lah 510.

**Who are not accomplices.** Witnesses to payment of bribes are not accomplices unless they co-operate in the payment of the bribes or are instrumental in the negotiation for the payment of the same. *Deonandan v Emperor* 33 C 649 = 10 C W N 669 = 3 Cr L J 452. *Queen Empress v Deodar Singh* 27 C 144, *Emperor v Eduard* 26 M 1 = 2 Weir 521. *Khadam v Emperor* 50 Ind Cas 18. But persons who accompany another who is entrusted with and carries the money intended to be given as a bribe are accomplices if they know that the money is to be had as a bribe and if they go to see and assist, although they do not actually carry the money or tender it. *Hyom Kant v Asan Mullick*, 2 C W N 672.

Where money was paid to a Police Sub-Inspector by a money-lender for obtaining the release of a person wrongfully confined, the money not being voluntarily given nor given in consideration of the Sub-Inspector not proceeding against the person so confined for the purpose of bringing him to legal punishment held that such payment was not an illegal gratification but money extorted and that the money-lender advancing the money could not be regarded as an accomplice of the Police officer. *Ahoy Kumar Chuckerbutty v Jagat Kumar Chuckerbutty* 27 C 925 = 4 C W N 755, see also *Deputy Legal Remembrancer v Upendra*, 12 C W N 140 = 6 Cr I J 534. A person charged with an offence by the police but discharged by the Magistrate after examination of the witnesses for the prosecution, because he found that no case has been made out which if un rebutted would warrant his conviction cannot be said to be an accomplice. *Nga Maung v Queen Empress*, L B R (1893) 1900 467, *Queen v Behary* 7 W R Cr 44, *Nabi Bulsh v Emperor*, 12 P R 1902 Cr.

A policeman or other person procuring an illegal sale of liquor in order to obtain a conviction is not an accomplice. *Queen Empress v Barlin* L B R (1893) 1900 365 overruling *M. The u v Queen Empress*, L B R (1872) 1893 146, see also *Queen v Nga*, U B R (1897) 1901 Vol I 176. Corroboration is not necessary in the case of persons apparently accomplices, who have entered into communication with conspirators but who have disclosed the conspiracy to the police authorities under whose direction they continue to act till the matter can be so far matured as to ensure a conviction. To such persons the rule as to corroboration does not apply. The early disclosure is considered as binding the party to his duty and though a great degree of disfavour may attach to him for the part he has acted as an informer yet his case is not treated as that of an accomplice. *In re Shankar Shohag*, Rat Un Cr C 428. One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice. *Jehana v Emperor*, 73 Ind Cas 506 = 24 Cr L J 618 = 1923 Lah 345.

**Accomplices in particular crimes.** In dealing with intoxicating liquor the buyer is an accomplice. In sexual offence the other person—usually the woman—may or may not be an accomplice, according as she is, by the nature

of the crime, a victim of it or a voluntary partner in it. Thus, in adultery, the other partner may well be deemed an accomplice, and so also perhaps, in incest (*Brown's case*, 6 Cr App 24, *Drine's case*, 7 Cr App 43, *Bloodworth's case*, 9 Cr App 80). But the woman is not in accomplice in rape, rape under age, seduction or abortion, nor the participant in sodomy. *R v Jellyman*, 8 C & P 604, *Wignmore* & 2060. But the word 'accomplice' includes a person who consents to the commission of an unnatural offence with him or her. *R v Jellyman*, 8 C & P 604, *R v Tate*, (1908) 2 K B 680.

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**Distinction between an accomplice and an informer.** In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and in order to determine whether a witness who first is associated with the wrongdoers and subsequently give information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till either out of fear or for some other reasons he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice and his position is not modified simply because later on he turns round and carries information to the police. *Mangat Rai v Emperor*, 10 F 4 L J 262=110 Ind Cas 676=29 Cr L J 740=A I R 1925 Lah 647 see also *Karim Bulsh v Emperor*, 9 Lah 550=109 Ind Cas 593=29 Cr L J 577=A I R 1928 Lah 193.

**Scope of the section.** Under this section a conviction is not illegal simply because it proceeds upon the uncorroborated testimony of an accomplice. But such evidence must be received with great caution and it is the practice of the Courts to require corroboration of such evidence. *Queen Empress v Kallu*, 7 A 160=A W N 1884 314. It is only under very exceptional circumstances that a conviction based only on the uncorroborated evidence of an accomplice could be sustained. *Wazu Khan v Emperor*, 57 P L R 1902=5 P R 1902 Cr. But there is no rule of law that an accused person cannot be convicted on the uncorroborated evidence of an accomplice. It entirely depends on whether the evidence of the accomplice is or is not believed. *Queen-Empress v Tipu* A W N 1898, 28. Accomplice evidence is held untrustworthy for these reasons—(1) because an accomplice is likely to swear false in order to shift the guilt from himself, (2) because an accomplice is a participant in crime, and consequently is an immoral person, is likely to disregard the sanction of an oath and (3) because he gives his evidence under promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution. *Queen Empress v Maganlal*, 14 B 115. There is often danger that, for the purpose of saving themselves rather than stating the truth, the accomplices will make out a stronger case against the prisoner and more favourable to themselves than the real truth will warrant. They do not give their evidence under an absolute certainty of impunity, and probably some of them hope, not only to avoid prosecution but to retain their appointments in the government service. *Ibid*. "This section was not necessary," says *Mr Justice Markby* "as s. 118 makes all persons competent to testify, except those there enumerated. Nor is there any rule which requires that the evidence of an accomplice should be corroborated. But the emphatic statement in this section might lead persons to suppose that the Legislature desired to encourage convictions on the uncorroborated evidence of an accomplice. This, however, cannot have been the case, because in s. 114 we find given as one of the presumptions based on the common course of human conduct, the presumption that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Moreover no conviction based on the uncorroborated evidence of an accomplice would be allowed to stand by a Court of appeal, except under

**S. 133.** very rare and exceptional circumstances, and if a Judge in his charge to the jury omitted to warn them against the danger of convicting on such uncorroborated evidence, he would be held to have convicted on such uncorroborated evidence—he would be held to have misdirected them. It would however have been better to omit this section. The law on the subject would then have been the same as it is now, and the awkwardness of appearing to sanction a practice so universally condemned would be avoided.” *Marl. Ev.* 98. The following point of law was raised in the certificate of the Advocate General in the Letters Patent Appeal in *Mathu Kumar Suami Pillai v King Emperor*, 35 M 397, namely—Does the evidence of an accomplice require corroboration in material particulars before it can be acted upon, is it open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true, and does not the Indian Evidence Act (I of 1872), section 133, read with section 114, illustration (b) merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances? *Benson Willis and Miller JJ* answered, “The evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. In the same case *Benson J* said ‘The substantive provision of the Indian Code law is contained in section 133 of the Indian Evidence Act, 1872, which in explicit terms declares that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. In my opinion there is nothing in the illustration (b) of section 114 which overrides or renders nugatory the plain and explicit declaration contained in section 133, or which requires us to hold that the evidence of an accomplice must always and in all circumstances be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the Court to act on such evidence, even when the Court believes it to be perfectly true. The very terms of the illustration itself appear to be intended to guard against such an interpretation. The words are the Court may presume (not ‘the Court shall presume’) that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But it then adds a caution to show that the presumed unworthiness is not a rule of universal application. It styles the presumption ‘a maxim’ not a rule of law, and says, but the Court shall also have regard to ‘certain facts’ in considering whether such maxim does or does not apply to the particular case before it. It then refers to a case of a person of the highest character giving evidence of an offence committed by the negligence of himself and another person of equally high character. The witness is an accomplice and he is not corroborated in any particular, still less the material particulars yet the Court should have regard to various circumstances viz the high character of the witness, and of the accused and the nature of the offence alleged and would be at liberty to refuse to draw any presumption against the credibility of the witness, even though his evidence stood alone and uncorroborated. It is no doubt true says *Norman J* ‘that, as mere matter of law, it is competent for a jury to convict on the uncorroborated testimony of an accomplice even in capital cases (See *Best on Evidence* page 182, *Chitty, Criminal Law*, page 605). But the danger of relying on such evidence is so great that in England Judges always advise the juries not to convict, or tell them they ought not to convict, unless the story of the accomplice is corroborated. *Queen v Chutthidhasee* 5 W L Cr 59 are also *R v Dina Shail* 10 W R 63 Cr, *R v Stubbs* 25 L J M C 16 *R v Ealahee Buhsh*, 5 W R 80 Cr *R v Nawal Jan* 8 W R 19 Cr, *R v Bycunt Nath Banerjee*, 10 W R 17 Cr, *R v Mohima Chunder Doss*, 15 W R Cr 37 *R v Aitheeram*, 18 W R Cr 45 1 Hale P C 303, 304 *Charnock’s Case*, 12 How St. 1r 1377, *Rex v Hudd*, Cowp 331, *Rex v Wood* 2 Leach, C I 538, *Duham’s Case*, 2 Leach C L 538.

The subject of the credibility of the testimony of an accomplice and the necessity for the corroboration in order to sustain a conviction are involved in

some confusion. The proposition that an accused person may be convicted on the evidence of an accomplice alone, and that the testimony of an accomplice must be corroborated, are both sound, though this involves a seeming inconsistency. The proposition that an accomplice must be corroborated does not mean that there must be cumulative or independent testimony to the same facts to which he has testified. So, evidence in a murder case that a coat belonging to deceased, was found in defendant's possession is proper corroboration though the accomplice testified only to the killing and not to the taking of the coat. *Underhill v. El*, § 730. *Malachi v. State*, 89 Ala. 134. "If the testimony of the accomplice, his manner of testifying, his appearance upon the witness stand impress the jury with the truth of his statement, there is no inflexible rule of law which prevents a conviction." *Con v. Commonwealth*, 125 Pa. St. 94, 103.

Under sections 118 and 133 Evidence Act, an accomplice is a competent witness. *Nga Po Yin v. King Emperor*, U B R 1906, Evidence 3=5 Cr L J 300. *Karomal v. Emperor* 81 Ind. Cts. 881=25 Cr L J 1057. Although it would generally be most unsafe to convict an accused, on the uncorroborated evidence of an accomplice yet, if the Judge, after considering and weighing the evidence thinks that it is true, and if believed establishes the guilt of the prisoner, it is his duty to convict. *Queen Empress v. Gobardhan* 9A 528=1 W N 1887 156. *Queen Empress v. Mogalan* 143 11 B. *Queen v. Godai* 5 W R Cr 1. *Empress v. Shahu*, 5 C P L R 1 Cr., *Crown v. Hoosamee* 27 P R 1869. The evidence of an accomplice may be admitted without corroboration if the witness is not open to the same charge as the accused. *In the matter of Rajon Kant*, 13 W R Cr 21. The evidence of an approver has to be most carefully analyzed and considered. It must be so far above suspicion that a Court has no alternative but to accept and act upon it. When the Court believes in the approver's evidence in part, and disbelieves in part, it has no alternative but to reject the evidence altogether. *Balkaran v. Emperor*, 7 Ind. Cas 185=11 Cr L J 441. The well known rule of criminal law "that an accomplice is unworthy of credit, unless he is corroborated in material particulars" which is formulated in section 114, illustration (b) of the Evidence Act has a second branch namely, that the corroboration must go to the guilt of each of the accused separately. It must be such as to satisfy the Court that the approver has not substituted the name of one or more of the accused for that of some other person possibly a particular friend of his own, who actually took part in the guilt. It is on that basis that the rule rests and it is a very sound rule. The rule is not absolute as will be evident from section 114 (illustration, b) and section 133 of the Evidence Act, but it is only in exceptional cases that the corroboration can be dispensed with. A witness who does not carry very much weight is not sufficient corroboration of an accomplice. *Naram Singh v. Emperor* 12 O L J 429=89 Ind. Cas 261=26 Cr L J 1317=A I R 1925 Oudh 715, *Emperor v. Bhim Rao* 27 Bom L R 120=86 Ind. Cts 72. Though illustration (b) of section 114 is not imperative the Courts *examine ore cautela* insist upon the corroboration of an approver's evidence in material particulars. *Faiyallah v. Emperor* A I R 1925 Sind 105, *Kouramal v. Crown* 19 S L R 183 see also *Emperor v. Sunder Das*, 26 Cr L J 1023=87 Ind. Cts 916. *Feroz Khan v. Emperor* 86 Ind. Cas 401=6 Lah L J 608=26 Cr L J 769=A I R 1925 Lah 268. *Sheroo v. Emperor*, A I R 1925 Nag 78. *Mannalal v. Emperor* A I R 1925 Oudh 1. An accomplice is a competent witness and may be examined on oath. *Joseph v. Emperor* 3 Ring 11=26 Cr L J 492=85 Ind. Cas 236=3 Bur L J 265. *Abdul v. Emperor*, 47 A 39, *Balchand v. Emperor*, L R 197 (Cr).

**Accomplice evidence and corroboration.** In *R v. Rudd*, 1 Cowp 331, 336, Lord Mansfield, after referring to the competency of accomplices as approvers said: "Though under this practice they are clearly competent witnesses, this single testimony alone is seldom of sufficient weight to convict the offenders." "As to the origin of this practice of requiring confirmation at all it cannot be clearly traced. It was not laid down or acted on in the time of Lord Holt, that is upto 1710. It was after this decision in *Rudd's case* (decided

- S 133. in 1775) that the practice must have been introduced " *Phulch, Evidence of Accomplices*, 2 In *R v Smith*, 1 Leach Cr L 11th Ed 179, which was decided in 1781 corroboration was hinted at as necessary. There the prosecution being unable to identify the criminal the Court thought it dangerous to let the case go to the jury on accomplice evidence alone. See also *R v Wood*, 1 Leach Cr L 11th Ed 161, *R v Durham*, ib 178. But in England that practice was not founded on any rule of law until very modern times. It was recognized constantly that the Judge's instruction upon this point was a mere exercise of his common law function of advising the jury upon the weight of the evidence, and was not a statement of a rule of law binding upon the jury. *Wigmore* § 2036, see also *R v Despard* 28 How St Tr 316 (1817), *R v Jones*, 2 Camp 132, *R v Dauber*, 3 Stark 31, *R v Sheehan*, Jebb 34, *R v Hastings*, 7 C & P 152, *R v Wilkes*, 7 C & P 272, *R v Car*, Jebb 203, *Simmons v Simmons*, 1 Rob Eccl 366, 575 *R v Mullins* 7 State Tr N S 1110, *R v Dunn* 5 Cox Cr 507, *R v Stubbs* 1 Dears 553, *McClorn v Wright*, 10 Ir C L 311, *Magee v Magee* 11 Ir C L 119, *R v Boyes*, 1 B & S 311, 320, *Re Manner*, (1891) 2 Q B 410, 118. In *h v Mullins*, 3 Cox Cr 526, *Maule J* said: "The truth of the matter is, there is no rule of law that all that an accomplice cannot be believed unless he is confirmed. It is an observation addressed to the jury who have to weigh the evidence and it is for them to say whether the confirmation will satisfy them or whether they will be satisfied without any. If they are satisfied without any, they may be and their verdict may be an honest and just and true one." The direction of Judges given to juries in this respect are not directions in point of law which juries are bound to adopt, but observations respecting facts, which Judges are very properly in the habit of giving because with respect to matters of fact the Judge is well as the counsel upon both sides endeavour to assist the jury. But in England since the establishment of the Court of Criminal Appeal there is a definite rule of law. *R v Tate* (1903) 2 K B 680, *R v Baskerville* (1916) 2 K B 658, *R v Feignbaum*, (1919) 1 K B 431, *Wigmore* § 2036. It is not necessary that an approver should be corroborated as regards every single statement that he makes. On uncorroborated points he can be believed, if the jury thought it reasonable. *Ledu Molla v Emperor*, 52 C 595=87 Ind Cas 965=42 C L J 501. Clear proof of motive for murder and discovery of minute spots of blood on the accused's shirt cannot be regarded as material corroboration of an approver's statement. *Jit Singh v Emperor* 86 Ind Cas 811=26 P L R 124=26 Cr L J 875. *Sheo Ambar v Emperor*, A I R 1925 Oudh 295. To support a conviction on the basis of the evidence of an approver is not sufficient that the approver's testimony is not confirmed as to the circumstances of the felony which would only show that he was present at the commission of the offence but it must be proved that the testimony is corroborated in some material circumstances, such circumstances connecting and identifying the prisoner with the offence. *Kattu v Crown*, 98 Ind Cas 190=27 P L R 615, *Jagwa v Emperor*, 5 Pat 63=93 Ind Cas 884=A I R 1926 Pat 232. *Jang Singh v Emperor*, 96 Ind Cas 262=27 Cr L J 918, *Pratab Singh v Emperor* 96 Ind Cas 127=27 Cr L J 879=A I R 1926 All 70, *Emperor v Satish Chandra* 31 C W N 551=54 C 721, *Chanan Singh v Crown*, 99 Ind Cas 929=8 Lah L J 610=A I R 1927 Lah 78, *Ram Prasad Emperor* A I R 1927 Oudh 369, *Barlati v Emperor* 103 Ind Cas 48=A I R 1927 Lah 581.

Although in criminal trials it is the settled practice to require other evidence in corroboration of that of an accomplice yet the manner and extent of the corroboration required are not so clearly defined. Some Judges have deemed it sufficient if the witness be confirmed in any material part of the case, others have been satisfied with confirmatory evidence as to the *corpus delicti* only but others, with more reason, have thought it essential that corroborative proof should be given of the prisoner having actually participated in the offence, and, when several prisoners are tried, that confirmation should be required as to all of them before all can be safely convicted. *R v Stubbs*, 25 L J M C 16. This last is undoubtedly now the prevailing opinion the confirmation of the witness as to the commission of the crime being considered

no confirmation at all as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely but on the contrary every motive to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner. *R v Farler* 8 C & P 106, *R v Willes* 7 C & P 272, *R v Moores*, 2 C & P 270, *R v Addis*, 6 C & P 388, *R v Wells*, M & M 326, *R v Sheenan*, Jebb C C 54, *R v Carey*, Jebb C C 263, *Taylor Ex* § 969, *Green Ex* § 381. It is a practice" said Lord Abinger in *R v Farler*, 8 C & P 107 108 "which deserves all the reverence of the law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now in my opinion that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not all tend to show that the party accused participated in it. The danger is, that when a man is fixed, and knows that his own guilt is detected he will purchase impunity by falsely accusing others."

Criticising on the above statement of law, *Chief Baron Joy* in his *Evidence of Accomplices* said "There are different opinions entertained upon the subject—First some hold that the corroboration required must go to the criminality or identification of every prisoner on trial accused by the accomplice—Lastly others are of opinion that the points of corroboration are not necessarily confined to the criminality or identification of any of the prisoners, but that it is enough if the testimony of the accomplice is confirmed in such and so many material parts of it as may reasonably induce the jury to credit him as to the entire narrative, and among other parts, is to the guilt of the prisoners. The first opinion appears plausible, and the arguments in support of it are specious, and are apt to captivate those who do not attentively consider the subject."

This opinion originates in a misconception as to the nature of the defects in the evidence which is to be supplied. The defect in the evidence is not in its quantity, but in its quality. The witness swearing directly to the prisoner's guilt, that guilt is established if the witness be credible. What therefore is required is to throw something no matter of what nature, into the opposite scale, which will serve as a counterpoise to the impeachment of the witness's credit arising from the character in which he appears, something that will improve the quality of the proof which has been given by the accomplice, and that something may be anything, which induces a rational belief in the mind of the jury that the narrative of the accomplice is in all respects a correct one. Now, if we try the question by what passes in our minds, we shall find that there may be many things which may contribute to inspire us with a rational confidence in the testimony of an accomplice as well as some corroboration is to that part of the evidence which goes to affect the prisoner. The correct and accurate manner in which an accomplice details the circumstances of the transaction show that he was cool and collected, that he possessed observation that his recollection is fresh, that he was an observer, not an inventor of facts and incidents, and if we find that in every point in which the evidence of other witnesses can be brought into contact with his, they fit into one another and correspond exactly, it is good ground for presuming that his entire narrative is correct. The accomplice, who must be supposed to know the whole details is expected to relate them, and is thus exposed to detection in a variety of ways. There is therefore less necessity for breaking the general uniformity and destroying the harmony of the rules of law, in this case, than in the other. Similarly in *Fidd's Trial* 33 How St Tr 1483, in charging the jury *Garrick B* said "It may not be unfit to observe to you here that the confirmation to be desired to an accomplice is not a repetition by others of the whole story of the accom-

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pllice and a confirmation of every part of it, that would be either impossible or unnecessary and absurd, and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct. You are, each of you, to ask yourself this question. Now that I have heard the accomplice and have heard other circumstances which are said to confirm the story he has told does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts with regard to which there may be no confirmation? Do I, upon the whole feel convinced in my conscience that his evidence is true and such as I may simply act upon?' See also *R v Despard*, 28 How St Tr 346 487, *R v Burtell and Brady* R & R 252, *Wigmore* § 2059. Though it is not a rule of law it is yet correct to say that the evidence of an accomplice requires just as much corroboration or as little corroboration as is needed to convince a prudent person of the truth of the facts alleged against the accused *Mamun v Empress*, 14 P R 1891 Cr Under section 133, Evidence Act the evidence of an accomplice by itself is enough for a conviction but it is a rule of practice founded on experience, that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law, but in each case the weight to attach must depend on the particular circumstances *Madan Guru v Emperor* 4 Pat L T 381=73 Ind Cas 953=24 Cr L J 723, see also *Tota Singh v Emperor*, 69 Ind Cas 463=23 Cr L J 734, *Emperor v Darya Singh* 1923 Lah 666. The demeanour of an accomplice in the witness box cannot be a substitute for corroboration *Mannalal v Emperor*, 9 O & A L R 947. The principles as to approver's evidence are as follows. The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly if the suspicion which attaches to the evidence of an accomplice be not removed it should not be acted upon unless corroborated in some material particular and if the suspicion attaching to the accomplice's evidence be removed then that evidence may be acted upon even though uncorroborated and the guilt of the accused may be established upon that evidence alone. In order to ascertain whether the evidence of the accomplice is truthful and therefore exempt from the requirements of corroboration the tribunal should apply intrinsic as well as extrinsic tests but if being applied that test it comes to the conclusion that the accomplice is a truthful person the accomplice becomes an ordinary witness. Section 134 becomes operative and the tribunal may proceed to convict upon his evidence *Rattan Dhanuk v Emperor* 9 Pat L T 672=A I R 1928 Pat 630. There is nothing in the law to prevent a Court from convicting the accused on the uncorroborated evidence of an approver but it would be exceedingly dangerous to do so. There must be corroboration of his evidence in material particulars by impartial and reliable evidence. Corroboration by an accomplice is worthless as is corroboration by a witness whose competence of truthfulness is under suspicion. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect them with the crimes. In other words it must be evidence which implicates them confirming in some material particulars the fact of the commission of the offence and that the accused had a hand therein. It is not necessary however that the approver should be corroborated as regards every single statement *Sureshchandra v Emperor* 47 C L J 471=A I R 1928 Cal 309, see also *Latafat Hussain v Emperor* 33 C W N 58=A I R 1928 Cal 745 *Kailash v Emperor*, 48 C L J 481, *Narain v Emperor* 107 Ind Cas 57=29 Cr L J 209.

Corroboration as regards the identity of the prisoner. In England originally there was no necessity of specific corroboration as regards the accused's identity *R v Despard*, 28 How St Tr 346 487, *R v Burtell and*



*Brady, R & R 252* But the opposite opinion began to be taken at *Nisi Prius*, and finally prevailed. Now it is settled that there must be corroboration both of the circumstances of the crime and the identity of the prisoner. *Roscoe Cr Ev*, 152, see also *R v Sheehan, Jebb 51, R v Addis, 6 C & P 388, R v Webb 5 C & P 595, R v Wilkes 7 C & P 272 273, R v Farler, 8 C & P 106, R v Kelsey, 2 Lew Cr C 45 R v Dyke, 8 C & P 261, R v Bukett 8 C & P 722 R v Stubbs, 7 Cox Cr 48 M Clory v Wright, 10 Ir C L 514 521 Everest's Case, 2 Cr App 130, Warren's Case, 2 Cr App 191. In *Everest's Case* supra, it was held that corroboration must be as regards 'some particular which goes to implicate the accused' But in *Wilson's Case*, 6 Cr App 125 the Court said 'It must not be supposed that corroboration is required amounting to independent evidence implicating the accused' In *Blatherwick's Case* 6 Cr App 281, the Court said '*Everest's Case* goes too far *Wilson's Case* is the correct statement of the law' See also *Watson's Case* 8 Cr App 219 In *Cohen's Case* 10 Cr App 91 101, *Reading L C J* said 'It is sufficient to say that *Everest's Case* and *Wilson's Case* seem to us to lay down the right principle' Again in *Threlfall's Case*, 10 Cr App 112 117 the same learned Judge said 'Without attempting to decide whether *Everest's Case* or *Wilson's Case* is correct and assuming that *Everest's Case* is correct' But in *R v Willis*, (1916) 1 K B 923, *Reading L C J* said 'This Court had no intention (in *R v Cohen*) to unsettle the law as established in *R v Wilson* and *R v Blatherwick*' In *R v Baskerville*, (1916) 2 K B 658=86 L J K B 28, the same learned Judge however reviewing the law said, 'The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the accused with the crime. The rule of practice as to corroboration has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true, and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it or if the only independent evidence relates to the identity of the accused without connecting him with the crime is it corroborative evidence? There are some expressions to be found in the books which imply that it may be, and in *Rex v Birket* (Russ L R 251) the Judges were of opinion that an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story. The case is very imperfectly reported, and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the Judges by the Judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the Court but the *ratio decidendi* is that as an accomplice is a competent witness, and the jury thought him worthy of credit, the verdict was in accordance with the law—*Rex v Atwood* (1 Leach C C 464) and *Rex v Jones* (1809) 2 Camp 131. There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury. *Rex v Hastings* (1935) (7 Car & P 152), *Reg v Andreus* (1 Cox C C 183 per Mr Justice Coleridge) and *Reg v Avery* (1845) (1 Cox C C 206). After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg v Stuffs* (25 I J M C 16, Derr C C 155) by *Baron Parke*—namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime, as we have said already—that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. *Baron Parke* gave his opinion as the result of twenty five years practice, it was accepted by the other Judges, and has been much relied upon in later cases. In *Rex v Wilkes*, (1836) (7 Car & P 272) *Baron Alderson* said 'The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to base the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony, but I advise juries never to act*

**S 133.** on the evidence of an accomplice unless he is confirmed as to the particular person who is charged with the offence' In *Reg v Parler* (8 Car & P 106) Lord Chief Baron Abinger said 'It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pry any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all. It would not at all tend to show that the party accused participated in it' In *Reg v Dyle* (8 Car & P 261) Baron Gurney said 'Although in some instances, it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction. In *Reg v Burrell*, (8 Car & P 732) the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice and to confirm it, it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the prisoner's house. Mr Justice Patterson said 'If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. But here we have a great deal more, we have a quantity of mutton found in the house in which the prisoner resides and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury.'

'These cases lead to the view expressed later by Baron Parke in *Reg v Stubbs* 25 L. J. M. C. 16—Deer C. C. 555 and shew that in his time, although there had been doubt in the past the law as formulated by him was accepted as the correct opinion, and continued to be the law to the time of passing of the Criminal Appeal Act, 1907, and in our judgment to the present day.

'We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same, whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, implicates the accused, compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg v Burrell*, (8 Car & P 732). Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

The decisions of this Court upon the nature of the corroboration required call for some explanation and it is because they do not always appear to be to the same effect that this Court was especially constituted in order that we might lay down rules for future guidance.

'In *Rex v Fierest* 2 Cr App R. 130 the Court said 'The rule has long been established that the Judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused. We think 'tell the jury to acquit' should read 'warn the jury of the charges of convicting.' There is no statement in the report of the exact warning given



- S 133.** in the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroborative of the testimony of another accomplice. *Rex v. Noakes* 5 Car. & P. 326. *Per Lord Reading J* in *Rex v. Barter Vile* 86 L. J. K. B. 28 (33). So long established a rule of practice as that which makes it prudent as a general rule, to require corroboration of accomplices, cannot without great danger to society be ignored by the Magistrates and Sessions Judges, simply because section 133 Evidence Act, declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The Courts should give proper effect to the provisions of section 111, illustration (b). The rule in section 111 illustration (b) and that in section 133 are part of one subject and both are found in most of the great judgments, and neither section is to be ignored in the exercise of judicial discretion. The illustration (b) to section 111 is the rule, and when it is departed from the Court should show or it should appear that, the circumstances justify the exceptional treatment of the case. *Queen Empress v. Chagan Dayaram*, 11 B. 331. Although a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars and such evidence should be accepted with a great deal of caution and scrutiny. The amount of criminality is a matter for consideration, and when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *abundi*, as to the facts deposed to by that accomplice. *Kanala Prasad v. Sital Praasad*, 28 C. 339=5 C. W. N. 517. The evidence of a pardoned accomplice taken with the statements of unpardoned co-prisoners is not sufficient by itself to warrant the conviction of those who never confessed. *Queen Empress v. Bhagya*, Rat. Un. Cr. C. 750. Where material discrepancies occur between the statements of the corroborating witnesses before the Police and their depositions in the Court, either on enquiry or trial there is no corroboration and consequently the prosecution must fail. *Imai Das v. Crown*, 36 P. W. R. 1910 Cr.=8 Ind. Cas. 193=11 Cr. L. J. 53. The rule as laid down in illustration (b) to section 111 of the Evidence Act, does not apply to all persons, who technically come within the category of accomplices. The particular circumstances of each case will effect its application and no general rule can be laid down on this point. *Deonandan v. Emperor* 10 C. W. N. 669=33 C. 649=3 Cr. L. J. 452. In cases where the act of the accomplice imports no great moral delinquency the presumption enacted in s. 111 illus. (b), does not apply. *Crown v. Isardas* 6 S. L. R. 106=17 Ind. Cas. 79=13 Cr. L. J. 767. see also *King Emperor v. Malhar*, 26 B. 193=3 Bom. L. R. 694, *Queen Empress v. Mangal*, 14 B. 115. There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated. *Emperor v. Hanmunt* 6 Bom. L. R. 443. However convincing the testimony of an accomplice may be of the facts necessary to be proved, it has become a settled course of practice not to convict an accused person on the uncorroborated testimony of an approver, and the corroboration ought to consist in some circumstances that affect the identity of the accused. *Emperor v. Bai Krishna*, 6 Bom. L. R. 481, *per Craue J*. The corroboration required of the testimony of an accomplice should go to some circumstances affecting the identity of the accused participating in the transaction. Such corroboration ought to be that which is derived from unimpeachable or independent evidence as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices. *Ibid per Chaudhary J*.

There must be corroborative evidence not only as to the identity of the person spoken of as the accused but also as to the *corpus delicti* *Reg v Chatur* Rat Un Cr C 102, *Reg v Nanulhan*, Rat Un Cr C 102 A person cannot be convicted upon the evidence of witnesses, who are no better than accomplices, if this evidence is not corroborated in material respects by other independent evidence in the case *Jogendra Nath v Sangap Garo*, 2 C W N 55

The rule of evidence contained in s 133 and in s 114 (b) of the Evidence Act amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot reasonably be held proved within the meaning of section 3, if there be no other evidence of it than the statement of an unreliable witness *Crown v Ramchand* 6 S L R 195=14 Cr L J 262=19 Ind Cas 34. Section 114 of the Evidence Act enacts a rule of presumption, and read with s 4 of the Act it indicates that this is not a hard and fast presumption, incapable of rebuttal, a *presumptio juris et de jure* *Emperor v Shumias*, 7 Bom L R 969=3 Cr L J 33

Prior to the Evidence Act, the rule not of law, but of practice was that a conviction could not be founded on the unsupported evidence of an accomplice, that the accused person's statement was no evidence against a fellow prisoner or one tried jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box *Crown v Nihal Singh* 31 P R 1866 Cr, *Queen v Jumeeyita* 124 P R 1866 Cr, *Queen v Boora* 123 P R 1866 Cr, *Dewa v Crown*, 27 P R 1867 Cr, *Crown v Jawram* 28 P R 1867 Cr, *Crown v Ruheemee*, 38 P R 1867 Cr, *Queen v Goda* 5 W R Cr 11, *Crown v Hooramee* 27 P R 1869, *Empress v Shakur* 5 C P L R 1 Cr But where a Magistrate treated a mere witness as an accomplice and granted him conditional pardon his evidence does not require corroboration *Reg v Fattlechand*, 5 B H C Cr 85 In ordinary cases the uncorroborated testimony of an approver is not sufficient to convict a person charged with an offence *Queen v Tuls*, 3 B L R A Cr 66, *Queen v Issen* 3 W R Cr 8 *Queen v Nawab Jan* 8 W R Cr 19, *Queen v Ramsagar*, 8 W R Cr 57, *Queen v Churag* 12 W R Cr 5, *Queen Empress v Shudlingappa* Rat Un Cr C 844, *Reg v Chatur* 1 B 476 N *Ismuruddin v Emperor* 29 C 782 *Queen Empress v Bipin*, 10 C 970, *Nazigadu v Emperor* 12 Cr L J 240=10 Ind Cas 289 *Hubba v King Emperor*, 4 Ind Cas 884=12 O C 418=11 Cr L J 71, *Queen v Kalla Chand* 11 W R Cr 21

Although s 114 illustration (b), provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated "may" is not "must" and no decision of Court can make it "must" Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence The Court is not obliged to hold that he is unworthy to consider after taking into consideration all the circumstances—one of which being that he is an accomplice—whether it does or does not rely on the evidence To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice *Emperor v Mathews*, A I R 1929 Cal 822

**Judge's duty in charging the jury** In *Rex v Basherville*, (1916) 2 K B 658=86 L J K B 23, Lord Reading in delivering the judgment of the Court said 'There is no doubt that the uncorroborated evidence of an accomplice is admissible in law—see *Rex v Atwood* 1 Leach C C 464 But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence, but the Judge should point out to jury that it is within their legal province to convict upon such unconfirmed evidence—*Reg v Stubbs*, 25 L J M C 16 and *Memner In re* 63 L J M C 198=(1894) 2 Q B 415 This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act, 1907, 17 Edw 7 C (23)] came into operation this Court has held that in the absence of such a warning by the Judge the conviction must be quashed—*Rex v Tate* 77 L J K B 1043=(1908) 2 K B 603 If after the proper caution by the Judge the jury nevertheless convict the prisoner this Court will not quash the conviction merely upon

**S 133.** the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand this Court will review all the facts of the case and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial and moreover, as it is anomalous in its nature, in as much as it requires confirmation of the testimony of a competent witness it is not surprising that this rule should have led to the differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. The Legislature intended to lay down in section 114 of the Evidence Act, the rule that the testimony of an accomplice is unworthy of credit so far as it implicates an accused person unless it is corroborated in material particulars in respect of that person, and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not and in a case tried by jury to draw the attention of the jury to the principles relating to the reception of an accomplice's testimony. *Queen v Sadhu Mandal*, 21 W R Cr 69. The Judge should inform the jury or assessors (1) that there is no rule of law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice (2) that as a general rule of practice it is considered unsafe to convict upon such evidence and (3) to point out any circumstances in the particular case which in the opinion of the Judge afford a sufficient reason for relying upon the evidence. 2 W R 798=4 M H C App 7. The evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. *In re Elahi Buksh* 5 W R Cr 80=B L R Sup Vol 459. Where the evidence of an accomplice is uncorroborated the correct practice requires Sessions Judges not merely to tell the jury that it is unusual to convict on such evidence but also to tell them that it is unsafe and contrary both to prudence and practice to do so. But his omission to state the above particulars does not amount to an error in law. *Reg v Gaun Bin*, 6 B H C Cr 57 see also *In re Palavasani* 2 W R 706. If the jury found a prisoner guilty on the uncorroborated evidence of an approver after the Judge in his summing up had pointed out to them the deirability, under the circumstances of such corroboration, the High Court on appeal would refuse to set aside the conviction. *Queen v Mahima* 6 B L R App 108=15 W R Cr 37. But where a Session Judge has failed to warn a jury that it is unsafe to convict merely upon the testimony of the approver and where the Judge has not properly explained to the jury the law and practice regarding such cases there is a misdirection of a very serious kind and the verdict of the jury cannot be sustained. *Mahbul v Emperor* 12 Cr L J 37=12 Ind C is 513. The Judge in his charge to the jury should take care to state also that the evidence of approver was given on conditional pardon. *Queen v Bykunt* 10 W R Cr 17. It will be an error in summing up if a Judge after pointing out the danger of acting upon the uncorroborated evidence of an accomplice were to tell the jury that the evidence of the accomplice was corroborated by a fact which did not amount to any corroboration at all. *Jamruddi v Emperor*, 29 C 782=6 C W N 553. The evidence of an approver should not be believed without material corroboration, and in order to see whether there is such a corroboration it is the duty of the Court to scrutinize and mark all out very carefully the proof relating thereto. Where this duty has not been properly performed by the lower Court, the High Court will interfere on the revision side and set aside even the concurrent findings of the Courts below. *Manna v Emperor* 9 Ind C is 232=12 Cr L J 35=3 P W R 1911. *Queen v Elaher Bux* 5 W R Cr 80 (F B). *Mam Ram v Emperor* 107 Ind Cas 876=29 Cr L J 311=A L R 1928 Oudh 207.

**Conviction whether illegal for want of corroboration.** A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice such evidence, being admissible, furnishes a good legal basis for a conviction as any other evidence which is admissible. The omission to follow

the established rule of practice as to the corroboration of such evidence does not constitute an error in law. But where the character of the evidence relied upon by the prosecution was not of a kind to warrant the refusal of the Judge to apply to the case the maxim enunciated in illustration (b) of s. 114, Evidence Act, a conviction on the uncorroborated testimony of an accomplice is not legal. *Queen Empress v Changan Dayaram*, 14 B 331 *Mauludin v Emperor* 53 Ind Crs 46. See also *Queen Empress v Nga Tun U B R* (1897 1901) Vol I 173, *Itah Balsh v Emperor*, 16 P R 1886 Cr, *Itah v King Emperor*, 14 Ind Cas 968. *Nga Po Chit v Emperor* 9 Ind Cas 778=12 Cr L J 132, *Lalan Malt v King Emperor*, 16 C W N 669=15 Ind Crs 987=13 Cr L J 570. *Emperor v Lalubhar*, 11 Bom L R 858=3 Ind Crs 963=10 Cr L J 133, *Queen Empress v Ningappa* 2 Bom L R 610. This section in unmistakable terms lays it down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, and to hold that corroboration is necessary is to refuse to give effect to this provision. *Reg v Ramasami*, 1 M 394=2 Weir 799. *Queen v Lucknow* 19 W R Cr 48, *Itah Balsh* 5 W R Cr 80=B L R Sup Vol 459. The rule regarding the evidence of accomplices is that it must be carefully scrutinized before it is accepted. In dealing with such evidence a Judge or jury must start with the rules stated in illustration (b) to section 114, Evidence Act, and presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. There may be circumstances in particular cases which are sufficient to overcome such presumption and, in such cases, a conviction is not illegal. Such cases are provided for by section 133 Evidence Act, but in the case of a Judge who has to give reasons for his decision, the reasons which had led him to believe the uncorroborated evidence of an accomplice should be clearly and fully set out. The evidence of one accomplice is ordinarily not sufficient corroboration of that of another. *Nga Po Thet v Queen Empress* 1 L B R 29. Though, before convicting on the evidence of an accomplice, corroboration is not legally necessary, a Court should follow the maxim that an accomplice is unworthy of credit if not corroborated in material particulars unless circumstances justifying a disregard of such maxim exist. *Itah Balsh v Emperor*, 16 P R 1886 Cr. It is generally unsafe to convict an accused person on the testimony of an accomplice unless it is corroborated in material particulars connecting the accused with the offence. But in considering whether this rule applies to any particular case, it must be remembered that all persons technically within the category of accomplice cannot be treated precisely on the same footing and no general rule on the subject can be laid down. *Deo Vandon v Emperor*, 33 C 649=10 C W N 669=3 Cr L J 452. It is not a rule of law but one of practice as to the corroboration of accomplice who is unworthy of credit unless he is corroborated in material particulars. The High Court will not disturb a conviction under its revisional jurisdiction, simply because this rule of practice has not been observed by the convicting Court, unless there are exceptional circumstances calling for the exercise of that jurisdiction in the interests of justice. *Emperor v Lalit*, 11 Bom L R 848=3 Ind Crs 963=10 Cr L J 433. Where the evidence of an accomplice is not of a character to warrant the refusal of a Court to apply to it the maxim enunciated in illustration (b) of section 114, Evidence Act a conviction based on such evidence alone would be of questionable propriety. *Queen Empress v Chagan*, 14 B 331. A conviction on an uncorroborated and retracted confession of an accomplice is improper and bad. *Yasin v King Emperor* 28 C 689=5 C W N 670. A prisoner should not be convicted on the sole and uncorroborated evidence of an accomplice who was made a witness after a pardon was granted to him. *Queen v Nunho*, 9 W R Cr 28. *Queen Empress v Bhagya*, Rat Un Cr C 750. see also *Queen v Chuttedharee*, 5 W R Cr 59, *Queen v Bailun* 3 B L R F B 2 note.

The law on this point was thoroughly discussed by Sir Barnes Peacock C J in *Q v Itah Bux*, 5 W R Cr 80=B L R Sub Vol (F B). That case was decided in 1866 and in stating the law he said: "I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not a new law, nor founded upon a new principle. The point was decided

**S 133.** in England as far back as the 10th December 1662, after conference with all the Judges" Then quoting extracts from *Sir Mathew Hale's Pleas of the Crown*, *King v Atwood*, 1 Leach Cr C 461, *King v Jones* 2 Camp Rep 131 and from *King v Darham*, 1 Leach Cr C 178, he continued "The law is above laid down that a conviction is legal though supported by uncorroborated evidence of an accomplice has been admitted by Lord Denham in *Rex v Hastings and another* 7 C & P 152, by Baron Alderson in *Rex v Wilkes*, 7 C & P 272 and by many other learned and eminent Judges and it was so ruled by the Court of Criminal Appeal in *Reg v Stuffs*, 25 L J M 16. The law of England, therefore, upon this subject is beyond doubt. The law of America is the same, and in that country where in most of the states new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice.

Act II of 1855 section 28, was referred to by the appellant's pleader, by whom the case was very ably argued and it was contended that that Act rendered corroboration necessary upon that point it is sufficient to say that it was not the intention of the Act to render inadmissible any evidence, which but for the Act would have been admissible (see section 53), nor was it intended to lessen the legal effect of any such evidence. We have therefore no hesitation in answering the first question in the affirmative and declaring that a conviction may be legally had on the uncorroborated evidence of one or more accomplices."

**Amount of corroboration.** A conviction based on the totally uncorroborated story of an accomplice is bad in law. *Queen Empress v Shudlingappa* Rat Un Cr C 844 *Chow v Heera Mahar*, 74 P R 1866 Cr *Chow v Motun* 11 P R 1867 Cr *Ator v Queen Empress* U B R (1892—1896) Vol I 103. An approver's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. *Lad Khan v Crown* 19 P W R 1912 Cr = 13 Ind Cas 998 = 13 Cr L J 183 = 17 P I R 1912 *Queen Empress v Krishna Bhat* 10 B 319, *P S Narayan v Emperor* (1914) M W N 363 = 15 Cr L J 417 = 24 Ind Cas 153. Not only as to the persons spoken of by an accomplice must there be corroborative evidence, but also as to the *corpus delicti* there must be some *prima facie* evidence pointing to the same direction. *Reg v Chatur*, Rat Un Cr C 102 = Cr Rg 171 1876. There must be independent corroboration with respect to the identification of the persons whom accomplices charge and with respect to the facts they state and their testimony ought to be confirmed by other evidence against each person they name. *Gunda Singh v Crown* 21 P R 1866 Cr, *Esur Singh v Crown* 1 P R 1868 Cr. The testimony of an accomplice is not alone sufficient for a conviction. The corroboration must be on matters directly connecting the prisoner with the offence of which he is accused. *Queen v Dwarka*, 5 W R Cr 18 = 1 Ind Jur N S 100 *Queen Empress v Dhondi* Rat Un Cr C 840, *Queen Empress v Kunjan Menon* 1 M L J 397, *Queen Empress v Shudlingappa*, Rat Un Cr C 844. The evidence of two or more accomplices requires corroboration equally with the testimony of one. *Queen v Dwarka* 5 W R Cr 18 = 1 Ind Jur N S 100 *Queen Empress v Shudlingappa*, Rat Un Cr C 844 *Nga Paw v Q E*, L B R (1872 1892) 54. An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad but there is an established practice, founded on the judicial experience of generations which requires corroborations by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in that crime. *Siar Noma v King Emperor*, 18 C W N 350 = 15 Cr L J 438 = 24 Ind Cas 174. The English practice should be followed as to the amount of corroboration required to support the evidence of an accomplice. According to such practice when the accomplice speaks as to two or more persons having been concerned in the same offence, his testimony should be confirmed not only as to the circumstances of the case, but also as to the identity of the prisoners and any prisoner as to whom his testimony is not supported should be acquitted. *Reg v Imam Valad*, 3 B H C Cr 57. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice,



the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances, or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *abundant* as to the facts deposed to by that accomplice. The amount of criminality is a matter for consideration and when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender. Although a conviction is not illegal, merely, because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should be accepted with a great deal of caution and scrutiny. *Kamala Prasad v Sital Prasad*, 5 C W N 517=28 C 339. The corroboration of the evidence of an accomplice when required, should be such corroboration in material particulars as would induce a prudent man, on the consideration of all the circumstances, to believe that the evidence is true, not only as to the narrative of the offence committed, but also so far as it affects each person thereby implicated. *Emperor v Srinivas Krishna* 7 Bom L R 969=3 Cr L J 33. *Banu Singh v King Emperor*, 10 C W N 962=4 Cr L J 145=33 C 1353. Previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial are insufficient for the corroboration of the evidence of the accomplice. The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source. *Reg v Malaya Bin*, 11 B H C A C 196. The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others. *Reg v Malappa*, 11 B H C A C 196, *Sheikh Sherov v Emperor*, 81 Ind Cis 898=20 Cr L J 1067. Tainted evidence is not made better by being corroborated by other tainted evidence. *Queen v Bayoo* 25 W R Cr 43, *Habam Singh v Emperor*, A I R 1929 Lah 80=1929 Cr C 626, *Queen v Ramsaran*, 8 A 306=A W N 1855, 311, *Queen v Duanka*, 5 W R Cr 18, *Mahomed Usuf v Emperor*, 114 Ind Cis 457=A I R 1929 Nag 215.

The rule laid down in s 114, illustration (b) corresponds with the rule observed in England. *Reg v Ramasami*, 1 M 394=2 Weir 799. It is unsafe to convict a person on the uncorroborated testimony of an accomplice. *Queen Empress v Imdad* 8 A. 120=A W N 1886, 7, *Maung Lay v Emperor* 77 Ind Cas 429. The initial presumption is that the evidence of accomplices is unworthy of credit and it is reliable only where there are any special circumstances that rebut this presumption and leave no reasonable doubt that the evidence of the accomplice is worthy of belief. *Nga Wa v King Emperor*, 1 U B R (1902 1903) Evidence 1.

The law as expressed in ss 114(b) and 133 of the Evidence Act is in no respect different from the law of England, but simply reproduces a rule of practice viz that a conviction based on the uncorroborated testimony of an accomplice is not illegal, that is it is not unlawful. But experience teaches that it is not safe to rely upon the evidence of an accomplice, unless it is corroborated, and hence, it is the practice of the Judges, both in England and in India, when sitting alone to guard their minds carefully against acting upon such evidence when uncorroborated and, when trying a case with a jury, to warn them that such a course is unsafe. Not only it is necessary that evidence should be corroborated in material particulars but the corroboration should extend to the identity of the accused person. There must be some corroboration independent of the accomplice or of the accomplice and the confessing prisoner to show that the party accused was actually engaged directly in the commission of the crime charged against him. It is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evi-

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dence, corroboration of his evidence as to one prisoner would not justify his evidence against another being accepted without corroboration. *Queen Empress v Ram Saran* 8A 306 = A W N 1885, 31, *Emperor v Jamal di*, 11C 160 = 28 C W N 536. If some part of his evidence is satisfactorily corroborated, there is good ground for believing him in other parts in which there is no corroboration. *Queen Empress v Kunyan Menon*, 1 M L J 397 (F B).

The evidence of an accomplice requires to be accepted with a great deal of caution and scrutiny, because among other things, he is likely to swear falsely in order to shift the guilt from himself. But this consideration hardly applies to the evidence of one, who testifies that he has bribed the accused, for, by his own testimony so far from shifting the offence from himself he, in fact thereby fastens it upon himself, for it is by making himself out to be a briber that he shows another has been bribed. *Emperor v Shruas*, 7 Bom L R 969 = 3 Cr L J 33.

Where a witness admits that he was cognizant of the crime as to which he testifies and took no means to prevent or disclose it his evidence must be considered as no better than that of an accomplice and consequently requires corroboration. *Queen v Chando*, 24 W R 55 Cr. The rule that an accomplice unless corroborated by evidence other than that of another accomplice, is unworthy of belief, applies to persons to whom a pardon has been tendered on condition of their making a full disclosure of all the circumstances of the crime in which they profess themselves to have been participants and subject to the penalty of being themselves placed upon their trial if, in the opinion of the Court they have spoken falsely or kept back anything important. It does not apply to a case in which the question is as to the degree of reliance to be placed upon the evidence of the accomplices who have been convicted of the offence and have undergone the full term of imprisonment inflicted upon them for their share in it. The evidence of such witnesses if corroborated by the statements made by them at the time of their trial, is good corroborative evidence under s 157 of the Evidence Act. *Empress v Pantia Bhul* 4 C P L R 1.

As regards the nature of the corroboration required to convict a person on the testimony of an accomplice it must be confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner. Facts, which do not show the connection of the prisoner with the commission of the offence with which he is charged, are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplice says is true. Courts ought not to convict upon an accomplice's testimony unless it is confirmed not only as to the offence, but as to the identity of the individual prisoner as the person or one of the persons, who participated in the offence. *Jamuruddin v Emperor* 29 C 782 = 6 C W N 553, *Ghulam v Crown*, 33 Ind Cis 352. *Inre Muthan Papayya* 4 Ind Cas 391. *Reg v Inam*, 3 B H C R Cr 57. *Queen Empress v Baldeo*, 8 A 509 = A W N 1886, 176. *Narayan v Emperor*, 2 Mys L J 11. *Reg v Badhu* 1 B 47. Where there are more than one accused persons there must be corroboration against each of the accused showing his connection with the offence alleged against him. *Nila v Crown* 19 P W R 1961 Cr = 33 Ind Cis 636. section 133 of the Evidence Act contains the rule of law section 114 illustration (b) being merely a sort of guidance to assist the Courts. It is impossible to lay down any hard and fast rule as to when and to what extent an accomplice must be corroborated. The reasons why an accomplice's evidence is to be viewed with suspicion may be summarised as follows—(i) because he has a motive to shift guilt from himself, (ii) because he is an immoral person likely to commit perjury on occasion, (iii) because he hopes for pardon or has secured it and so favours the prosecution. *Baskat Ali v Crown* 2 P R 1917 Cr = 36 Ind Cas 86. *Nand Singh v Crown* 9 P W R 1917 Cr.

No hard and fast rule can be laid down either that in no case should an approver's evidence be rejected as regards a particular incident simply because on that point it happens to be uncorroborated, or that, in every case, regardless of all other facts and considerations, an approver's evidence must be thrown aside as worthless unless it is corroborated by independent evidence of a trustworthy character. *Dichanta v The Crown*, 7 P W R 1916 Cr = 32 Ind Cas

833, see also *Balmol und v. Crown*, 28 Ind Cas 738 The evidence tending to show that the co accused or some of them were seen in the company of the approver at or in the vicinity of the places at which he says dacoities were committed, is not sufficient corroboration in support of his statement *Wayam v The Crown*, 3 P W R 1916 Cr = 17 Cr L J 107 = 32 Ind Cas 843

A conviction based on the uncorroborated testimony of an approver is illegal *Gurdit Singh v Crown*, 52 P L R 1918 = 41 Ind Cas 967 = 19 Cr L J 439, *Pan Gang v Emperor*, 42 Ind Cas 1002 = 19 Cr L J 47

The retracted confession of an accused person may be sufficient corroboration of the approver's story as against himself but not against a co accused *Palia v Emperor*, 12 P W R Cr 1943 = 49 Ind Cas 604 = 20 Cr L J 188, *In re Danur Veerabhadra*, 13 L W 385 = 61 Ind Cas 528

The approver's evidence is in itself tainted evidence though in some cases it may be of belief for various reasons The uncorroborated statement of an approver taken at the end of the trial is of no value whatever *Sundar Singh v Emperor*, 56 Ind Cas 667 = 21 Cr L J 507, see also *Fatta v Emperor* 3 Lh L J 296 An accused cannot be convicted unless the Judge is satisfied that the evidence of the accomplice was corroborated in some material and satisfactory manner *Dhanu v Emperor* 2 Pat L T 757 Where the corroboration was the recovery of certain articles, alleged to be some of the articles stolen and subsequently produced from the house of the accused his house was searched in his absence and he was given no opportunity of checking the results of the search for giving any explanation as to how the articles came into that house and there was no evidence as to where the respective ornaments were found, nor was anything said as to who produced them In the circumstances it was held that there was no sufficient corroboration *Saudagar Singh v Emperor*, 1923 Lah 683, but see *Khushal v Emperor*, 1923 Lah 335

The approver referred to a story by one A who invited him along with appellants to join in the dacoity, the incident of the story told by the approver turned out to be true on police inquiry Appellants were seen with the approver at Sukho and arrested in his company at Mundra The possession of the three tickets all from Chakali to Mundra and bearing consecutive number was strong corroboration of the approver's story as to the appellants having accompanied him to the scene of the occurrence *Halim v Emperor*, 1923 Lah 153

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft *Mahomed v Emperor*, 111 Ind Cas 447 = 29 Cr L J 863

The testimony of a professed accomplice requires to be carefully scrutinized with anxious search for possible corroboration *Macdonald v Fred Latimer*, 99 L W 155 = 112 Ind Cas 875 = A I R 1929 P C 15 The well known rule of criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars is not absolute but, it is only in exceptional cases that the corroboration can be dispensed with The evidence in corroboration of the approver's evidence need not be direct evidence showing that the accused have committed the crime It is sufficient that it is merely circumstantial evidence of their connection with the crime *Lale v Emperor*, 118 Ind Cas 423 = 30 Cr I J 922 = A I R 1929 Oudh 321 The mere presence of a person in the house is not a corroboration *Abol v Emperor*, 1929 M W N 698 An approver is unworthy of credit unless corroborated in material particulars Where the only witness who corroborated him was his son aged 7 years who parrot like repeated what he had been tutored to say, it is unsafe to convict the accused on such evidence *Meher Singh v Crown* 11 Lah L J 224 = 30 P L R 422 = A I R 1929 Lah 287

Corroboration need not necessarily consist of direct evidence that the accused committed the crime it is sufficient even if it consists of circumstantial evidence of his connection with the crime *R v Basherville*, (1916) 2 K B 68 *Hakam Singh v Emperor*, A I R 1929 Lah 850 *R v Marks*, (1919) 1 K B 421 The extent of corroboration which a Court demands naturally

**S 134** varies with the circumstances of each case, including the character and antecedents of the approver and the degree of suspicion attached to his evidence *Hakim Singh v Emperor*, A I R 1929 Lah 850

In deciding a criminal case with reference to the evidence of an accomplice the Court must take into consideration the maxim that it is unsafe to convict a person upon the evidence of an accomplice unless he is corroborated in material particulars both as to the circumstances of the offence and the identity of the person whom he implicates *Lady Mohar v Emperor*, 114 Ind Cas 623=A I R 1929 Nag 222=30 Cr L J 331, see also *Mahomed v Emperor*, 114 Ind Cas 457=30 Cr L J 311=A I R 1929 Nag 215, *Sundaram v Emperor* 1929 M W N 794, *Mahomed Usaf v Emperor* 114 Ind Cas 457=30 Cr L J 311=A I R 1929 Nag 215 *Musa v Emperor* 114 Ind Cas 609=A I R 1929 Nag 233=30 Cr L J 333, *Hakam Singh v Emperor*, A I R 1929 Lah 850 *Monohar v Emperor*, A I R 1930 Cal 430, *Sheo Bahas v Emperor*, A I R 1930 Pat 164

It is the main duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record *Mahomed Usuf v Emperor*, 114 Ind Cas 457=30 Cr L J 311=A I R 1929 Nag 215 The foremost essential condition for accepting the approver's statement is that it must be a trustworthy statement *Lodha v Emperor*, 114 Ind Cas 623=30 Cr L J 331=A I R 1929 Nag 222,

**134** No particular number of witnesses shall in any case be required for the proof of any fact

**Principle** 'And after all, what is it worth?' said *Jeremy Bentham* in his *Rationale of Judicial Evidence*, B IX pt VI C 1 § 1, 'In the multitude of counsellors says, the proverb, there is safety in the multitude of witnesses there may be some sort of safety, but nothing more, it is by weight, full as much as by tale, that witnesses are to be judged *Pundere non numero* From numbers (the particulars of the case out of the question) no just conclusion can be formed Nothing can be weaker than the best security that can be derived from numbers In many cases a single witness, by the simplicity and clearness of his narrative, by the probability and consistency of the incidents he relates, by their agreement with other matters of fact too notorious to stand in need of testimony—a single witness (especially if situation and character be taken into account) will be enough to stamp conviction on the most reluctant mind In other instances, a cloud of witnesses though all were to the same fact, will be found wanting in the balance There is no man, conversant with the business of the bar whose experience has not presented him with instances of dozens of witnesses opposed to each other in the same cause, line against line, and whose testimony has been of such a nature that (howsoever it may have been in regard to mendacity) falsehood must have been on one side or the other

I do not mean to insinuate (it would be absurdity to insinuate) that the requisition of a second witness adds nothing to the security against perjury No doubt but that, the greater the number of witnesses you require, the greater the security against perjury All I contend for is that that security, (be it greater or less) is not so necessary as that you should pay so great a price for it, as you do pay, and must pay by the license you thereby grant to commit the crime in the presence and with the aid of anyone 'Reason', says *Montesquieu*, 'requires two witnesses because a witness who affirms and a party accused who denies make a serious assertion, and it requires a third to turn the scale Thus, by way of proof of the proposition immediately preceding 'The laws which enjoin a man to perish upon the deposition of a single witness are fatal to liberty' This observation short as it is, teems with errors fatal to liberty? What means liberty? What can be concluded from a proposition, one of the terms of which is so vague? What my own meaning? I know and I hope the reader knows it too Security is the political blessing. In my view, security as against malefactors, on one hand, security as against

the instruments of Government, on the other Security, in both these branches of it, is the benefit, the making due provision for which, in the case in question, is the object of these inquiries. Where two witnesses have been required, the principle of determination is obvious enough it has been the fear of giving birth to the conviction and punishment of innocent persons, if in each case the testimony of a single witness were held sufficient. Engrossed by the view of this danger, the attention has overlooked the so much greater danger on the other side.

The giving security to the innocent is the object and final cause of this ill considered scruple of what description of the innocent? Of those, and those alone, to whom, by false testimony, it might happen to be subjected to prosecution in a Court of Justice. On the other hand, those to whom in consequence of the license granted by this same rule it might happen and (if the rule were universally known) could not but happen, to suffer the same or worse punishment at the hands of malefactors, are altogether overlooked. The innocent who scarcely present themselves by so much as scores or dozens, engross the whole attention, and pass for the whole world. The innocent who ought to have presented themselves by millions, are overlooked, and left out of the account. So also commenting on the saying that the evidence of a single witness is "fatal to liberty" Mr W D Evans in his notes on Pothier II, 231 said 'It might perhaps be said with greater justice that the absolute and indiscriminate exclusion of a single witness in every capital case would if not fatal at least be dangerous to security—as the opportunity of a solitary situation would enable a miscreant to perpetuate a robbery or a rape with impunity, however respectable the character of the person who suffered the violence, and however assured by previous knowledge of the identity of the defendant. The supposed equality between the denial of the accused and the testimony of the witness is merely fanciful, unless it can be asserted that there is an equal inducement to make a false accusation for the purpose of destroying an individual with whom there is no previous animosity, and to deny the commission of a crime for which a party is justly liable to undergo punishment,—between (as I have seen it observed in a publication of Mr Christian) a person who by his falsehood has everything to lose and nothing to gain, and one who has everything to gain and nothing to lose."

Mr Best says 'We have said that this rule is a distinguishing feature in our common law system. The Mosiac law in some cases and the civilians and canonists in all exacted the evidence of more than one witness,—a doctrine adopted by most nations of Europe and by the ecclesiastical and some other tribunals among us. As might naturally be expected, much has been said and written, and the most opposite views have prevailed, on the merits of the different systems. Those who take the civil law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness, since by this means any person, even the most vile, can swear away the liberty, honour, or life of any one else, they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked. Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is entrusted to a single Judge, or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury, but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a Judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real, for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone, they are usually corroborated by the presumption arising from the absence of counterproof or explanation, and in criminal cases by the demeanour of the accused while on his trial. On the other hand however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a casual nature,—above all, where being in

**S. 134.** violation of law, as much clandestinity as possible would be observed,—it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty by telling the murderer and felon that they may exercise their trade, and the knave that he may practice his fraud, with impunity in the presence of any one person, and the unprincipled man that he may safely violate any engagement, however solemn contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to react on the human mind, and they thus create a system of mechanical decision dependent on the number of proofs, and regardless of their weight. On the whole we trust our readers will agree with us in thinking that any attempt to lay down a universal rule on this subject which shall be applicable to all countries ages and causes, is ridiculous, and that although so far as this country is concerned, the general rule of the common law—that judicial decisions should proceed on intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence—is a just one, there are cases where, from motives of public policy it has been wisely ordained otherwise. *Bert Ev* §§ 597-601, *Wigmore* § 2033. 'What we must conclude then is that our whole presumption should be against any specific rule requiring a number of witnesses or corroboration of a single witness, that such arbitrary measurements are likely to be of little real efficacy and to introduce disadvantages greater than those which they purport to avoid, and that therefore any such rule when advanced for a specific use—for example treason or perjury—or for a specific witness—for example an accomplice or a rape complainant—must justify itself by experience as overwhelmingly useful and efficacious.' *Wigmore* § 2033.

**Scope of the section.** Section 28 of Act II of 1855 enacted "Except in cases of treason the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury. So far as the offences of treason and perjury were concerned Act II of 1855 followed the English law (*Vide Taylor* §§ 952-959). In this connection *Mr Goodere* says "Thus in a prosecution either for treason or misprison for treason, the offence is required to be established 'on the testimony of not less than two witnesses. This is a statutory provision of the reign of William III and requires the oath of either two witnesses to the same overt act or one to one and the other to another overt act of the same transaction unless the accused should willingly without violence in open Court confess it. The Act was passed in jealous protection of the subject against the supposed power and influence of the Crown and, with a merciful and just consideration of the weighty consequences involved in a conviction of the crime. The rule however addressed itself only to the treasonable transaction itself. It would not embrace any collateral or incidental matter not being part of the act or treason even though part of the general proof—as for instance, in an indictment for adherence to the Queen's enemies proof that the accused was a subject of the Crown. In the case of an indictment for perjury the perjury could only be established on either the testimony of two supporting witnesses or of one equivalent to it,—as in a suit in equity a decree could not be had against the positive statements of the answer on the testimony of a single witness only. In both cases it would be only the setting of one oath against the other. *Goodere Ev* pp 302-303 see also *R v Lal Chand* 5 W R Cr 23 *R v Bhalcree* 5 W R Cr 98, *R v Ross* 6 M H C R 342.

Now by this section that restriction even has been removed. Now a conviction upon the statement of a complainant is lawful. *Khulam v Bhoulam prosad* 22 W R 32 Cr. This section declares that no particular number of witnesses shall, in any case be required for the proof of any fact. *Ibid* see also *Raja Prosomo v Romonee* 10 W R 236, *Gorindo v Naram*, 24 W R Cr 18.

In *Queen Empress v Ghulet*, 7 A 44 at p 50 *Dulton J* said "*R v Harris*, 5 B & A 926, has been followed in *Mary Jackson's case*, 1 Lew Cr C 270, in *R v Wheatland*, 8 C & P 238, in *R v Hook*, 15 D & R and in other cases. As regards all these cases I would remark generally that the law of England is to the necessity of calling at least two witnesses to support an assignment of perjury, and of showing that the oath taken was material to the question of depending, is not law in India."

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## CHAPTER X

### OF THE EXAMINATION OF WITNESSES

**135** The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court

Order of production and examination of witnesses

**Attendance of witnesses** This chapter deals with the examination of the witnesses, by incorporating the rules of English law on the subject. The only addition is section 165 which empowers the Judge to put questions. It frequently happens that the parties do not, in their questions, elicit all the facts necessary to a sound view of the merits of the case. He may also ask the parties to produce any documents. This chapter does not lay down any rules as regards the production of witnesses or documents before the Court. The Civil and Criminal Procedure Codes incorporate rules on these subjects. Provisions have been made in the Indian Penal Code for disobeying the process of a competent Court.

The duty of citizens to appear and testify to such facts, within their knowledge, as may be necessary to the due administration of justice is one which has been recognized and enforced by the common law from an early period. *Amey v Long* 9 East 473. The process by which this writ is enforced is the *subpoena ad testificandum* commonly called *subpoena*, which commands the witness to appear at the trial to give his testimony. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books or documents or other things under his control which he is bound by law to produce in evidence. The right to compel the attendance of witnesses was incident to the jurisdiction of the Common Law Courts and statutes generally exist extending this power to other officers, such as referees, arbitrators and the like." *Burr Jones* § 797.

Either party to a suit has a right to a process of Court to secure the attendance of witness to testify in his behalf in any judicial proceeding. By an early English Statute, witnesses were entitled to their reasonable costs and charges. 5 Eliz. C 9. In this country, the subject is generally regulated by Statute and High Court Rules which prescribe the rate of compensation for each day's attendance and the rate of mileage. It is indispensable to the due administration of justice that the Court should have the power of summarily compelling the attendance of witnesses, and "every Court, having power definitely to hear and determine any suit, has by the common law inherent power to call for all adequate proofs of the facts in controversy and, to that end, to summon and compel the attendance of witnesses before it." *Greenl Et* 60. Section 174 of the Indian Penal Code penalises non attendance in obedience to an order from a public servant to attend at a certain place and time. So also section 175 of the Indian Penal Code punishes intentional non production of a document by a person legally bound to produce it. In England the mode of compelling attendance of a witness, who wilfully neglects to attend, is by attachment for contempt of Court *Burr Jones* § 799, *Cole v Haickens*, *Andrews* 275 *Childerson v Barrett*, 11 East 439. The process of attachment, for these and the like complaints must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in

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the supreme Courts of Justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishment, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend."

**Exclusion of witnesses from Court room** Before discussing the general rules which govern the examination of witnesses it is proper to call attention to the familiar rule that the Court may, in the exercise of its discretion, direct the exclusion of witnesses from the Court room while the testimony of other witnesses is being given. *Burr Jones* § 807, *Taylor* Fr §§ 1400 1401. This is called putting or placing the witnesses under the rule and is a practice which has prevailed in the British Parliament and in the Courts of England and Scotland from an early day. *Taylor* § 1042. The object of such an order is obviously to elicit the truth by securing testimony not influenced by the statements of other witnesses or the suggestions of counsel as well as to prevent collusion and covert testimony among witnesses. While this order will generally be made by the Court on the application of counsel, before the examination of the witnesses it is generally held to be a matter of discretion rather than of strict right, yet in some States it may be claimed as a right. *Burr Jones* § 807. Parties to the litigation except for some impropriety will not generally be excluded, since their presence is usually necessary to a proper management of their case. Nor will an attorney for one of the parties be excluded. The same is true of one who is a party in interest, though not a party to the record and also of an agent of the party when presence of such agent is necessary, as when the agent has gained such familiarity with the facts that his presence is necessary for the proper management of the action or defence. The mere fact of the necessity for the presence of such an agent will not outweigh the right of the Court to the exercise of its discretion. Expert witnesses are not generally excluded until the evidence be given upon the question or subject as to which they are called. But if there is any reason to apprehend that the expert witnesses are liable to be influenced by the testimony of other witnesses they should be treated in the same manner. In order to make the order effective the Court may order the witnesses to be kept separate while others are being examined, in order that they may not communicate with each other. *Burr Jones* § 807.

The consequences of the violation of an order of the Court were at first very stringent and disastrous to the party. Later it was held to be a matter of judicial discretion whether his testimony should be received. *Cobbet v Hudson* 1 El & Bl 11=22 L J Q B 13. But in England it is now held that the Judge has no right to reject the witness on this ground. *Chandler v Horne*, 2 Moo & R 423. *Cool v Nehercote* 6 Car & P 743. His remaining in the Court room in violation of said rule might, however be used in discrediting him as a witness, and subject him to a reprimand by the Court and punishment for contempt, but it would not render him incompetent as a witness. The jury has a right to hear his evidence and pass upon its weight and credibility. *Price v United States* 1 Oll Cr 291. *Burr Jones* § 808.

**Scope of the section** This section lays down that the Civil and Criminal Procedure Codes should be guides as regards the orders of production and examination of witnesses. In the absence of any such provision in the Civil and Criminal Procedure Codes by the discretion of the Court. In this connection *Prof Greenleaf* says "The subject lies chiefly to the discretion of the Judge before whom the case is tried, it being, from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness but the character, intelligence moral courage bias, memory and other circumstances of witnesses are so various as to require almost equal variety in the manner of interrogation, and the degree of its intensity to attain that end." *Greenl Ev* § 21. The Judge must necessarily be invested with a wide discretion in regard to ordering or permitting an alteration of the ordinary rules of practice and procedure at trials and the time and order in which the evidence shall be introduced. These rules are always subject to be modified in their application to



particular cases at the discretion of the Judge *Burr Jones* § 809 While counsel has discretion, the Court has also power under this section to direct the order in which witnesses cited by a party shall be examined. In the goods of *Gopeson Dutt* 16 C W N 265=39 C 245 In *Kedar Nath Ghosh v. Bhupendra Nath Bose*, 5 C W N XV, at the close of the examination in chief of the plaintiff's attorney, who was the first witness called *Mr Jackson* referring to section 135 of the Evidence Act asked that the cross examination of the witness be deferred, until after the examination in-chief of the plaintiff by his counsel submitting that the word 'examined' includes cross examination. In rejecting the prayer of the counsel, *Stanley J* said 'The Court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined. I think that in the present case the ordinary practice should regulate the order of examination, and that the witness should be cross-examined at the conclusion of the examination in chief.' It is not the duty of the Court to direct the party as to the manner in which the defendant is to lead his witnesses. *Lalshim Chand v. Mukta Parshad*, 8 Lrn L J 67=92 Ind Cas 1006=27 P L R 136

It is a further illustration of the discretionary control of the trial Judge over the conduct of the trial and the examination of witnesses that he may determine whether a witness may be recalled and examined subsequently to his first examination. This is frequently made necessary by facts arising from the cross-examination of other witnesses or by reason of inadvertence or from other causes and is allowed in the sound discretion of the Court, although other proceedings have intervened. While the discretion is sometimes too indulgently exercised in allowing such recall, the appellate Court will not interfere where the request is allowed or refused unless the discretion is clearly absurd. This is especially true where the discretion is exercised in favour of the re-examination. And where permission has been given to recall a witness to whom counsel had omitted to propound a particular question, it was properly within the discretion of the Court to refuse to allow him to be examined outside the limits of that question. It is also within the discretion of the trial Court to allow rebuttal evidence to be introduced, out of its order, in the examination in-chief, though such evidence is anticipatory of the case to be presented by the other side. On the same principle where the examination of a witness is needlessly protracted, it is within the discretion of the Court to arrest it, and the Judge may properly interfere on objection made or of his own motion. *Burr Jones* § 814

**Right to begin.** In the regular order of procedure, the party having the affirmative ought to introduce all the evidence necessary to support the substance of the issue, then the party denying the affirmative allegations should produce his proof, and finally the proof in rebuttal is received. *Burr Jones* § 809. The right to begin is to be determined by the rules of evidence. As a general rule the party on whom the burden of proof rests should begin. Sections 101-114 of the Indian Evidence Act deal with the subject of burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Ordinarily the plaintiff has the right to begin. But where the defendant admits all the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. *Civil Procedure Code*, Order XVIII rule 1, *Aghore v. Prem Chand* 7 C L R 274, *Wood v. Pringle*, 1 Moo & R 277, *Curtis v. Wheeler* 4 C & P 196

On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case. *Civil Procedure Code*, Order XVIII rule 2. If there be some defendants who support the plaintiff's case, in that case, they should address the Court and call their evidence before the other defendants. *Haji Bibi v. Sultan Mahamed*, 32 B 399. Where

**S 136** there are several issues the burden of proving some of which lies on the other party, the party, beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning but the party beginning will then be entitled to reply generally on the whole case Civil Procedure Code, Order XVIII, rule 3

As regards order of production of witnesses in criminal cases, *vide* Chapters XVIII, XX, XXI, XXII, XXIII of the Criminal Procedure Code

**136** When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact

#### *Illustrations*

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement

(b) It is proposed to prove, by a copy, the contents of a document said to be lost

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced

(c) A is accused of receiving stolen property knowing it to have been stolen

It is proposed to prove that he denied the possession of the property

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved or permit the denial of possession to be proved before the property is identified

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A

**Para I** The reception of clearly incompetent evidence is a practice which leads to confusion in the trial casts the burden of meeting such incompetent evidence upon the opposite party, and is liable to entail useless expense

of money and waste of time in fruitless inquiry. The evil consequences which may follow from such a practice are sufficient to condemn it. *Hagan v Mc Dermott* 134 Wis 490, *Burr Jones* § 813. The order in which a party shall offer his evidence is for his counsel to determine, unless it is made to appear to the Court that some undue advantage of the opposite party is thereby attempted. When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection. Hence, it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned provided, in its relation to the other evidence in the case it is at the end pertinent to the issue. A case consists, frequently of various parts, neither one of which makes it out and to hold that a party is not entitled to introduce any part until he establishes 'the whole' is to require an impossibility. All that the Court can ask is, that the particular evidence offered conduces to establish any one proposition involved in the issue. It is time enough to pass upon the sufficiency of the proofs after they are all in the cause. There must be a starting place somewhere and the Court should never reject evidence merely because, unaided by other testimony it is insufficient, if it tend legally to prove any part of the case. The practice is the same in criminal and civil cases. Where a chain of testimony is proposed the links of which, unconnected, would be irrelevant, counsel must be allowed to begin somewhere upon the expectation that other links are to be afterwards supplied, and for this the Courts rely upon the statement of counsel, professional honour being a guarantee against abuse. For example, the Court may permit a sheriff's deed to be given in evidence before the judgment and execution on which it is founded are introduced, and where one relies on his right as assignee of a bond he may introduce the bond in evidence before he shows his title and interest in it. *Burr Jones* § 812. So it is clear that relevant testimony, admissible in itself, may be given in evidence as of right, and that when its admissibility does not depend upon itself but rests upon some necessarily preliminary proof, its reception is matter of privilege. In other words the Court may reject it in the absence of that testimony without which it would be incoherent. It has often been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is "the usual course to receive it at any proper and convenient stage of the trial, in the discretion of the Judge any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case. *Green*, Et § 51 (7). But if the testimony is apparently irrelevant, before counsel can claim the indulgence of the Court in this manner to introduce evidence, other wise presumably incompetent he should state what he expects to prove or in some other way satisfy the Court that the evidence will be made competent. But on cross examination much more latitude is necessarily allowed to counsel. In the absence of such assurance the evidence should not be received. If it is plain when the testimony is offered that it is irrelevant, and it is objected to, and there is no suggestion that it would be made competent through circumstances not then disclosed, the Court would be justified in rejecting it. We are next brought to consider the consequences when the assurances of counsel that the evidence will subsequently be perfected and the links in the chain supplied are not fulfilled. *Burr Jones* § 813. Evidence cannot be given to contravert irrelevant matter. *Kelly v Kelly*, 3 B L R App 6.

**Para 2** Vide Section 104 illustration and Notes. It often happens that an agent for instance to carry a message and bring back an answer, or do some other act, is put into the box before his agency or authority is proved. Thereupon an objection is taken by the opposing counsel that the evidence is not receivable, because the agency etc. is not proved. An undertaking is usually then given that evidence to prove the agency will be forthcoming at a later period whereupon the case proceeds. If the proof of agency should break down, the whole of the alleged agent's evidence is expunged from the Judge's notes. It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination, to prove the

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agency. It is to meet such a state of things that the clause is provided. *Verd. Tr. p. 319*

**Para 3** Vide notes under para (1). It is doubtful whether s. 138 gives the Court any discretion to allow evidence to corroborate a witness to be given under s. 137 before the witness himself is examined. *See Wray King v. Rogers* 5 L. R. R. 1-9 Cr. L. J. 576-2 Ind. C. L. 113. Where a Judge suggests to a pleader that it is needless for him to call further witnesses evidence on a particular point and suggests that they would be merely tendred for cross-examination that is an intimation to the pleader that the Judge is satisfied with the evidence so far as it has gone and that the cross-examination of the witnesses that have been called has not impressed him and when the Judge has made such a suggestion and it has been acted upon by the pleader he and his client have a just cause of complaint if the Judge afterwards turns round and says 'I decide against you on that point.' *His v. Singh and Dhundhu* 6 B. L. R. 638

**137** The examination of a witness in chief by the party who calls him shall be called his examination-in chief

The examination of a witness by the adverse party shall be called his cross-examination

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination

**138** Witnesses shall be first examined in-chief, then (if the adverse party so desires) cross-examined then (if the party calling him so desires) re-examined

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination in-chief

The re-examination shall be directed to the explanation of matters referred to in cross-examination, and, if new matter is, by permission of the Court, introduced in re-examination the adverse party may further cross-examine upon that matter

**Scope of the Section** A party on whom the burden of proof lies calls his witness and (after the witness has duly taken the oath or affirmed) examines him in support of it. The opposite party then cross-examines the witness. At the close of the cross-examination the witness is re-examined by the party who called him for the purpose of giving any explanation that may be required as to any answers made by him in cross-examination. The party then calls his next witness who is examined in like manner. When all the witnesses of the party beginning have been thus examined his case is closed. His opponent then opens his case and calls his witnesses who are examined in the same way firstly by himself in chief, then cross examined by his opponent and then re-examined if necessary by himself. The close of his case is ordinarily followed by his summing up of the evidence, and then by the speech in reply of the party who began. Sometimes however the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. *Wills Evidence* 2nd Ed p. 312

Every party to a suit is entitled to have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given. *Looloo v Rajender*, 8 W R 361, see also *Bungshie v Choudhury*, 1 W R 263, *Morno v Bheem* 6 W R 231, *Chowdhury v Shih* 17 W R 172, *Gopee v Hingobind*, 12 W R 229, *Jeswant v Jansingjee* 2 M L J 174—6 W R 46 P C. Masters should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witness should be examined. *Duggirala v Mulford*, 23 M L J 134=16 Cr L J 156=27 Ind Cis 220

**Witness to testify orally** When testimony is to be given in Court at a trial, it is to be given verbally, in the presence of the Court and jury where the behaviour, expression, and gesture of a witness may be seen. One cannot write out his testimony, and read it to the jury him self, or have it read. One of the strongest indications of the truthfulness of a witness is his manner under the particular circumstances which surround the giving of his testimony. This is of course, lost to the jury unless the witness testify orally before it. Whenever possible therefore, and except where necessity compels testimony to be taken by deposition, the witness is to be personally present and state orally such facts as he may be called upon to give. A witness is expected to testify from his own knowledge. In the examination of witnesses much difference is brought out between the ideas and language of various witnesses in reference to their own knowledge of the facts about which they are questioned. One witness will know a thing, another will have a recollection and another will only go to the extent of giving his impression as to it. The chances are that all mean the same. With certain persons physical disability requires answers to be either written or made by signs, as in the case of deaf mutes. *McKeehey's Ev* § 243

Referring to this subject Mr Cox says — "No better mode of ascertaining the truth of a part transaction will probably ever be devised by human ingenuity than the present method of  *viva voce*  examination of witnesses conducted as it is in open Court, in the sight of the public and in the presence of the parties, their counsel and of the Judge and jury who all have an opportunity of observing the intelligence, demeanour, inclination, bias or prejudice of the witnesses. In this way every man is given a fair and impartial trial, and his rights cannot be abridged, nor he be deprived of the inestimable blessings of life, liberty and property, without the concurrence of Judge and jury. In all cases, too, he has the constitutional privilege of facing his accusers, and by a manly defence, of shaping public opinion, which in this enlightened day is one of the greatest safeguards against injustice of every kind." *Wattlesley* p 16

**Examination in chief** The first rule which regulates examination in chief is this — Counsel can ask a witness whom he has called himself such questions only as are strictly relevant to the issue. Anything that goes to prove a material fact or which will affect the amount of damages is relevant. Every thing else will be rigorously excluded. And relevant facts must be proved in the legitimate way, a fact may be most material still that is no reason for admitting hearsay evidence. Again, counsel must confine his questions to matters of fact. He must not put to a witness points of law, or ask him what he inferred from the facts which he saw or heard. The personal opinion of a witness on any matter is, as a rule, inadmissible except in the case of skilled or scientific witness, who are allowed to state their opinions whenever peculiar training or special experience is necessary to enable the tribunal to form a competent judgment on any matter in issue. *Pouell Ev* 526. Generally it is not the province of the Court to examine witnesses and as a rule Courts should leave the witnesses to the pleaders to be dealt with as is provided in section 13 *Janki v Sheo Narain*, 82 Ind Cis 151=25 Cr L J 1226

**Importance of examination in chief** Cross examination is far easier than examination in chief. In cross-examination one cannot avoid getting answers which are not desired, but in chief a great deal depends upon the way in which witnesses are examined. *Lord Alherston's Recollections of the Bench*

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*and the bar* The examination of a witness in chief or the direct examination of a witness as it is sometimes called is very much underrated in its significance and its importance. *Parry's Seven Lamps of Advocacy* 8-9. If a direct examination is properly and skilfully conducted, the impression that is made by an honest witness is more lasting than any argument of counsel. The vital story of a single witness told in a winning way will leave a first impression upon a juror's mind that no eloquence can efface. It is no easy matter for an advocate to get his own evidence properly before a Court and jury. It is an important fact for him to remember that cases are often won or lost by the straightforward statements of the parties themselves and the natural homely way they sometimes have of putting things. *Wellman's Day in Court* pp 112-113. "If they had to examine a witness what they had got to do was to induce him to tell his story in the most dramatic fashion without exaggeration; they had got to get him not to make a mere parrot-like repetition of the proof put to tell his own story as though he were telling it for the first time—not as though it were word learnt by heart but as if it were a plaintive story plaintively telling it. And they had got to lead him in the difficult work." *Parry's Seven Lamps of Advocacy* pp 82-83. "An impression very generally prevails in both branches of the profession, that the examination in chief is an easy task which anybody may perform, and demanding neither ability nor experience. But this is a grave mistake, and the difficulty of the one as of the other will be discovered at the first experiment." *Cox Advocate cited in Wrottesley* 51-51. "In direct examination," says Mr Best, "although mediocrity is more easily attainable it may be questioned whether high degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull matter of fact or imaginative simple minded or designing as to bring his story before the tribunal in the most natural comprehensible and effective form." *Best J.C.* § 663. "You probably suppose," says Mr Cox "that you have nothing to do but to take your brief in your hand and carry your witness through his evidence, as it is there set down, turning aside neither to the right hand nor to the left, and when you have come to the end of the statement on the paper, to resume your seat and leave him to be dealt with by your adversary in cross examination. But your task is far from being so easy." *Cox Advocate cited in Wrottesley* 51-51. "No lawyer can be successful in the highest sense of the term unless he is a master of the difficult art of examining witnesses. It requires great combination of qualities than almost any other branch of advocacy, the most important of which are patience coolness and tact." *Ibid* pp 31-51. Great caution is required in the examination of all your witnesses after the first, to prevent their disagreement in any important particulars. No error of inexperience or unskilfulness is more common than to examine a witness according to the brief without reference to the evidence previously given and the requirements of the case as it stands. If you fear that there may be conflicting testimony on any point the first witness having varied from the statement in brief it is usually better to leave it as it stands upon that single testimony than to bring out a contradiction, but upon this you must exercise your sagacity at the moment, it must depend upon the particular facts of the case." *Ibid* p 37.

**Duty of counsel** It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. There timid witness must be encouraged, the talkative witness repressed, the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness however, should be left to tell his tale in his own way with as little interruption from counsel as possible. In criminal cases the duty of counsel for the prosecution is wider. It is the practice and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner, for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction. *Powell Ev* 526, *Ramranyan v Emperor*, 42 C 422.

Paul Brown's Golden Rules—Examination in chief “No better general rules” says Mr Wrottesley “for the examination of witness in chief that we know of, can be found than those given by *David Paul Brown*, who was one of the greatest American advocates His rules have stood the test of experience and have been found highly useful by the profession in the United States, and nearly every writer of note, on the subject, has borrowed largely from them We feel that we could have no safer guide, and have concluded to give the rules in full Wrottesley on examination of witnesses p 40 The following are *David Paul Brown's Golden Rules* for the examination in-chief of witnesses —

“1 If they are bold, and may injure your cause by pertness or for want of gravity and ceremony of manner towards them which may be calculated to repress their assurance

“2 If they are alarmed or diffident and their thoughts are evidently scattered, commence your examination with matters of familiar character remotely connected with the subject of their alarm or the matter in issue, as, for instance—Where do you live? Do you know the parties? How long have you known them? etc And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches lest you may again trouble the fountain from which you are to drink

“3 If the evidence of your witness be unfavourable to you (which should always be carefully guarded against) exhibit no want of composure, for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel

“4 If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter, unless there be some facts which are essential to your client's protection and which that witness alone can prove either do not call him, or get rid of him as soon as possible If the opposite counsel perceive the bias to which I have referred he may employ it to your ruin In judicial enquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend You cannot impeach him, you cannot cross-examine him, you cannot disarm him, you cannot indirectly even assuage him and if you enquire the only privilege that is left to you and call other witnesses for the purposes of explanation, you must bear in mind that, instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces and in the very heart, perhaps of your own camp Avoid this by all means

“5 Never call a witness whom your adversary will be compelled to call This will afford you the privilege of cross examination—take from your opponent the same privilege it thus gives you,—and in addition thereto, not only render everything unfavourable said by the witness doubly operative against the party calling him but also deprive that party of the power of counter acting the effect of the testimony

“6 Never ask a question without an object, nor without being able to connect that object with the case if objected to as irrelevant

“7 Be careful not to put your question in such a shape that, if opposed for informality you cannot sustain it, or at all events produce strong reason in its support Frequent failures in the discussion of points of evidence enteeble your strength in the estimation of the jury, and greatly impair your hopes in the final result

“8 Never object to a question from your adversary without being able and disposed to enforce the objection Nothing is so monotonous, as to be constantly making and withdrawing objections, it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good

“9 Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest, and make him also speak distinctly and to your question How can it be supposed that the Court and the jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

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'10 Modulate your voice as circumstances may direct—'Inspire the faithful and repress the bold'

'11 Never begin before you are ready and always finish when you have done In other words do not question for question's sake, but for an answer"

Allowing witnesses to tell in his own way 'The advocate may either allow the witness to tell his story in his own way, or he may bring out his testimony by a series of questions. If the witness is intelligent and honest the best way is to let him tell his own stories, but if he is stupid and inclined to speak of irrelevant matters, it is better to elicit his testimony by question' *Wrottesley* p 38 But strictly speaking, 'no rule can be laid down for this, it must depend upon your discernment at the moment There is a class of minds which can only recall facts by recalling all the associated circumstances, however irrelevant, they must repeat the whole of a long dialogue, and describe the most trivial occurrences of the time, in order to arrive at any particular part of the transaction With such you have no help for it but to let them have their own way It is the result of a peculiar mental constitution, and endeavours to disturb their trains of association will only produce inextricable confusion in the ideas of witnesses and you will be further than ever from arriving at your object But if you are dealing with that other class of witnesses happily more rare, who appear to have no trains of thought at all, who can observe no order of events, whose ideas are confused as to time, place and person, your only chance of extracting anything to your purpose is to begin by requesting that they will simply answer your questions and falling in, as it were, with their own mental condition, proceed to interrogate them, after their own fashion, with disconnected questions, and so endeavour to draw out of them isolated facts, which you will afterwards connect together in your reply, or which may dovetail with the rest of the evidence, so as to form a complete story' *Wrottesley* p 62 citing *Cox's Advocate*

Continuous narration without question May not the witness narrate his knowledge in continuous speech and without the interruption of questions? It is obvious that this method, on the one hand, has often the advantage of preserving continuity and clearness of thought for the witness himself and saving time for all parties concerned *Wigmore* § 767 'One of the important branches of advocacy' said *Mr Harris* "is the examination of a witness in chief One fact should be remembered to start with and it is this the witness whom he has to examine has probably a plain straight forward story to tell and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict If it were to be told amid social circle of friends, it would be narrated with more or less circumlocution and considerable exactness But all the facts would come out, and that is the first thing to insure if the case be as I must all along assume it to be, an honest one I have often known half a story told and that the worst half, too the rest having to be got out by the leader in re-examination if he have the opportunity If the story were being told as I have suggested in private all the company would understand it, and if the narrator were known as a man of truth, all would believe him It would require no advocate to elicit the facts or to confuse the dates, the events would flow putting much in their natural order Now change the audience let the same man attempt to tell the same story in a Court of Justice His first feeling is that he must tell it in his own way He is going to be examined upon it he is to have it dragged out of him piecemeal, disjointedly, by a series of questions—in fact he is to be interrupted at every point in a worse manner than if everybody in the room, one after another, had questioned him about what he was going to tell instead of waiting till he had told it It is not unlike a *post mortem*, only the witness is alive, and keenly sensitive to the painful operation Now the best thing the advocate can do under these circumstances is to remember that the witness has something to tell, and that but for him the advocate, would probably tell it very well in his own way The fewer interruptions therefore the better and the fewer questions, the less questions will be needed Watching should be the chief work,



peculiarly to see that the story be not confused with extraneous and irrelevant matter" *Harris on Hints on Advocacy* p 29 S 138.

**Objection to questions by other party** The general principle governing the time of the objection is that it must be made as soon as the applicability of it is known to the opponent *Wignore* § 18, *Kissen Kamini v Ram Chandra* 12 W R 13, *Sheetal Pershad v Junimeyoy*, 12 W R 214 For evidence contained in a specific question, the objection must ordinarily be made as soon as the question is stated, and before the answer is given, unless the admissibility is due, not to subject of the question, but to some feature of the answer *Wignore* § 18, vide p 73 *supra* If objection be not made in proper time it is generally considered as being waived But the rule of waiver is not applicable in case of inadmissible evidence *Miller v Madho Das* 23 I A, 106 (116)=1917, *Sri Rajah Pralasaravim v Venkata Ram* 38 M 160 When evidence is rejected by the Court, the party whose evidence has been rejected should ask the Judge to make a note of it *Taylor* § 1882 A, *Rameswar v Emperor*, 30 Ind Cr 593=21 Cr L J 21, *Danya v Emperor*, 9 Bur L T 153=36 Ind Cr 468 Failure to object to the reception of evidence which is irrelevant cannot make it relevant *Lacchu v Mela Ram*, A I R 1929 Lah 583 The question of admissibility should be dealt with by the Judge immediately *Lal Jan Singh v Emperor*, 86 Ind Cr 817=A I R 1925 All 405

**Cross Examination.** When a witness has been examined in chief, the other party has a right to cross-examine him The powers of cross examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth By means of it the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means his powers of discernment, memory, and description are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanour, and of determining the just weight and value of his testimony It is not easy for a witness who is subjected to this test to impose on a Court or jury for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross examination may be extended *Greenleaf* Li § 446, *Starkie Ev* Vol I, 160 On the subject of "cross examination or examination *ex adverso*" Mr Best cited certain celebrated passages from *Quintilian* and advised them to be studied attentively (*Vide Best Ev* § 653) The following free translation of the same is given by *Norman J* in *Meer Sujad Ali v Rashee Nath Dass* 6 W R C R 181 at p 182 "In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back This can only be done by repeating the interrogation in greater detail He will give answers which he thinks do not hurt his cause and afterwards from many things which he will have confessed, he may be led into such a strait that what he will not say, he cannot deny For as in an oration, we generally collect scattered proofs, which singly do not appear to press on the accused yet, by being put together, prove the charge, so a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and persons and other things so that he must fall upon some answer after which he must fall upon some answer after which he must necessarily either confess what is desired or contradict his former statement If this does not happen it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause or by being led on to say more than the matter requires in favour of the accused the Judge may be led to suspect him, which will damage his cause not less than it had spoken the truth against the accused It sometimes happens that the testimony given by a witness is inconsistent with itself Sometimes (and that is the more frequent case) one witness contradicts another A skilful interrogation may produce by art that which usually happens accidentally Apart from the cause, witnesses are usually asked many questions which may be useful, as to the lives of other

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witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties—in the answers to which, they may either make some useful admission, or be detected either in a falsehood or the desire of injuring to the opposite party.”

It is certainly implied by s 138 of the Evidence Act that a party must have had an opportunity to cross examine and does not mean that merely a right to cross examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law. *Moti Singh v Dhanuk Dhan*, 73 Ind Cas 339=24 Cr L J 595=(1923) P 53

Cross examination as a distinctive and vital feature of English Law For centuries past, the policy of Anglo Saxon system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of law The belief that no safe ground for testing the value of human statements is comparable to that furnished by cross examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience Not even the abuses, the mishandlings and the puerilities which are so often found associated with cross examination have availed to nullify its value It may be that in more than one sense it takes the place in our system which torture occupied in the mediæval system of the civilisations Nevertheless it is beyond any doubt the greatest legal engine ever invented for the discovery of truth However difficult it may be for the layman the scientist or the foreign jurists to appreciate this its wonderful power there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience “You can do anything” said *Wendel Phillips*, ‘with a bayonet—except sit upon it A lawyer can do anything with a cross examination—if he is skillful enough not to impale his own cause upon it He may, it is true, do more than he ought to do, he may ‘make the worse appear the better reason, to perplex and dash maturest counsels—may make the truth appear like falsehood But this abuse of its power is able to be remedied by proper control The fact of this unique and irresistible power remains, and is the reason for our faith in its merits If we omit political considerations of broader range, then cross-examination not trial by jury, is the great and permanent contribution of the English system of law to improved method of trial procedure *Wigmore* § 1367 ‘Whoever has attended to the examination says *Bayley J* in *Berkely Peerage Case* 4 Camp 40, ‘the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness and still more of a witness brought forward under the influence of a party interested’ However artful’ says *Mr Starkie* “the fabrication of the falsehood may be it cannot embrace all the circumstances to which the cross-examination may be extended, the fraud is therefore open to detection for want of consistency between that which has been fabricated and that which the witness must either represent according to the truth for want of previous preparation, or misrepresent according to his own immediate invention The power and liberty of cross examination is one of the principal tests which the law has devised for the ascertainment of truth and is certainly a most efficacious test.” *Starkie Evidence* Vol. I, pp 96 129 In *State v Campbell* 1 Rich L 126, *Richardson J* said ‘Experience has proved that it is, of all others, the most effective, the most satisfactory, and the most indispensable test of the evidence narrated on the witness stand I know of no disagreement, among the expounders of evidence, upon the importance of cross-examination’

**Cross examination—Theory of** The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts that which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony as known to the witness, and (b) the facts which diminish and impeach the personal trustworthiness of the witness (a) The remaining and qualifying circumstances of

the subject of testimony will probably remain suppressed or undisclosed not merely because his testimony is commonly given only by way of answers to specific interrogatories, and the counsel producing him will usually ask for nothing but the facts favourable to his party. If nothing more were done to unveil all the facts known to this witness his testimony (for all that we could surmise) might present half truths only. Some one must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross examination, then, is a further examination by the opponent, has for its first utility the extraction of the remaining and qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him. (b) The facts which diminish and impeach the personal trustworthiness or credit of the witness will also, in every likelihood, have remained undisclosed on the direct examination. There it is the further function of the opponent's examination to extract. Some of them, no doubt, could be as well or sometimes better proved by other witnesses. But many of them can be obtained only from the witness himself,—particularly those which concern his personal conduct and his sources of knowledge for the case in hand. To this extent, again cross examination is vital: it does what must be done and what nothing else can do. *Wigmore § 1368*. So the objects of cross examination are to impeach the accuracy, credibility, and general value of the evidence given in chief, to shift the facts already stated by the witness to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. *Powell Ev 532*. By means of cross-examination also the situation of the witness with respect to the parties and to the subject of the litigation, his interests, his motives, his inclination, his prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated, and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. *Taylor § 1428*.

There are at bottom but two kinds of cross-examination,—the one intended to elicit friendly evidence to make the witness give a complete narrative, if what has been kept back is favourable to your side, and the other to show the unreliability of the witness. *Reed's Conduct of Law Suit, 2nd Ed 250*.

Cross examination—opportunity of, whether equivalent to actual cross examination. The doctrine requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross examination but merely an opportunity to exercise the right to cross-examine if desired. The reason is that, whenever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or shaken by cross-examination. In having the opportunity and still declining he has had all the benefit that could be expected from the cross-examination of that witness. *Wigmore § 1371*. To satisfy this principle says *Mr Starkie* 'it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used in order that he may then be cross-examined, it is sufficient if the party against whom it was offered has cross-examined or has had the opportunity of doing so, being legally called upon so to do when the statement was made. If the party might have had the benefit of a cross-examination in the course of judicial proceeding it is the same thing as if he had actually availed himself of the opportunity.' *Starkie Ev 97*. Similarly in *Cavenare v Langham, 1 M & S 6*, *Lord Ellenborough CJ* said 'The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining.' *Mali v Dhanukdhar, 73 Ind Cas 339-24 Cr L J 595*, *Chatoor v Rajaram, 11 C L J 124 (F B)*, *Motiram v Lalit, 5 Pat L J 515*.

- S 138.** Evidence given when a party never had the opportunity either to examine or to cross-examine the witness, as the case may be, or to rebut by fresh evidence, is not legally admissible as evidence for or against him, unless he consents that it should be so used. *Gorachand v Ramnarain*, 9 W R 387, *Gur Dyal v Sulhanandan*, A I R 1929 P C 110. In the absence of cross examination evidence is of little value. *Sarju v Emperor*, 88 Ind Cas 852 = 26 Cr L J 1236 = A I R 1925 Oudh 726, *Moti Singh v Dhanukdhari*, 73 Ind Cas 339 = 21 Cr L J 395.

The proper time for cross examination of a witness is immediately after the examination in chief, and an order by a Magistrate allowing an accused examining the prosecution witnesses time until they have been all examined in chief is a proceeding not contemplated by the Criminal Procedure. *Tanbi v Emperor*, 14 Ind Cas 343 = 19 Cr L J 327.

**Cross examination, right of.** 'A deposition is considered a partial representation of facts as to all persons who have no opportunity of bringing out the whole truth by cross-examination.' *Per Laurence J in Berkeley Peerage Case*, 4 Camp 412. So also in *R v Linsuell* 31 R 707, *Kenyon L C J* said 'Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness.' The right of cross examination which an accused has means, only a right of cross examination of witnesses produced against him by the prosecution. *Queen v Suroop*, 12 W R Cr 75. see also *Queen v Shama Chavan* 10 W R Cr 25, *Queen v Ishan* 6 B L R App 88 = 15 W R Cr 34; *Queen Empress v Ramchandra* 19 B 749, *Meer Syad v Kashinath*, 6 W R 181, *Radha v Taramoni* 12 M I A 380, *Gorachand v Ram Narain*, 9 W R 387, *Ram v Ashori*, 3 B L R 273 = 12 W R 130, *Tarini v Saroda*, 11 W R 463, *Shahzada v Jakri* 2 B L R App 2. In a criminal case every facility should be given to the accused to cross examine the prosecution witnesses. *Sadasiv v Emperor*, 41 C 299. An accused person must be allowed to cross-examine witnesses called by another co-accused for his defence if the case of the latter is adverse to that of the former. *Ramchandra v Hanif Sheikh* 21 C 401. *R v Burditt* 6 Cox 458. *Allen v Allen* L R P D (1894) 248 254, *R v Houlden*, 20 Cox Cr 206 = (1902) 1 K B 882. In *Allen v Allen*, (1894) P 248 the Court of Appeal was disposed to hold, but did not hold, that the Judge was wrong in refusing to allow the co-respondent to cross examine the respondent, and yet in his summing up contrasting the evidence given by the one with the evidence given by the other. As they held the Judge wrong in the latter matter, they thought it unnecessary to express concluded opinion on the former which is to be regretted, as the point still appears to be left open. *Poullif* F 229. A co-defendant whose interests are separately represented may cross examine another with a view of discrediting evidence which he has given in favour of the plaintiff. *Narasimma v Kuntanama* 1 M H C R 456.

When a witness has been examined in chief the other party has a right to cross examine him. *R v Burditt* 6 Cox 458, *Lord v Colvin*, 3 Drow 222, 224. But the question often arises whether the witness has been so examined in chief as to give the other party his right. If the witness is called merely for the purpose of producing a paper, which is to be proved by another witness, he need not be sworn, vide section 139 *infra*. *Perry v Gibson*, 1 Ad & El 48, *Davis v Dale*, 1 M & M 514. *Reeds v James* 1 Stark 132, *Rush v Smith*, 1 C M & R 94, *Summers v Mosely* 2 C & M 477. *Bracegirdle v Bailey*, 1 F. & F 536. In England, when a competent witness is called and sworn, the other party will, ordinarily in strictness, be entitled to cross examine him though the party calling him does not choose to examine him in chief. (*R v Brook* 2 Stark 472, *Phillips v Eamer* 1 Esp 357, *Dickinson v Shee* 4 E p 67, *R v Murphy*, 1 A M & O 204) unless he was sworn by mistake (*Clifford v Hunter*, 3 C & P 16, *Rush v Smith* 1 C M & R 94) (*Wqod v Mackinson*, 2 M & R 273) or unless an immaterial question having been put to him, his further cross-examination has been stopped by the Judge. *Greedy v Carr* 7 C & P 64. *Greent Et* § 445. And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of

formal proof only, he not being a party to the record, it has been held that he was thereby made a witness for all purposes, and might be cross-examined to the whole case *Morgan v Brydges*, 2 Stark 314 *Greenl Ec* § 445

A witness summoned and examined by Court cannot, as of right, be cross-examined either by the pro-ecutor or by the accused. The Court as a general rule should however allow the parties to cross-examine the witness if they desire to do so *Churai v Queen*, S C 275 Oudh. Such a witness is a witness of the Court. 'The counsel of neither party has a right to cross-examine him without the permission of the Judge. The Judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties the Judge would no doubt allow and he ought to allow, that party counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted.' *Per Lord Esher* in *R. in Coulson v Disborough* (1894) 2 Q. B. 316, but see *Tarmy v Saroda*, 3 B. L. R. 145, *Gundas v Gndhan* 11 W. R. 110, *Gopal v Mamel* 24 C. 288, *Empress v Girish* 5 C. 614 *Sharfara, v Dhumno* 16 W. R. 257

It is the duty of the Magistrate to insist on the trials proceeding from day to day and rigidly to check prolix examination and cross-examination of witnesses in exercise of the powers inherent in all Magistrates to prevent abuse of process *F. W. Sole v Crown*, 11 S. L. R. 27

**Death of witness after examination in chief.** Where a witness dies after examination in chief and before cross-examination the evidence is admissible but the weight to be attached to such evidence should depend upon the circumstances of each case and though in some cases the Court may act upon it, if there is other evidence on record its probative value may be very small and may even be disregarded. *Maharajah of Kolhapur v Sundaram*, 48 M. 1 = A. I. R. 192, Mad 497, *Jones v Forth*, 1 M. & M. 196, *R v Hagan*, 1 Jebb Cr. C. 127. Where the witness's death or lasting illness would not have intervened to prevent cross-examination but for the voluntary act of the witness himself or the party offering him—viz., by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out. Upon the same principle the same result should follow where the illness is but temporary and the offering party might have reproduced the witness for cross-examination before the end of the trial. But where the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Nevertheless the principle requires in strictness nothing less. The true solution would be to avoid any inflexible rule and to leave it to the trial Judge to admit the direct examination so far as the loss of cross-examination can be shown to him not in that instance a material loss. *Wymore* § 1390. In *R v Mitchell*, 17 Cox Cr. 503 a dying woman was examined in chief and after her cross-examination had continued for about 10 minutes the Magistrate stopped on account of her condition. She died a few minutes after. Her evidence was held inadmissible. But in *Fuller v Rice* 1 Gray 313, *Shaw C. J.* said "No general rule can be laid down in respect to unfinished testimony. If substantially complete it ought not to be rejected."

**Cross-examination by Court.** In *Nur Buz Ka v Empress* 6 C. 279, *Garth C. J.* said "We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witness for the prosecution was irregular, opposed to the provisions of section 138 of the Evidence Act, and not fair to the prisoners. We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoners' pleaders to a great extent ineffective, by assisting the witness to explain away, in anticipation the points which might have afforded proper ground for useful cross-examination."

# THE INDIAN EVIDENCE ACT

**S 138.** It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions, and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 139 of the Act. The Judges power to put questions under s 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case. Generally, it is not the province of the Court to examine witnesses, and as a rule the Court should leave the witnesses to the pleaders to be dealt with as provided for in section 138. *Janahi v Sheo Naram* 82 Ind C 151

**Multiple examiners** It has long been a tradition that but one counsel should question during a single trial in the examination (direct or cross examination) of a single witness. *Chippendale v Masvan* 1 Camp 174, *Mason v Ditchbourne* 1 Moo & Rob 160. It is of course subject to reasonable exception allowable in the trial Courts discretion. *Ilmore* § 783. In *Doe v Doe*, 2 Camp 280 Lord Ellenborough A C J said Convenience certainly requires that the examination of a witness should be carried on entirely by the gentleman who begins it and several counsels clearly cannot be permitted to put questions to the same witness, one after another in the manner apprehended to take the examination into his own hands. Very unpleasant consequence might follow if this were not allowed. If a gentleman it being his first appearance in a Court of Justice should be much embarrassed in the course of examining a witness, it would be hard if it were in the power of the opposite party to prevent his leader from stepping into his relief. And other occasions may be imagined when it may be very important that the gentleman who conducts the cross should have the privilege of putting questions to a witness originally called by a co adjutor. In the present state of the bar there is no danger of this privilege being abused.

**Length of cross examination** Although we do not regard it always safe that a Judge should freely interfere with the discretion of counsel while cross-examining witnesses still when the privilege is abused it seems but right that the Judge should also exercise some control over cross examination assuming inordinate length. In the *Golden R Mining Co v Buxton Mining Co*, 9 Fed Report 414 it was held that examination of witnesses must not be protracted beyond reasonable limits even if the questions put be logically relevant. The admissibility of such evidence depends upon the opinion of the trying Judge, and if he is of opinion that a clear inference can be drawn without going into such details as would confuse the jury and unnecessarily protract the case he may not allow questions on collateral issues to be put. A C W N 222. So where the examination of a witness is needlessly protracted it is within the discretion of the Court to arrest it. *Bur Jones* § 814. *Baile v Kanhaiya* A I R 1922 Oudh 174. This discretion the Court can use even where a witness is examined in commission. *Vide Surry Prosad v Standard L J Co* 30 C 625. *Must Bibi Kaniz v Mobatal* A I R 1924 Pat. 281. But a Court should not fix arbitrary limit. *Empero v Asiruddin* 63 Ind C 151. 412-22 Cr L J 524. It may be frequently necessary to allow repetition of statements by a witness or the repetition of interrogatives, until full answers are obtained. *Burr Jones* § 814.

**Cross examination whether should be confined to relevant facts** In England great latitude is permitted in cross examination, and a cross examiner will not be stopped by the Court unless the question is manifestly irrelevant and calculated neither to weaken the examination in chief nor to impeach the credit of the witness. Questions clearly irrelevant in examination in chief may be relevant and of the highest importance when asked in cross-examination. In cross-examination then a witness may be asked any question however irrelevant to the matter in issue the answer to which may tend to affect his credit but he will not always be obliged to answer the question and if he does answer it he cannot as a rule be contradicted. He may be asked questions which affect his veracity, such as, whether he has been convicted of a crime whether he is a relation, or intimate friend, or under any special obligation, to

the party who calls him, whether he is not identified or connected with him in interest, whether he has not been on terms of enmity with the adverse party, whether his memory is not defective generally, as to the peculiar transaction, and whether he has been bribed, or paid to give evidence. *Pouell* Lr 533. So also under section 138 of the Evidence Act an accused has the right to cross-examine prosecution witnesses at the conclusion of their examination in chief and such cross-examinations may be on all points and by means of all questions not disallowed by the Evidence Act. Cross-examination need not be confined to matters raised elsewhere in the evidence. *Mahomed Ali v Emperor* 12 Cr L J 277=10 Ind Crs 917. *R v Khan*, 6 B L R, App 58=15 W R Cr 311, *Mayor v Murray* 19 L J Ch 281, *Subramanyam v Government of Mysore*, 6 Mys L J 551 (F B).

But even in cross-examination, irrelevant questions will be disallowed, if they neither contradict or qualify the result of the examination in chief, nor impeach the credit of the witness. Thus a cross-examiner may not ask a rule 34 questions of the witness as to his transactions with a third person. *Pouell* Lr 533. See also *Tennant v Hamilton*, 7 Cl & F 123, *Hollingham v Heald*, 1 C B N 5 398.

Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for and against the relevant issue is untrustworthy. It is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story. *The Bombay Cotton Manufacturing Co v Mohall Shival*, 19 C W N 617=17 Bom L R 455=23 M L J 593=39 B 336 P C. It is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge. *Donald Watson v Peary Mohan*, 40 C 893=18 C W N 185. Where counsel acting under instruction imputed a dishonest act to a witness which counsel did not substantiate their lordships of the High Court, having been expressly asked by counsel on both sides to make some statement on the subject, expressed their opinion that in all the circumstances and having regard to the character of the litigation and the parties to the suit, the imputation complained of ought to have been with drawn. *In re Messrs Crompton & Co v Secretary of State*, 26 M L J 519.

What facts are not relevant in cross examination. In cross examination too the facts inquired into must be relevant. A witness may not be cross-examined as to purely collateral matters, for they are foreign to the issue. If questions upon such collateral facts were permitted to be put for the purpose of laying a foundation to contradict the witness as to the answers he might give, it is clear that one trial might ramify into fifty. A Judge might have to try twenty different issues upon matters which would not in the least assist, but, on the contrary might embarrass him in dividing the issues really before him. For instance in an action on a contract a witness should not be examined or cross-examined as to a contract made with third parties. The leading case on this point is *Spencele v De Willott*, 7 List 108. There the Court was all decidedly of opinion that it was not competent to counsel, in cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue if answered affirmatively for the purpose of discrediting him. If he answered in the negative by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans such other contracts could not be evidence of the contract made with the defendant, unless the witness had first said that he made the same contract with the defendant as he had made with those persons which however he had not said. *Nort* Lr 321. Section 138 of the Evidence Act gives the defence the right to cross-examine prosecution witnesses at the conclusion of their examination in-chief, and such cross-examination may be on all points and by means of all questions not disallowed by the Evidence Act. *Mahomed Ali v Emperor*, 12 Cr L J 277=10 Ind Crs 917.

**The Art of cross examination.** 'Since the direct examination may not have disclosed all the remaining and qualifying circumstances of the issues, as known to the witness, and may also have left unrevealed the deficiencies of his

**S 138** knowledge, the suspicious of his motives, and other elements of discredit, it remains for the cross-examiner to evoke them. But what is he about to evoke? What will be the complexion of these facts which exsisted? They may be what the cross-examiner hopes. And yet they may not be. In the long run there will be a large proportion of such facts. But for a given witness it is other wise. The cross-examiner may already know what is there waiting for disclosure. But if he does not, he is forced by a contingency. He may extract the most confirming circumstances for the proponent's own case which have somehow been left unmentioned. He may demonstrate that the credit of the witness is greater, not less than was supposed. The great axiom, then of the art of cross-examination as dependent on the theory is that it is a contingency whether the facts that will actually be extracted will be favourable or unfavourable to the cross-examiner's purposes. It is here that the art (that is the technical skill) of cross-examination enters. On this hangs all the lesser rules of the art. Hence it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner—all these things and more, have to do with the art. Yet the theory of the process underlies and influences at every point. To cross-examine or not to cross-examine,—that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness's testimony. The greatest cross-examiners have always stated this as the ultimate problem." *Higmore* § 1368

**David Paul Brown's Golden Rules for cross examination** '1 Except in indifferent matters, never take your eye from that of the witness. This is a channel of communication from mind to mind, the loss of which nothing can compensate —

*"Truth, falsehood hatred anger, scorn despair  
And all the passions—all the soul is there"*

"2 Be not regardless, either of the voice of the witness. Next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time, the question is asked were you at the corner of Sixth and Chestnut Streets at six o'clock? A frank witness would answer perhaps I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object speaking to the letter rather than the spirit of the enquiry answers, No although he may have been within a stone's throw of the place or at the very place, within ten minutes of the time. The common answer of such a witness would be I was not at the corner, at six o'clock. Emphasis upon both words plainly implies a mental evasion or equivocation and gives rise with a skilful examiner, to the question At what hour were you at the corner or at what place were you at six o'clock? And in nine instances out of ten it will appear that the witness was at the place about the time, or at the time about the place. There is no cope for further illustrations, but be watchful I say of the voice and the principle may be easily applied.

3 Be mild with the mild shrewd with the crafty, confiding with the honest merciful to the young the frail or the fearful rough to the ruffian and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph, and your cause may prosper.

4 In a criminal, especially in a capital case, so long as your cause stands well ask but a few questions, and be certain never to ask any the answer to which if against you may destroy your client, unless you know the witness perfectly well, and know that his answer will be favourable equally well or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

5 An equivocal question is almost as much to be avoided and condemned as an equivocal answer, and it always leads to or excuses an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the



examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of the truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

"6 If the witness determine to be witty or refractory with you, you had better settle that account with him at first, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken your power or his own. But, in any result, be careful that you do not lose your temper, anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

"7 Like a skilful chess player, in every move fix your mind upon the combinations and relations of the game, partial and temporary success may otherwise end in total and remediless defeat.

"8 Never undervalue your adversary, but stand steadily upon your guard, a random blow may be just as fatal as though it were directed by the most consummate skill, the negligence of one often cures, and sometimes renders effective, the blunders of another.

"9 Be respectful to the Court and to the jury, kind to your colleague, civil to your antagonist, but never sacrifice the slightest principle of duty to an overweening deference towards either."

**Cross examination of the perjured witness.** "It seldom happens that a witness's entire testimony is false from beginning to end. Perhaps the greater part of it is true, and only the crucial part—the point, however, on which the whole case may turn—is wilfully false. If at the end of this direct testimony, we conclude that the witness we have to cross examine, comes under this class, what means are we to employ to expose him to the jury? Let us first be certain we are right in our estimate of him—that he intends perjury. Embarrassment is one of the emblems of perjury, but by no means always so. The novelty and difficulty of the situation—being called upon to testify before a room full of people, with lawyers on all sides ready to ridicule or abuse—often occasions embarrassment in witnesses of the highest integrity. Then again some people are constitutionally nervous and could be nothing else when testifying in open Court. Let us be sure our witness is not of this type before we subject him to the particular form of torture we have in store for the perjurer. Witnesses of a low grade of intelligence, when they testify falsely, usually display it in various ways in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness chair in an apparent effort to recall to mind the exact wording of their story and especially in the use of language not suited to their station in life. On the other hand, there is something about the manner of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard. The expression of the face changes with the narrative as he recalls the scene to his mind, he looks the examiner full in the face, his eye brightens as he recalls to mind the various incidents, he uses gestures natural to a man in his station of life, and suits them to the part of the story he is narrating, and tells his tale in his own accustomed language.

"If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful as your first question to ask him to repeat his story. Usually he will repeat it in, almost identically the same words as before, showing he has learned it by heart. Of course it is possible, though I of probable, that he has done this and still is telling the truth. Try him by taking him, to the middle of his story, and from there jump him quickly to the beginning, and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the wording of his story, he can only call it to mind, as a whole, and not in detachments. Draw his attention to other facts entirely dissociated with the main story as told by himself. He will be sure unprepared for these new inquiries, and will draw upon his imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly when his mind is upon another subject, return to those considerations to which you had first called his attention, and ask him the

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same question a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net. He cannot invent answers as fast as you can invent questions and at the same time remember his previous inventions correctly, he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, will be at your mercy. Let him go as soon as you have made it apparent that he is not mistaken but lying." *Wellman's the Art of cross examination* pp. 50-53

But the difficulty is that perjury is not confined to ignorant classes alone. Nothing in the trial of a cause is so difficult as to expose the perjury of a witness whose intelligence enables him to hide his lack of scruple. There are various methods of attempting it, but no uniform rule can be laid down as to the proper manner to be displayed towards such a witness. It all depends upon the individual character you have to unmask. In a large majority of cases the chance of success will be greatly increased by not allowing the witness to see that you suspect him before you can lead him to commit himself as to various matters with which you have reason to believe you can confront him later on. *Wellman, the Art of cross examination* p. 54. In this connection *Mr Reed* says: "You must sometimes try to entrap the false witness into such self-contradiction or repugnancy to known facts as will induce the belief that his testimony is feigned. The following extract from *Mr Cox* is full of good instruction upon this sort of cross-examination: 'Open gently mildly do not appear to doubt him (the witness), go at once to the marrow of the story he has told, as if you are not afraid of it, make him repeat it then carry him away to some distant and collateral topic, and try his memory upon that, so as to divert his thoughts from the main objects of your enquiry and prevent his seeing the connection between the tale he had told and the questions you are about to put to him. Then by slow approaches bring him back to the main circumstances by the investigation of which it is that you propose to show the falsity of the story

"If however you adopt the other course (i.e.) to show that you suspect him at the first and instead of surprising the witness into the betrayal of his falsehood you resolve to bring out of him by a bold and open attack—to awe him as it were, into honesty—aspect and voice must express your consciousness of his perjury and your resolve to have the truth. A stern determined fixing of your eye upon his, will often suffice to unnerve him, and it will certainly help you to assure yourself whether your suspicions are just or unjust. It may be stated as a general rule that a witness who is lying will not look you boldly and fully in the face with a steady gaze, his eye quivers and turns away is cast down or wanders restlessly about. On the contrary the witness who is speaking the truth or what he believed to be the truth will meet your gaze however timidly will look at you when he answers your questions, and will let you look into his eyes.

"Thus assured, and pursuing your plan of bold attack, there needs to be no circumlocution, no gradual approaching but go straight to your object, plunging him at once into the story you are questioning. Make him repeat it slowly. It will often be that, under the discomposure of your detection of his purpose, he will directly vary from his former statement and if he does so in material points which are undoubtedly sufficient to discredit him, it will usually be the more prudent course to leave him there self-condemned instead of continuing the examination lest you should give him time to rally and perhaps to contrive a story that will explain away his contradiction. If however his lesson is well learned, and he repeats the narrative very nearly as at first, you will have to try another course which will task your ingenuity and patience.

"Procure from him in detail, and let his words be taken down, the particulars of his story and then question him as to various circumstances upon which he is not likely to have prepared himself, and to answer which, therefore he must draw on his invention at the instant. Some little ingenuity will be necessary on your part after surveying the story to select the weakest points for your experiment and to suggest the circumstances least likely to have been pre-arranged. Having obtained his answers, permit him no pause, but in calmly

take him to a new subject, lead his thoughts away altogether from the matter of your main topic. The more irrelevant your queries, the better, your purpose is to occupy his mind with a new train of ideas. Conduct him to different places and persons and events. Then in the very midst of your questionings when his mind is the most remote from the subject, when he is expecting the next question to relate to the one that has gone before suddenly return to your first point not repeating the main story (for this having been well learned will probably be repeated as before) but to those circumstances associated with it upon which you surprised him into invention on the moment. It is most probable that after such a diversion of his thoughts he will have forgotten what his answers were, what were the fictions with which he had filled up the accretions of his false narration, and having no leisure allowed to him for reflection, he will now give a different account of the circumstances and so betray his falsehood. Of all the arts of cross examination there is none so efficient as this for the detection of a lie.

"Another excellent plan is to take the witness through his story, but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out. You disturb his memory of his lesson. Thus, begin your cross examination at the middle of his narrative then jump to one end then to some other part of the most remote from the subject of the previous question. If he is telling the truth, this will not confuse him because he speaks from impressions upon his mind, but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only which acts by association, you disturb that association and his invention breaks down.

"When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions. Give him no pause between them, no breathing pause, no time to rally. Few minds are sufficiently self possessed to maintain a consistent story under such a catechising. If there be a pause or a hesitation in the answer, you thereby lay bare a falsehood. The witness is conscious that he dares not stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed into contradictions. In this process it is necessary to fix him to time and place and names. 'You heard him say so?' 'Where?' 'Who were present?' 'Name them.' 'Name one of them.' Such a string of questions following one upon the other as fast as the answer is given will frequently confound the most audacious. 'Fit names and times and places are not readily invented or if invented not readily remembered.' *Reed's Conduct of law suits*, 307 308

**Truthful witness.** 'The truthful witness has been said to be the most difficult of all to cross-examine. I cannot help differing so much from that opinion as to say that I have always regarded him as the easiest of any. When I say truthful I do not intend to imply that his evidence is necessarily true. If it were so it would be idle to cross examine at all. What I mean by a truthful witness is one who believes and intends his evidence to be true. He is the easiest to deal with, because he does not equivocate. He has no secret meaning, and gives his answers readily and without mental reserve. He desires to tell you all he knows, and his credibility I will assume, is unimpeachable. The first thing to ascertain in cross-examining a witness of this class is whether he has any strong bias or prejudice in the matter under inquiry. One or two carefully worded questions will discover this, if you have not already learnt it from his answers in chief.' *Harris* p 107

**Spy as a witness.** "If this man is accidentally, or from previous information or suspicion, designedly, present during the plotting of some offence, whether against the state or Government or individuals, and from his dislike of the meditated conspiracy, and to further the ends of justice he conscientiously remains to learn the views and secrets of the associates in the plot, with the fixed design to stop and counteract it or if unable to do this at least to aid in punishing the conspirator, this conduct may be justifiable, both legally and morally, and it will follow that if to convict the parties to the plot he gives his evidence against them, the mere character of spy ought not to prejudice, or

**S 138.** stain the credit of the witness To this man no guilt of the plotted offence attaches Another description of spy may be a man, who has undignifiedly been present at a plot, and by the inducement or example of others, been tempted to join it, or a man who has been even one of the original framers of the plot, and either of these men, whether from seeing that the proceedings may lead him further than he intended, or from some quarrel with his companions, or from repentance or other cause, may secretly and unknown to the others withdraw from the confederacy, and from that time resolve to watch their proceedings with the view to be a witness against them, and with this intent to continue to attend at their meetings and take notes of or carry away in his memory, what he sees and hears This man stops short in his career of guilt as a conspirator before it is perfected But as all kinds of spies meditating to inform, are naturally in some degree disliked, there is no doubt in each of the men before mentioned a something, which affects and endangers his credit Yet it need not in either of those instances utterly destroy it For it is plain the man has had the very best opportunity of seeing and hearing what was done and said by his associates And to what extent his credit is hurt, and how far he is to be believed may be learnt from considering whether the different parts of his story are consistent with each other whether he is contradicted in any material fact by other witnesses and whether there is a probability of truth in what he says If his story is consistent, if he is not contradicted in any material fact, and a fortiori if he is confirmed in material facts, by other witnesses, and if probability supports his story it may be right to believe him And, although, in the course of his examination, there is some hesitation or confusion in his answers shame in his countenance or embarrassment in his demeanour, yet it should be recollected that, excepting the shame, each of the other defects is often seen in the most honest and honourable witness each is the natural and often the inevitable, fruit of the wily and ensuring questions put to the witness by a skilful and ever an interrogator And the shame itself is a token favourable to the witness in as much as it shows he feels himself degraded by the character he bears of a spy and to be void of all appearance of shame would argue a want of self respect under an imputation of dishonour' *Ram on Facts*, 171 179

**Police witness** "Everyone who conducts a defence in a criminal trial has to deal with police testimony, and as a class of evidence it figures more conspicuously in criminal courts than any other Again I shall commence by saying as far as possible leave him alone They are dangerous persons They are professional witnesses, and in a sense that no other class of witness can be said to be Their answers generally may be said to be stereotyped All the ordinary questions have been answered scores of time by the well disciplined 'active and intelligent officer' Don't imagine that you are going to trap him up upon the path where his beat has been for many a year He will perceive you coming while you are a long way off and in all probability go out and meet you Perhaps before you were born he answered the question you have just put. *Harris Hints on Advocacy* p 104, *Willman's Day in Court* 182 *Iyer's Cross examination*, Vol II p 280 He knows what you will ask him if you are no better than the rank and file of Quarter Sessions cross-examiners But try him with something just a little out of the common line, by way of experiment You see he looks at you as though he had got the sun in his eyes He cannot quite see what you are about And you must keep him with the sun in his eyes if you desire to make anything of him If he sees the drift of your questions, the chances are against your getting the answer you want or in the form in which you would like them He thinks it is his duty to baffle you and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are *Harris Hints on Advocacy* pp 104, 105, *Iyer's Advocacy Series* Vol II p 281 To be effective with police men your questions must be rapidly put Although he has a trained mind for the witness box, it is trained in a very narrow groove it moves as he himself moves, slowly and ponderously along its particular beat, it travels slowly because of its discipline and is by no means able to keep pace with yours or ought not to be You should not permit him to trace the connection between one question and another when

you desire that he should not do so. If you ask him whether it was very dark night, and the darkness has nothing whatever to do with the issue, he will commence a process of reasoning as to your motive, and what might possibly be the effect of his answer. While his mental exertion is going on, interrupt there suddenly with a question you have good reason for putting, and in all probability you will get something near the answer you inquire. Unless certain of answer, never under any circumstances, ask a police man as to character. Your client may have the best, but police men have such a high standard that no man in the dock can ever come up to it. Further more it is dangerous to put "fishing" questions to this class of witness. You are almost sure to catch the wrong answer. Your safer course will be to cross examine for contradictions and improbabilities, not forgetting where necessary to give the witness the opportunity of denying anything upon which you intend to contradict him. Cross examine for prejudice and as to opportunities, remembering always that there is often as much in the manner as in the matter of cross examination, and much more at times in silence than in both. *Ibid*

**Expert witness** - Attention is also called to the distinction between mere matters of scientific fact and mere matters of opinion. For example, certain medical experts may be called to establish certain medical facts which are not mere matters of opinion. On such facts the experts could not disagree, but in the province of mere opinion it is well known that the experts differ so much among themselves that but little credit is given to mere expert opinion as such. As a general thing, it is unwise for the cross examiner to attempt to cope with a specialist in his own field of inquiry. Lengthy cross examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted. Many lawyers for example, undertake to cope with a medical or hand writing expert on his own ground—surgery, correct diagnosis or the intricacies of penmanship. In some rare instances (more especially with newly educated physicians) this method of cross questioning is productive of result. More frequently however it affords an opportunity for the doctor to enlarge upon the testimony he has already given and to explain what might otherwise have been misunderstood or even entirely overlooked by the jury. Experience has led me to believe that a physician should rarely be cross examined on his own specialty unless the importance of the case has warranted so close a study by the counsel of the particular subject under discussion as to justify the experiment and then only when the lawyer's research of the medical authorities, which he should have with him in Court, convinces him that he can expose the doctor's erroneous conclusions not only to himself but to a jury who will not readily comprehend the abstract theory of physiology upon which even the medical profession itself is divided. On the other hand, some careful and judicious questions, seeking to bring out separate facts and separate points from the knowledge and experience of the expert will tend to support the theory of the attorney's own side of the case, are usually productive of good result. In other words the art of the cross examiner should be directed to bring out such scientific facts from the knowledge of the expert as will help his case and thus tend to destroy the weight of the opinion of the expert given against him. Another suggestion which should always be borne in mind is that no question should be put to an expert which is in any way so broad as to give the expert an opportunity to expatiate upon his own views, and thus afford him an opportunity in his answer to give his reasons, in his own way for his opinions which counsel calling him as an expert might not otherwise have fully brought out in his examination." *Wellman's The Art of Cross-examination*, pp 74 75

"A successful method of cross examining professional expert is to quietly and gradually lead him to an extreme position which can neither be fortified nor defended. If this cause can be carefully conceived, it is often expedient to now and then wonder from the direct path and create a belief that the road the witness is to be taken over is a very different one from that which the examiner has resolved he shall travel. The examiner must not, however, for an instant, lose his temper, nor suffer his attention to be drawn from the time he means to take. When the position is reached, then, if the witness attempts to retreat or explain, it is well enough that the examiner's manner should become severe and

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determined, and the witness sternly kept to the questions asked him. An expert, when he finds himself in an uncomfortable position will resort to all sorts of artifices and shifts to turn the tide of his examination, but turned it must not be. A keen eye kept upon the witness will often enable the examiner to detect his purpose and to check it. The same faculty which enables the swordsman to detect and guard against a feint of his adversary very often enables the advocate to discover and prevent the artifices of a witness." *Elliot*, 264-265

**Woman witness** "Women, I have usually found much better witnesses of what they have seen than men. Men reflect on and draw inferences from what they have seen and are apt to mix in their evidence what they surmise must have happened with what they actually saw happening. Women usually tell what they saw. Their evidence however is reliable only so long as their passions are not involved when love of the husband or children or hatred of their neighbour enters into the question not a word they utter can be trusted. They have no conscience." *Strahan's Bench and Bar* p. 69. "Now and then in her own case a woman will commit the grossest perjury but when she is called as a witness she far surpasses men in the perspicuity of her narrative and in the honesty of her replies. No counsel who has any pretence to tact ever tries to get the better of a plain country woman giving evidence at the assizes. There is just a chance of eliciting some favourable answer if you treat her with profound respect call her 'madam' and soften your voice but even these artifices will not induce her to swerve from what she has made up her mind in the real trial of the case." *George Whitt's Life in Law* p. 51, *Anger's cross-examination* Vol II p. 251

**Re examination** When the cross examination of the witness is concluded the party who called him has the right to re-examine him on all matters arising out of the cross examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination in chief and that which has been given in cross examination, or for the purpose of removing or diminishing any suspicion that the cross examination may have cast on the evidence in chief or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross examination. If there has been no cross-examination there can be no re-examination. And it is, as a rule unnecessary, and therefore wrong to repeat any question already put in chief. Only such questions may be asked as are connected with and arise out of the cross examination. *Pouell Esq* 539. The Judge however, may in his discretion allow old questions to be put. *Per Curiam* in *Scott v Sampson* 8 Q. B. D. 506. No new evidence can be introduced in the re-examination. *The Queen's Case* 2 B & B at p. 297. In that case Lord Tenterden said "I think that counsels have a right upon re-examination to ask all questions which may be proper to draw forth in explanation of the sense and meaning of the expressions used by the witness on cross examination if they be in themselves doubtful as also of the motive by which the witness was induced to use those expressions but I think he has no right to go further and to introduce matter new in itself and not wanted for the purpose of explaining either the expressions or the motives of the witness."

"So far as the evidence of the opponent is to be explained away," says *Prof Greenleaf* contradicted or otherwise repudiated, by any process which consists merely in diminishing or negating its force the original party has the right to do this, either by a re-examination following immediately upon the cross-examination of his witness or by new witnesses called in rebuttal after the opponent's own evidence has been put in. But anything beyond this cannot belong to him as of strict right the reason being that, all questions that we asked are to be asked at the proper time otherwise the trial will be in perpetual confusion (per *L. C. Hardwick* in *Lord Lovat's Trial* 18 How St. Tr. 658) and the proper time for all matters not rendered material by the course of the opponent's cross-examinations of his own witnesses' testimony is the original party's direct examination of his witnesses. Nevertheless, to obviate the effects of inadvertence it will often be fair to allow a party

to do it at later stage what he might and should have done at an earlier one. The propriety of his making an exception must depend largely on the circumstances of each case, and for this reason it is universally held in almost all the varieties of situations thus presented, that the allowance of such evidence out of its natural order is to be determined by the discretion of the trial Court. The line between the evidence which is merely explanatory of and rendered necessary by the opponent's, and evidence which might have been introduced at an earlier stage is often difficult to draw but the principle is apparent. A variety of situations for the exercise of the discretion of the trial Court may present themselves (1) In the re-examination of a witness immediately after his cross-examination, or in the stage of rebuttal after the opponent's own evidence has all been put in it may be desired to add testimony of new facts, &c matter which was omitted in the direct examination as a whole or in that of the particular witness but might have been there put in. This may be done in the trial Court's discretion. (2) In the re-examination of a particular witness or in the general stage of rebuttal it may be desired to repeat or emphasize or detail more precisely a matter already testified to in chief. This also may be done in the trial Court's discretion and a re-examination to make corrections should be treated in the same way. (3) After a witness has been cross-examined and dismissed it may become desirable to recall him to the stand for further direct examination, this may be granted or refused in the trial Court's discretion. After one re-examination, it may be desired to re-examine the witness a second time either immediately after a re-cross-examination or after the witness has left the stand this may be granted or refused in discretion. (5) After the evidence has been put in by each party and the case declared closed and even after argument or charge begun it may become important to supply omissions and here also the discretion of the Court must control. *Greill Et* § 466 (a). In *R v Morrison* 75 J P 272 the Court allowed the accused to call fresh evidence after counsel for the prosecution had commenced his final speech. But a witness who has been cross-examined as to a conversation with a party cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred. *Prince v Samo* 7 A & E 627. If such questions are asked and answered the witness may be again cross-examined but such further cross-examination will be confined to the matter so improperly introduced. *Pouell Ev* 540.

Where on an indictment for murder the prosecution called witnesses whose names were on the back of the indictment solely in order to give the prisoner the opportunity of putting questions to them, and the prisoner elicited by his cross-examination many facts in his own favour, it was held that the prosecution could not re-examine to any matters not referred to in such cross-examination. *R v Deeley*, 4 C & P 220 *Wills Fr* 2nd Ed p 327. The explanations of the witness in re-examination may of course relate not only to statements made in cross-examination as to the relevant facts but also as to those affecting the witness's credit, as for instance to show what provocation he had received for making use of a vindictive expression which he has admitted having uttered. *R v St George* 9 C & P 483 (488). In re-examination no question as to the context of a document can be asked where it is only put in the cross-examination in the hand of a witness for identification. *Cope v Thames Haven Dock* 2 C & K 757, *Collier v Nokes* 2 C & K 1012. Whenever any part of a witness's evidence in chief is not directly or indirectly challenged in cross-examination there is of course no occasion nor any right to re-examine thereon. *Wills Ev* 2nd Ed 328.

**139** A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document

Scope of the section.—Where a witness is summoned by *subpoena duces tecum* merely to produce documents, he need not be sworn. *Perry v Gibson*,

**S 140** 1 A & I 18, *Summer v Moseley* 2 C & M 177 But if he has to speak to the proper or safe custody of the document, the course of business in his office with respect to documents, filing, noting, docketing, and the like, or to do more than merely produce, he must be sworn. *North* 1 L 323 When a witness is not sworn, he can not be cross-examined. *Perry v Gibson* 1 A & I 18, *Summer v Moseley*, 2 C & M 177 *Rush v Smith*, 3 L J 1 x 375 But if he is called as a witness & if he is sworn, the opposite party is entitled to cross-examine him. This is so although he is not examined, but is merely called to produce a document. But a party is not entitled to cross-examine a witness called by mistake, if the mistake be discovered before any question is put to him. *Wood v Marlinton* 2 M & R 273 In the above case *Coleridge J* said "Upon the whole, it appears to me that the more satisfactory principle to lay down is this, that if there really be a mistake whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage on this mistake by cross-examining the witness." Here the learned counsel explains that there has been a mistake, which consists in this that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is I think such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination. If, indeed the witness had been able to give evidence of the transaction which he was called to prove, but the counsel had discovered the witness, besides that transaction, knew other matters inconvenient to be disclosed, and therefore attempted to withdraw him, that would be a different case. I think the defendants have here no right to cross-examine the witness.

Witnesses to character  
ter

**140** Witnesses to character may  
be cross examined and re-examined

**Scope** Where witnesses are called simply to speak to the character of a prisoner it is not usual to cross-examine them, excepting under special circumstances. *R v Hodgkins*, 7 C & P 298, but no rule of law expressly forbids this. *Taylor* § 1429 see also *R v Wood* 5 Jur 225 But where a witness for the prisoner having proved that he had known him for some years, and given him a good character, stated, on cross examination, that he had never heard anything against him, but admitted that he had heard of a robbery which had taken place in the neighbourhood some years previously, and was then asked 'Did you ever hear that the prisoner was suspected of having done it?' It was objected that it was not competent to enquire about offences imputed to the prisoner. *Parle B* said 'The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. The man's character is made up of a number of small circumstances of which his being suspected of misconduct is one. The question may be put.' *R v Wood*, 5 Jur 225

**141** Any question suggesting the answer which the  
person putting it wishes or expects to  
Leading questions receive is called a leading question

**Leading questions** meaning of A leading question is one which suggests to the witness the answer which it is desired he should give. If the questions are asked to which the answer 'Yes' or 'No' would be conclusive they would certainly be objectionable (in examination in chief). *Per Lord Ellenborough C J* in *Nichols v Doubling* 1 Stark 81. A leading question means what its name indicates—one which leads the witness up to the desired answer i.e., one which is put in such a way as to suggest to the witness the answer which is expected or wanted. There is no particular form which will make a question leading or will save it from being such. The fact that a question is put so as to require a categorical answer does not necessarily make it leading though it may do so. nor does the fact that a question is prefaced by 'whether or not' so as to avoid a categorical answer, save it from being leading. *Best Ev* § 611.



*Wills v Quimby* 31 N H 485, 490 "A question" says *Bentham* "is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him, the examiner, while he pretends ignorance and is asking for information, is in reality giving instead of receiving it." *Bentham Rationale of Judicial Evidence*. It is very clear that a question is leading which suggests to the witness the answer which he is to make or which puts into his mouth words which he is to echo back. *Purney v State*, 16 Miss 104. But if it merely suggests a subject, without suggesting an answer or a specific thing, it is not leading. *Born v Rosemond* 84 Wis 620. It has often been declared that a question is objectionable as leading, which embodies a material fact and admits of answer by a simple affirmative or negative. *Greenleaf Ev* § 434. While it is true that a question which may be answered by 'yes' or 'no' is generally leading there may be such questions which in no way suggest the answer desired, and to which there is no real objection. On the other hand leading questions are by no means limited to those which may be answered by 'yes' or 'no'. A question proposed to a witness in the form 'whether or not' that is in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired. And that has been called a leading question which assumes a fact to be proved which is not proved. More properly, such questions may be called misleading, and are objectionable both as likely to mislead a fair witness. *Baird Jones* § 816.

**142** Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court

When they must not be asked

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved

**Principle** "The assigned reason in support of the rule is that a witness usually has a strong feeling in favour of the party who has subpoenaed him and is disposed to swear anything that he thinks will serve the party, and that a leading question in effect suggests to the witness the answer that he is desired to give and invites misrepresentation. This reason imputes to the counsel an unworthy motive, and to every witness a supposition that he would be guilty of perjury, but perhaps the better and more comprehensive reason is that many witnesses, either from complaisance or indolence are too much disposed to assent to the proposition of the counsel and answer as he may suggest, instead of reflecting and answering after an exertion of their own memory." *Joseph Chittys Practice of Law*, Vol III, 892. But *Chief Justice Appleton* in his *Evidence* - and "The end proposed in extracting testimony is the obtaining the actual recollection of the witness, not the allegations of another person suggested to and adopted by the witness and falsely delivered as his. The real danger is that of collusion between the witness interrogated and the counsel interrogating, and that the counsel will deliberately imply or suggest facts with the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts thus suggested." *Appleton Ev* 227.

**Scope of the Section** The witness must not be examined in chief by means of leading questions that is, questions calculated to lead his mind to such answers as the party examining desires. It is presumed that a witness is to some extent biased in favour of the party who calls him and this fact coupled with the party's knowledge of what his witness is prepared to say, would

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afford the party an opportunity for unfairly shaping the testimony if he were allowed to frame his questions to the witness in such form as to suggest what answer he desires to receive. *Will's Ev* 2nd Ed p 315. Such evidence would obviously be open to suspicion, as being the rather pre-arranged version of the party than the spontaneous narrative of the witness. *Best* § 641, *Starkie Ev* 166, *Philp Ev* 113. The prohibition of all leading interrogation is a principle of Courts, no less of India than of England, and as respects the Criminal Courts of all the three Indian Presidencies, leading interrogation is in express terms excluded by the Regulation Law under which they are governed (Vid Beng. Reg. IV of 1797 s 6 Madras Reg. VII of 1802, s 18, Bom. Reg. XIII of 1827 s 36). The oldest of the Regulations on the subject (that governing the Presidency of Bengal) and which may be taken in principle as a sample of the others, provides—'In the examination of witnesses leading questions suggesting an answer or having a tendency to such suggestion, are to be carefully avoided, and the interrogatories to them are to be proposed in such general terms, as may bring forth all the information they possess and lead to a discovery of the truth.' Up to the point of dispute, however,—that is while the examination is introductory only to what is material,—the witness may be led. Were it otherwise a very unnecessary consumption might be had of the time of the Court, and a great infliction practised on its patience. *Goodere Ev* p 215.

"It is often a convenient way of examining," says Mr. Alison, 'to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection and brings him to that stage of the proceeding to which it is desired he should dilate. But this is not always fair and when any subject is approached on which his evidence is expected to be really important, the proper course is to ask him what was done or what was said, or tell his own story. In this way also if the witness is at all intelligent, a more consistent and intelligible statement will generally be got there by putting separate questions.' *Alison's Practice*, 546.

But the determination of what is, and what is not, leading is in itself frequently one of difficulty, whenever the test has to be applied to any particular question. And the particular difficulty on the one hand is to secure that all the essential portion of the narrative be given in its entirety, and on the other, to prevent a needless prolixity of statement. "It is not a very easy thing," says Mr. Starkie, 'to lay down any precise general rule as to leading questions. On the one hand, it is clear that the mind of the witness must be brought into contact with the subject of enquiry, and on the other hand, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer 'yes' or 'no' would be conclusive. But how far it may be necessary, to particularize in framing the question, must depend on the circumstances of each individual case.' *Starkie on Evidence* p 167.

The "Yes or No" test suggested by Mr. Starkie is not however it is submitted, a very accurate and at all events must not be taken as an universal one. There are many instances in which it would be the natural response, without the question which evoked it being leading. Thus suppose it was required to show the presence of the witness on any particular occasion, he might be asked—'Were you present on that occasion?'—Notwithstanding the natural answer to the question might be 'Yes or No.' It could hardly be requisite in such a case to go the round about way of asking—'Who was present?' There might have been a hundred people there, and the form of the question in this shape might leave the witness to exhaust the series in other words to tell over the ninety and nine before he arrived at himself. On the other hand, all such question as—'Did one say so and so?'—or 'Did he do so and so?'—while obviously capable of being answered by the Court—'Yes or No'—would, by suggesting what it was required of the witness to state, naturally provoke the reply. An illustration may be supplied from the duly practice of all Courts, where the question is one of personal identification. If there be no ground of suspicion, the individual is pointed out to the witness as he is asked directly,—'Is that the party?' and the answer is the simple—'Yes or No.' Let the witness however, be suspected the question would not be allowed to be put in that form, and the witness would be told to look round

the Court and point out the individual in question. The invitation to the answer—"Yes or No"—would, in truth be leading or not according to the circumstances. *Goodale v Ev* 217

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One great test as to whether a question were to be regarded as leading would be its tendency to elicit an answer conveying rather in itself the result of facts, than a statement of the facts themselves from which the Court was to draw the result. Thus, if it were a question of some given arrangement come to at a particular meeting, the witness ought to be interrogated not as to the result, which he himself ascribed to the meeting, that is to say whether such and such was then arranged but generally only as to the detail of what took place, leaving it to the Court to draw the legal inference from the narrative. It is necessary, however to distinguish between a leading course of interrogatives and one, where the emergency arises, merely suggestive, and it is obvious that, while the mind of the witness must be brought into contact with the subject of enquiry when once there, the examination must be assisted, not only with such checks upon wandering, but with such suggestions to recollection, as occasion might require. *Starb v Ev* p 167, *Goode v Ev* 218

More suggestions in the way of stimulants to the memory accordingly would not fall within the category of leading questions, and may be made wherever the incapacity to answer sufficiently appears to arise either from a want of recollection, or absence of some connecting link with the subject of examination. Thus the names of persons, or places or dates may be suggested, and sometimes particular transactions, or connecting circumstances. Though a touchstone only to memory, they might widen the whole association in the mind, just as in music to strike one chord would be to recall the entire tune. In a question accordingly as to the component members of a firm, the names might be repeated the witness states that he could recognize them on repetition but could not rehearse them from memory. So he might be asked as to his knowledge or recollection of a particular date or circumstance, and he might be led from them to more detailed allusions as to occurrences in connection with them. Again some prior witness may have made a given statement which another might be called to contradict. Here the statement must be narrated to the latter, or he would be at fault to what to address his denial, and passages even of a letter might be suggested to him. So a witness unable to detail an entire conversation might yet have sufficient recollection to negative certain particular statements as part of it. Here the particular statements might be put to him, and he might be asked if they were in truth made. "It may frequently happen," says *Mr Sturges*, "that a witness unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters sworn to have been made in the course of a conversation. In such cases, therefore, this form of enquiry is absolutely necessary for obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as for instance, to prove that on some former occasion, that witness gave a different account of the transaction, a difficulty may frequently arise in proving affirmatively that the first witness did make such other statement, without a direct question to that effect." *Lord Ellenborough, C J* said "I have always understood, after some little experience, that the meaning of a leading question was this and this only. That the Judge re-trains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favour the party for whom he is adduced." 25 *Hans Part. Dec* 207

Leading questions such as can properly be put in cross-examination of a hostile witness cannot be put by the Public Prosecutor in examination in chief. *Di Anna Beldar v Emperor*, 2 *Pat L*, 1 757. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question would be improper. If it is so disallowed the counsel should ask both the question and the order to be recorded. *Dey v King Emperor*, 9 *L B R* 33 = 3 *Jur L*, T 133 = 17 *Cr L J* 500 = 36 *Ind Cr* 163

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If objected to, etc. If the objection is not taken at the time, the answer will be taken down in the Judge's notes. Sometimes the Judge himself will interfere to prevent a leading question or series of leading questions being put, but it is the duty of the opposing counsel to take the objection, and it is only through want of practical skill that the omission occurs. At the same time, it is to be observed that if evidence is elicited by a series of leading questions unobjected to, the effect of the evidence so obtained is very much weakened, for it scarcely escapes the notice of the Judge. It is advisable, therefore, for a counsel, examining in chief or on re-examination not to put leading questions, except of course as to those points on which they are expressly permitted by the Act. *Nort Ev* 325.

The Court shall permit. As the rule is merely intended to prevent the examination from being conducted unfairly the Judge has a discretion, which is open to review (*Laudon v Laudon* 5 Ir L N S 27, *Rice v Hounle*, 16 Q. B. D 681) to relax it whenever he considers it necessary in the interest of justice, and it is always relaxed in the following cases (*Phipson Ev* 443) —

(1) **Introductory matters**, — Leading questions may always be asked on merely introductory matters, such as name or occupation of a witness. *Cockle's Case* 266. So also leading questions are proper where they are merely introductory and designed to lead the witness more quickly to matters which are material to the issue. For example in cases of conversations admissions or agreements the attention of the witness may be drawn to the subject, occasion time place or person and he may be asked directly whether such person said anything on the subject thus brought under his attention, and if so what he said. Questions regarding the age, antecedent, business and experience of a witness are largely within the discretion of the Court and unless it manifestly appears that such questions are put for an improper purpose, such discretion is not receivable as error. *Burr Jones* § 817.

"The good sense of the rule" says *Mr W D Evans* in his *Notes to Pothier* II, 226 "is perfectly manifest with respect to all cases where the question propounded involves in answer immediately bearing upon the merits of the cause and indicating to the witness a representation which will best accord with the interests of the party. But where the questions are merely introductory where the mere answer of 'yes' or 'no' will have the point of the case precisely as it found it and can only be material as laying the foundation for a further inquiry, the reason of the objection does not occur and the objection itself appears to be ill founded and the making it can only proceed from a captious and petulant disposition to interrupt the course of examination.

2 **On other matters not in dispute**. A question is not objectionable as leading when it relates to matters as to which there is no dispute. In most cases it is necessary to prove a certain number of uncontested facts, in order that Judge and jury may understand the position of the parties and the circumstances surrounding the case. As to these matters leading questions are often put with the permission of counsel on the other side and such questions should then be put in the shortest and most direct manner. *Pouell Ev* 528.

3 **Assisting memory**. Even upon points which are keenly contested between the parties the mind of a witness must frequently be led by the party who calls him to the extent of directing his attention to the particular matters sought to be inquired into (*Vickolls v Douding* 1 Stark 81) without some indication of the point on which his evidence is required a question may easily be unintelligible. *Wills Ev* 2nd Ed 317. Thus to prove slander in putting that 'A was a bankrupt whose name was in the Bankruptcy List, and would appear in the next Gazette,' a witness who had only proved the first two expressions was allowed to be asked 'was anything said about the Gazette?' *Nichols v Douding* 1 Stark 81. So where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if read to him, this was allowed to be done. *Accero v Petron* 1 Stark 100, *Phip Ev* 444. So also where a witness's independent recollection of a matter has been exhausted, the Judge will often permit him to be led to the very particulars which are sought, if from the way in which he has given his evidence it appears that it can with

farne s be done (*Coutem v Fouse*, 1 Camp 43), the imperfection of the witness's memory generally affords a sufficient test of the true value of the testimony thus elicited *Wills Et* 2nd Ed 315 In *State v Jandell* 5 Harringt 475 (478) the Court said "The rule is plain, its application is not always evident. You are first to test the witness's own knowledge or recollection of the terms by questions necessary for that, if his memory is at fault, you may suggest contemporaneous events, with a view to stimulate or fix his recollection" *Wigmore* § 777 It may not be necessary to name all the details the mention of one or more of them may suffice by association to stimulate the recollection of the remainder The common situation of this sort, running perhaps through out the person's entire testimony, is that of a child, or of an illiterate or alien adults A related situation is that of a person too ill or too feeble of speech to be able to articulate sentences here the sentences may be framed for him suggestively, leaving him as little as possible to articulate and yet avoiding the danger of a misunderstood signal of assent or dissent *Wigmore* § 778

4 Identification On a question of identification, a witness may be asked whether the person pointed out to him is the person in question (*R v Berenger* 2 Stark 129, *R v Halson*, 32 How St Tr 74) though of course, if the witness can himself point out the person in question without the aid of such a question his evidence will have greater weight *Burr Jones* § 817 Still, cases often arise where such an identification would be worthless, and where it would be in the highest degree unfair to prompt the witness *Best* s 613, *Whart* s 502

5 Contradiction Another exception arises where it is desired to show that a witness on the opposite side has, at another time made a statement contradictory to his present statement. When the attention of such witness has been called on cross-examination, to the alleged contradictory statement and he has denied it, another witness may be asked the direct question whether the particular words denied were in fact used by the former witness *Be Et* 10th Ed § 642, *Green Et* § 435, *Burr Jones* § 818, *Edmonds v Waller* 3 Stark 7 *Courteen v Touse*, 1 Camp 43 There is, however a conflict of opinion on this subject, and there is very high authority for the view that, in such a case the proper course of examination is to ask 'what the witness in fact said relative to the matter in question, and not in the first instance to ask in the leading form whether he said so and so' *Phill Et* 404 In this work on Evidence, *Taylor* suggests that the rule allowing the leading question in such cases should only apply to such expressions as in themselves are not evidence in the cause, the object of relaxing the general rule being simply to exclude the other parts of the conversation which would not be admissible *Taylor* § 1405 Where, however the conversation is not proved merely for the purpose of contradiction the latter question, is improper *Hallet v Cousens* 2 M & R 238, *Phill Et* 114

6 Adverse witness A similar situation arises where the witness though called by party examining, is in fact biased against his cause and is thus inclined to favour it by accepting suggestions of desired testimony In such a case a question can not be objectionable as leading *Wigmore* § 774 "This unwillingness is commonly to be decided by the Judge according to his impression of the demeanour of the witness upon the trial This situation of the witness, and the inducement which he may have for withholding a fair account, are also very proper circumstances to be taken into account in forming its decision A son will not be very forward in stating the misconduct of his father of which he has been the only witness, a servant will not, in an action against his master be very ready to acknowledge the negligence committed by itself" *W D Evans, Notes on Pothier* II 228 *Wigmore* § 771, *Luce v Howard* 16 Q B D 681, *Coles v Coles*, L R 1 P & M 70 See also s 151, *infra* for further elucidation

Discretion of the Court Although as we have seen, there are certain general rules governing this subject of leading questions, very much must be left to the discretion of the trial Judge The subject is one of judicial discretion, and the allowing or refusing leading questions is not generally a ground for appeal

**S 143** *Race v Howard*, 16 Q B D 681 *Loudon v Loudon*, 5 Ir L R N S 27,  
*Barindia v Emperor*, 37 C 467=14 C W N 1114

When they may be asked

### 143 Leading questions may be asked in cross-examination

**Principle** The typical situation in which the witness's presumable bias removes all danger of improper suggestion is that of an opponent's witness, under cross-examination. The purpose of the cross examination is to shift his testimony and weaken its force, in short, to discredit the direct testimony, thus, not only the presumable bias of the witness for the opponent's cause but also his sense of reluctance to become the instrument of his own discrediting, deprives him of any inclination to accept the cross examiner's suggestions unless the truth forces him to. Accordingly it is well settled that in cross examination of an opponent's witness, ordinarily no question can be improper as leading. *Parkin v Moon*, 7 C & P 409. Yet, where the reason ceases the rule ceases also, thus when an opponent's witness proves to be in fact biased in favour of the cross examiner, the danger of leading questions arises and they may be forbidden. The remarks in *Hardy's Trial* 24 How St Tr 659 in which Mr Erskine was told by *L C J Eyre*, 'you are not to put the very words in his mouth, even on cross examination', were said of a witness manifestly favourable to the cross examiner, and were not intended to be applied to the ordinary case of a hostile witness. *Higmore* § 773, *Phy Ev* 453.

**Scope of the section** 'Leading questions are admitted in the cross examination of a witness when much larger powers are given to counsel than in the original examination. Witnesses under cross examination may be led immediately to the point on which their answers are required. If they betray a zeal against the cross examining party or show an unwillingness to speak fairly and impartially they may be questioned with minuteness as to particular facts or even particular expressions. There can be no danger in leading too much, where the witness is obstinately determined not to follow.' *Ph & Ar* Vol II, p 472. So as a general principle leading questions may be put on cross-examination, the objection which would apply to this on an examination in chief not ordinarily holding here. The function of a cross examination is to shift the previous testimony in chief, and the interrogative usually proceeds upon the basis that the sympathies of the witness under examination are in favour of the side originally producing him and adverse to the one cross examining while the cross examination takes place under the assumed disadvantage of being addressed to one reluctant to tell. Still the privilege must not be abused the examination must not be made a mockery. *Goodere Ev* 228. If the witness is in fact favourable to the party cross examining him, it will often weaken the effect of his evidence if he is asked leading questions in cross examination. It must not put the words into the mouth of the witness which he is to echo back again—nor may it assume as its basis, facts as proved which have not been proved—or ascribe to the witness statements by him, which have not been uttered. It is probably not very easy without illustration to convey to a mind not vested in the experience of Courts the precise meaning of the restrictive qualification here noticed. As respects the *echoing back of the words* the case which first furnished the expression will be the best example and this was one of the state trials,—that of *Hardy* for high treason—where the question being as to the proceedings of a political society of which *Hardy* the prisoner was a member and the witness under examination having given a representation of its designs favourable to the prisoner his counsel was proceeding to follow this up by suggesting particular expressions and a king if they had not been used. *Chief Justice Eyre* thereupon reminded the counsel, that he "could not put the very words into the witness's mouth" and when the subject occurred again on the following day *Mr Justice Buller* observed "You may lead a witness upon a cross-examination to bring him directly to the point as to the answer but not so long as was attempted yesterday of putting into the witness's mouth the very words which he is to echo back again." But in a later case, *Alderson B*

stated that the right to lead in cross examination exists whether the witness be favourable or not. *Parkin v Moon*, 7 C & P 408. In that case the plaintiff's counsel was cross-examining one of the defendant's witness (who it seemed was an unwilling witness for the defendants but a willing one on the part of the plaintiff), by putting leading questions in the usual way. The defendant's counsel submitted that under the circumstances leading questions ought not to be allowed even on cross examination. *Alderson B* in admitting leading questions said: "I apprehend you may put leading questions to an unwilling witness on the examination in chief at the discretion of the Judge but you may always put a leading question in cross examination whether a witness be unwilling or not."

"But the rule" says *Mr Taylor* "ought also to receive some further qualification, where the witness is evidently hostile to the party calling him, for although it appears in one case to have been laid down that leading questions may always be put in cross examination, whether a witness be unwilling or not, (*Parkin v Moon*, 7 C & P 409), some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness has brought the evil on his own head, for a fraudulent witness might purposely conceal his lies in favour of one party, and thus induce the other to call him or he might be an testing witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust." *Taylor Ex* § 1431. In America the Judge in his discretion may prohibit leading questions from being put to an adversary witness who shows a strong interest or bias in favour of the cross-examination, and needs only an intimation to say whatever is more favourable to his cause. *Moody v Rowell*, 17 Pick 498, *Taylor* § 1431.

**Misleading questions.** A question which assumes a fact that may be in controversy is leading when put on direct examination, because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Conversely such a question may become improper on cross examination, because it may by implication put into the mouth of an witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his. *Wignmore* § 780. *Courteen v Touse* 1 Cimp 43, *Edmonds v Waller* 3 Stark 8. The law on the subject was thus laid down by *Mr Joseph Chitty* in his *Practice of the Law* 2nd Ed III 91. "It is an established rule, as regards cross examination that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not. Indeed, if such attempts were tolerated the English Bar would soon be debased below the most inferior of Society." In *Hardy's Trial*, 24 How St Tr 751 *Mr Erskine* cross-examining a witness to the proceedings of an alleged seditious meeting asked "Then you were never at any of those meetings but in the character of a spy?"—"As you call it so, I will take it so. — If you were not there is a spy take any title you choose for yourself, and I will give you that." *L C J Eyre*. "There should be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence you may give it any appellation you please." After repetition of the practice, *Mr Gibbs* on the other side contended "I am sorry to interrupt you, but your question ought not to be accompanied with those sort of comments they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of facts, to probe a witness as closely as you can, but it is not the object of a cross-examination to introduce that kind of periphrasis as you have done just now." *Mr Erskine* "But, on a cross-examination, counsels are not called to be so exact as in an original examination, you are permitted to lead a witness." *L C J Eyre* "I think it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case they tend so to distract the attention of everybody, they load us in point of time so much and that that is not

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**S 144** the time for observation upon the character and situation of a witness is so apparent that as a rule of evidence it ought never to have been departed from *Wignmore* § 780

**144** Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it

*Explanation* — A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts

#### *Illustration*

The question is whether A assaulted B

C deposes that he heard A say to D— B wrote a letter accusing me of theft, and I will be revenged on him' This statement is relevant as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter

**Object of the section** In this section we have a rule for the purpose of carrying out the provisions of section 91, as to exclusion of oral by documentary evidence, this is, that any witness, who is about to give evidence as to a contract grant or other disposition of property may be asked whether it was not in writing and if he says it was he may be stopped, and the production of the document enforced, or the right to give secondary evidence made out. So this section merely points out the manner in which the provisions of sections 91 and 92, as to the exclusion of oral by documentary evidence may be enforced by the party to the suit. "Documents which in the opinion of the Court might be produced" would of course include the cases referred to in section 91, where the law requires a matter to be reduced to the form of a document. Care must, however be taken not to apply it to cases in which oral evidence is given of statements of other people about the contents of documents, when those statements are relevant (*Vide* illustration). Suppose for instance that the question was whether A had murdered B. A witness might prove that A had said B's bond is inequitable, I will kill him sooner than pay it, without the bond being produced the reason obviously being that what the witness wants to prove is not the contents of the document, but A's feeling about the contents of the document as applying a motive for his crime. *Cum Est* pp 64 326. Even where the adverse party does not object, it is the duty of the Court not to allow inadmissible evidence. *Vide* s 298 *Criminal Procedure Code* *Emperor v Panch Kauri*, 52 C 67=29 C W N 300. A private diary containing a record of facts contemporaneously made and regularly kept may be used for contradicting or corroborating a witness or refreshing his memory and the like under ss 144 157 and 159 of the Evidence Act, but such user does not make the document itself evidence. *Mulundaram v Dayaram*, 10 N L R 44=23 Ind Cas 893



**145** A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended

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Cross examination  
as to previous state-  
ments in writing

to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him

**Object of the section** When the contradictory statement alleged to have been made by the witness was contained in a letter or other writing, the rule as laid down by the Judges in the *Queen's Case*, (2 B & B 286 290 292 291) was that the cross-examining counsel must produce the document as his evidence, and have it read in order to found any questions to the witness upon it. *Taylor Ex* § 1446, see also *Macdonnell v Evans*, 11 Com B 930. So it was at that time a matter of considerable discussion in England whether, in the instance in which the contradiction to be insisted on existed in writing, the writing itself should be required to be produced in order to found the question to be put to the witness. It was considered on the one hand, that to allow the examination in the absence of the document, would not only *contravene the rule which forbids all use of the contents of a written instrument so long as that instrument is itself producible*, but that it might be to leave the Court to the partial contents only of the document, instead of having the whole before it. On the other hand it was urged that to put the document into the hands of the witness would at once requirit him with its contents and so to defeat the object of the enquiry. The latter principle has at length prevailed, subject only to the qualification enjoining the production of the writing itself when this is ultimately to be used as the contradiction and placing it at the control of the Judge, and this has been accomplished in England by a further enactment of the Common Law Procedure Act of 1851 (Stat 17 & 18 Vict, Cap 125) s 24. On that section 34 of Act II of 1855 was based. That latter section runs as follows:

A witness may be cross-examined as to previous statement made by him in writing, or reduced into writing, relative to the *subject matter of the cause* without such writing being shown to him, but if it is intended to contradict such witness by writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit. The English Act was restricted to civil cases only but section 34 of Act II of 1855 was equally applicable to civil and criminal cases as well. This section re-enacts the provision of section 34 of Act II of 1855.

Objections to the rule as laid down in *Queen's case* "The objections to the rule are not difficult to perceive (1) It does not seem to be required by strict principle. So far as concerns the above rule as to calling the witness's attention to his supposed prior statement, it is entirely satisfied by the counsel's oral inquiry without showing or producing the letter. It is only by the virtue of the Primariness rule that production is required, i.e. the rule 'that the contents of a written instrument, if it be in existence are to be proved by the instrument itself and not by parol evidence' (*Per Abbott C J* in the *Queen's Case*, 2 B & B 286). But this rule is not violated here for (a) the cross-examiner is not seeking to prove the document's contents at this stage, but merely to meet the requirement of the law that the witness must be warned that the inconsistent writing will be produced, (b) even where the witness in answer admits executing the document, this does not involve proof of its contents, there is no violation of the Primariness rule (c) even if the counsel sought to take the answer as evidence of the writing's contents the principle of the

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Primariness rule may well be thought not violated, for that principle is based on the possibility of misrepresentation by the party failing to produce the writing, and if he is willing to take the answer of the adversary's witness as evidence of contents, the reason for applying the Primariness rule falls away. (2) From the point of view of policy the prohibition against asking the witness without showing him the writing is an unfortunate one, for 'one of the best test of the memory or the veracity of a witness, the trial of his recollection or candour as to what he has himself written on the subject on which he has just been deposing, is entirely destroyed by his being made aware of the existence and contents of the document,' (*Report of the Commissioners*), in other words, the chance of showing to the tribunal either that the witness cannot remember or incorrectly remembers or that he is willing to falsify as to the contents, is entirely taken away by the requirement that the writing must be shown to him at that stage. The rule then, so far as it does not allow the counsel to wait until the putting in of his own case, but requires him in advance, before cross-examining, to produce and to show the writing to the witness, is both unsound in principle and unfair in policy. *Green Liv* § 465(1)

**Scope of the section.** Under this section a witness may be cross-examined as to previous statements made by him in writing, when his attention may be drawn to the parts of the former writing which are to be used for the purpose of contradicting him. But in the examination in chief before the Court of Session, his attention should not be directed to his deposition before the Magistrate. *Queen v Jamchandha*, 13 W R 18 Cr. The complainant's pleader was at liberty to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so as regards previous statements which were reduced to writing, without showing the writing. *Lukheya Rai v Lupree Koei*, 15 W R 23 Cr. In delivering the judgment, *Insley J* said: 'We observe that the Deputy Magistrate was altogether wrong in refusing to allow the complainant's pleader in cross-examination to question the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate. He was at liberty to examine on all the facts of the case, as much as if the matter had then been before the Court for the first time. He was, moreover, at liberty to cross-examine the witnesses, as to previous statements made by them and reduced to writing without showing the writing. Section 34 of Act II of 1855, does not say, as the Deputy Magistrate seems to think that the writing must be shown before the cross-examination, but that if it is intended to put in such writing to contradict a witness, his attention must be called to those parts which are to be used for the purpose of so contradicting him. This is, not that he is to be allowed to study his former statement, and form his answers accordingly, but that, if his answers have differed from his previous statements reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so, and if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence.'

Where a person employed by another for the purpose of writing up his account books had made entries therein on information furnished by that other person, such entries could not be regarded as previous statements made by him in writing which could be given in evidence to contradict him as witness. *Muchershaw v New Dhermsey*, 4 B 476

If the defence wishes to cross-examine a witness on a previous deposition with a view to discrediting him the attention of the witness must be drawn to those discrepancies so that he may have the chance of explaining them. In such a case it is not proper for the Judge to stop the examination and have the whole deposition filed with a view to discrepancies being pointed out at the time of argument. *Subbiah v Empe or*, 1929 M W N 789. In view of the strict language employed in this section of the Evidence Act a witness is entitled to have his attention specifically drawn to the passages in his statement which are to be used for the purpose of contradicting him. Any laxity of practice in this respect cannot be condoned. *Bhagyalal v Hardkar*, 9 I L J 200 (Raj) = 26 A L J 673 = A I R 1928 All 511

The deposition of a witness in a criminal trial which has not been read out to the witness is admissible under s 145 of the Evidence Act to contradict a witness at a subsequent trial *Fazlu Rahman v Emperor* 6 Pat 478 = 104 Ind Cas 100 = 28 Cr L J 772 = 8 Pat L T 773 = A I R 1927 Pat 315 Previous statements of a prosecution witness used under s 145 for cross-examining the person or under s 155 of the Evidence Act for discrediting the evidence of the witness cannot be used as substantive evidence against the accused *Bishen Dutt v Emperor*, 25 A L J 994 = 105 Ind Cas 677 = 28 Cr L J 965 = A I R 1927 All 705

It is not necessary in order that an accused person may be allowed under s 162 to contradict the witness that the statement must contain the very words used by the witness and that it is sufficient even if the statement is a memorandum of what the witness said to the Police officer *Mafi-Addi v Emperor* 45 C L J 561 = 31 C W N 940 = 104 Ind Cas 245 = 28 Cr L J 805 = A I R 1927 Cal 644, see also *Jadunandan v Emperor*, 104 Ind Cas 242 = A I R 1927 Oudh 321

Writing need not be produced in absence of intention to contradict *Rumakha v Nagaram*, 92 Ind Cas 133 = A I R 1925 Mad 145 = 48 M L J 89

A statement made by a witness before a coroner is admissible at the trial of the accused for the purpose of impugning the credit of the witness, even though the accused had no opportunity to cross-examine the witness *Emperor v Raghuo*, 28 Bom L R 775 = 97 Ind Cas 37 = 27 Cr L J 1061 = A I R 1926 Bom 404

A report made by a Police officer in connection with an enquiry made by him in the exercise of his lawful jurisdiction is not admissible in evidence in a judicial proceeding unless the Police officer is examined as a witness *Baldeo Ram v Kunkun Ram* 83 Ind Cas 586 = A I R 1925 All 808 A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his examination. In such a case he should be recalled for further cross-examination *Naba Kumar v Rudra Narayan* 45 M L J 439 = 33 M L T 309 (P C) = 1923 M W N 622 = 1923 P C 95, see *Mi Amu Begam v Mi Begam*, 9 P W R 1914 = 127 P L R 1914 = 23 Ind Cas 861

Where the purpose of the production of the document must have been well understood by the witness and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was at a particular place on the alleged date as was clear from the document and when on re-examination no attempt was made to elicit explanation, *Held* the witness was properly contradicted *Bairanatha Nath v Dasanmoyee*, 1922 P C 409 Where a Court finds certain discrepancies between a witness's statement made before it and that previously made before another Court, the witness should be asked to explain them as required by s 145 of the Evidence Act *Suraj Bahsh v Sukdhari*, 32 Ind Cas 291 Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered, unless the specific statements are put to the parties sought to be contradicted they cannot be used in evidence *Upendra Nath v Bhupendra Nath*, 32 Ind Cas 267 The evidence taken in the summary case may be admissible upon the conditions and for the purposes described in the Evidence Act section 145 *Nga Seil v Aja Pat*, U B R (1913) 3rd Qr 181 = 22 Ind Cas 676 The deposition of a witness in a previous case is not relevant in a subsequent case in which he is examined except to contradict him *Queen v Noko Kristo*, 8 W R Cr 87 Although section 145 of the Evidence Act admits of previous statements being referred to, for purpose of cross-examination, it does not authorise a Court to treat such statements as evidence against an accused *Jadhua v Emperor*, 117 P L R 1911 = 10 Ind Cas 119 = 12 Cr I J 214

In a trial for giving false evidence, the record of a previous deposition given by the accused is relevant and negates any evidence *Government of Bengal v Gaudmo Mahlo*, 9 C L J 373 = 1 Ind Cas 121 = 10 Cr L J 199

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When the depositions in a former criminal trial were used to contradict the witnesses, but without giving them opportunity to tender their explanation or to clear up the particular points of ambiguity or dispute the procedure was contrary to the general principles and to the specific provision of section 145 of the Evidence Act *Balgangadhar Palal v Shri Shrinivas Pandit*, 19 C W N 729 P C, see also *Upendra v Bhupendra* 32 Ind Cas 267. It is quite contrary to the Evidence Act to try to impeach a witness by means of contradictory statement unless the contradictory statement is put to him in cross examination *Maung San v Emperor*, Ind Rul (1930) Rang 91.

**Police diaries** It is only what is written in the Police diaries that can be used under s 145 of the Evidence Act to contradict the witness and what the Sub Inspector of Police stated that a witness said or did not say, is inadmissible. The way to prove these portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy *Dharam Singh v Emperor*, 108 Ind Cas 162=29 Cr L J 343=A I R 1928 Lah 507=9 A I C R 567. If police diary is used the provisions of s 145, Evidence Act and s 162 of the Criminal Procedure Code will have to be borne in mind *Kashu Ram v Emperor* 26 A L J 139=9 L R 30 Cr =109 Ind Cas 120=29 Cr L J 172 (2)=A I R 1928 All 280. A Police officer, who recorded the statements cannot be cross examined under section 145 or section 161 of the Evidence Act, with regard to such statements, such cross examinations being allowable only with regard to the entries properly recorded in the diary kept under s 172 Cr Pro Code if the Police officer refers to such entries for the purpose of refreshing his memories *Dadon Gazi v Emperor*, 33 C 1023=10 C W N 890=4 Cr L J 79.

Where a police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses the accused person would be entitled to call for and inspect such documents and cross examine the witness thereon, as such statements would not amount to a portion of the diary referred to in section 172 *Bikas v Queen Empress*, 16 C 610, *Sheru Sha v Queen Empress*, 20 C 642 *Emperor v Rudra Singh*, (1896) A W, N 193, *Empress v Sadera Felt* 9 C P L R 33, see also *Sadhu Sheikh v Emperor*, 33 C W N 250. A statement made by a witness to the police can be used only to contradict the witness *Emperor v Jyoti Bhai* 23 B 596, *King Emperor v Kumaramuthu* 20 Cr L J 254 *Bhulal v King Emperor* 11 Cr L J 117=73 O C 7. Only those portions of the statements of witnesses made before the police as have been actually used under s 162 Criminal Procedure Code, to contradict the witness in the manner provided in s 145 Evidence Act, in the course of their cross examination or re-examination are parts of the judicial record and can be treated as evidence in the case; the other parts of these statements cannot be relied upon by the prosecution or the defence in determining the guilt or innocence of the accused *Subhai v Emperor* Ind Rul (1930) Lah 162.

**First Information report—admissibility and value of** The statement of a person recorded by the police as a first information report can be proved to corroborate that person's evidence in Court under the provisions of s 157 of the Evidence Act or to impeach his credit by cross-examination under s 145 of the Act provided that the procedure there prescribed is observed *Thakor Singh v Emperor*, 107 Ind Cas 761=26 Cr L J 277=9 A I C R 716, see also *Hayat v Emperor* 107 Ind Cas 766=29 Cr L J 282=10 Lah L J 389=A I R 1928 Lah 380, *Madari Sikdar v Emperor*, 54 C 30=28 Cr I J 582.

Under section 162, Cr Pro Code, the witness has to be called for the prosecution that it is to say he must be produced in Court and if then the accused applies for copy of his statement before the police recorded in writing the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof subject to the proviso that if the Court is of opinion that any part of such statement is not relevant to the subject matter of the enquiry or trial or that its disclosure to the accused is not essential in the interest of justice

and is expedient in the public interests then the Court shall record such opinion and exclude such part from the copy furnished to the accused. When this copy has been given, any part of the statement, if duly proved can be used in the manner provided by the writing *Ramgulam v Emperor* 7 Pat 205=9 Lah L T 92=107 Ind Cas 817=29 Cr L J 297=A I R 1928 Pat 215, see also *Emperor v Ram Rang*, 109 Ind Cas 231=29 Cr L J 493=A I R 1929 826, *Haroon Singh v Emperor*, 9 Lah 389=108 Ind Cas 167=29 Cr L J 348=A I R 1928 Lah 257 *Emperor v Ahmad*, 106 Ind Cas 350=29 Cr L J 14=A I R 1928 Lah 144. The statements to the police must be definitely put to the witness under s 145 of the Evidence Act, in order to contradict him *Emperor v Ebrahim*, 8 Lah 605=105 Ind Cas 807=28 P L R 649.

Statements made by third parties to the police in the course of their investigation are admissible to contradict under s 145 of the Evidence Act provided the person who made the statement is called as a witness *Amuddy v Emperor* 41 C L J 253=A I R 1927 Cal 17. The first information report against the accused is admissible under s 145 of the Indian Evidence Act and may be relied on by the defence to contradict the informant *Ibid*. But where the attention of the witness was not directed to the statement made by him in the first information report in accordance with the procedure laid down in s 145, that statement cannot be used for the purpose of contradicting the evidence given by him in Court *Mohna v Emperor* 7 Lah L J 59=26 Cr L J 774=86 Ind Cas 406=A I R 1925 Lah 328. A statement made to a police officer could only be made evidence when used for the purpose of cross-examining the person who made it *Mahomed v Emperor*, 89 Ind Cas 202=26 Cr L J 1308, *Badri v Emperor* 6 Pat L T 620, *Emperor v Fithu*, 26 Bom L R 905=A I R 1924 Bom 510.

So far as proceedings before charge are concerned copies of statements to police under s 162 Criminal Procedure Code should not be granted until the stage of cross examination is reached. If that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. Upon a request for a copy being made, the Court must necessarily afford the accused a reasonable opportunity for obtaining it before he is deprived of the opportunity to cross examine upon it *Public Prosecutor v Vedi*, Ind Rul (1930) Mad 301.

Under s 162 a statement made before the investigating officer can be used for the purpose of contradicting such witness when produced at the trial but after strict compliance with the provisions of s 145 of the Evidence Act *Gopi Chand v Emperor*, A I R 1930 Lah 491. See also *Sabhai v Emperor*, A I R 1930 Lah 449.

**Deposition before Magistrate** The statement of a witness which he made before the Magistrate who tried the case cannot be used to discredit the evidence which the witness gave later unless his previous statement has been brought into evidence on cross examination *Sauan v Emperor* 7 Lah L J 339=90 Ind Cas 657=26 Cr L J 1585=26 P L R 811=A I R 1925 Lah 499. Where the Session Judge wishes to use depositions taken before the committing Magistrate he should record them as exhibits in his own Court, and not read them to the jury without reading them to the witness or exhibiting them *Queen Empress v Soma Dahi*, Rat Un Cr C 924=Cr Rg 29 of 1897. Statements recorded under s 288 of the Criminal Procedure Code may be used under s 145 of the Evidence Act, as a basis of cross examination *Queen Empress v Ramdin*, Rat Un Cr C 728=Cr Rg 56 of 1894. The counsel for the prisoner in a Sessions trial, is not entitled to refer to the depositions given before the committing Magistrate for the purposes of contradicting the witnesses in the Sessions trial, without having drawn their attention to the alleged contradiction in their depositions before the committing Magistrate, and without giving them an opportunity for explaining *Emperor v Zauan Rahman* 31 C 142 (F B)=1 Cr L J 86 (F B) overruling *Queen v Hancharan*, 6 C L R 390. The Judge is bound to put to the witnesses, whom he proposes to contradict by their previous statements, the whole or such portion of their depositions as he

**S 146.** intends to rely upon so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth *Queen Empress v Dan Sahai* 7 A 862, see also *Lachmi Lal v King Emperor* 1 P L 1 398, *Queen v Brindaban*, 5 W R Cr 51. No doubt when depositions before the committing Magistrate are admitted in Sessions Court under s 289 they are on the same footing with any other evidence in the case. But s 116 Evidence Act governs the position so far as these statements are used for contradicting the witness either mainly or incidentally. Depositions therefore taken in the committing Magistrate's Court which contradict the evidence given in the Sessions Court, cannot, however be put in without putting them to the witness. *Nanha v Emperor*, A I R 1930 Pat 138 see also *Lachmi Lal v Emperor*, A I R 1922 Pat 10. *Queen Empress v Dan Sahai* 7 A 862.

**When the writing is lost or destroyed.** If it appear from the cross-examination of the witness, or from any antecedent evidence that the writing in question has been lost or destroyed, the provision is not intended, empowering the Judge to require its production will of course become inoperative. In such a case, therefore, it is apprehended that the witness might be cross-examined as to the contents of the paper notwithstanding its non production, and that if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains as to whether the cross-examining party might first interpose evidence out of his own turn to prove the loss or destruction of the document or to show that it was in the hands of the opponent, that he had notice to produce it, and that he refused to do so, and might then cross-examine the witness as to its contents. *Taylor* § 1447 *Green* Ev § 164.

**Admission not put to party.** When an admission is not put to the party making it and the party making it is not examined on it under s 145 the admission is not legal evidence and cannot be used against such party. *Muharram v Barlat*, A I R, 1930 Lah 695, *Safiquddin v Madhub*, A I R 1933 Lah 711.

**116** When a witness is cross examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

Questions lawful in cross examination

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to exonerate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

**Scope of the section.** Sections 132, 146, 147 and 148 together embrace the whole range of questions which can properly be addressed to a witness. *R v Gopal Das* 3 M 271 (278). In section 138 it is stated that cross-examination must relate to relevant facts. In addition to questions on those facts a witness can be asked any questions as regards the facts mentioned in this section. So this section extends the power of cross-examination far beyond the limits of section 138 which confines the cross-examination to relevant facts, including facts in issue. *Marby* Ev p 106. All the questions covered by s 116 are governed by the provisions of ss 148-153. *Ibid* p 107. Sections 148-152 were intended to protect the witness against being improperly cross-examined. *Ibid* p 107. Cross-examination to credit is necessarily irrelevant to any issue in the action its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy, it is most relevant in a case like

the present where everything depends on the Judge's belief or disbelief in the witness's story and to excuse him and actually accept his story on the ground that he was uncomfortable when he was hewn to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow" *Per Sir George Farwell, in Bombay Cotton Manufacturing Co Ltd v Rajah Bahadur Motilal Shrilal* 19 C W N 617=17 Bom L R 445=39 B 386 P C. The statement of a witness being testimonial in their nature it is right to subject them, when admitted to impeachment in the appropriate ways, as it was to require the usual testimonial qualification in advance. *Wigmore* § 884. So "it is no doubt competent for the party to put almost any question, upon cross examination which he may consider important to test the accuracy or veracity of the witness" *Per Redfield J in Stevens v Bearh* 12 Vt 587. "A witness may always be subjected to a strict cross-examination as a test of his accuracy his understanding his integrity, his biases, and his means of judging" *Per Hubbard J in Perkins v Adams* 5 Mete 18. "In cross-examination, an adverse party is usually allowed great latitude of enquiry, limited only by the sound discretion, of the Court, with a view to test the memory, the purity of principle, the skill, the accuracy and judgment of the witness the consistency of his answers with each other and with his present testimony, his life and habits, his feelings towards the parties respectively and the like, to enable the jury to judge of the degree of confidence they may safely place in his testimony" *Per Shaw, C J in Hathaway v Crocker* 7 Mete 266, *Wigmore* § 944.

The purpose of the cross-examination is to test the truthfulness candour, intelligence, memory, bias or interest of the witness, and any question to that end within reason is usually allowed. The fact that a question may tend to disprove the witness is no objection to it, provided it is fairly directed towards testing the veracity of the witness. *McKelvey's Ex* § 29. It is permissible under this section to cross examine a witness as to his credit but when questions have been put to him to impeach his credit and he has answered them the examination of further witnesses to disprove his answers is not allowed. *Manning San v Emperor*, Ind Rul (1930) Rang 91.

**To test his veracity.** A witness may be cross examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross examination to credit, in as much as a large part at any rate of the facts which are relied on for the purpose are facts which touch the credit and good name of the witness. But this term is perhaps somewhat misleading as suggesting that any cross examination is permissible which tends in any way whatever to disparage the character of the witness where is no such cross examination can be legitimate unless it has some reasonable bearing on his credibility that is to say, his means of knowledge, or the accuracy of his memory or his truthfulness. *Wills Ex*, 2nd Ed 323. The general rule as to impeaching the veracity of one's opponent's witnesses was thus stated by Lord Herschell in the case of *Broune v Dunn* 61 The Reports (H L). "I cannot help saying that it seems to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him the circumstances which it is suggested indicate that the story he tells ought not to be believed to argue that he is a witness unworthy of credit. My lord, I have always understood that if you intend to impeach a witness you are bound, whilst in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me that is not only a rule of professional practice in the conduct of a case but it is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross examination of witnesses, and it has been complained of as undue but it seems to me that a cross-examination of a witness which errs in the direction of cases may be far more fair to him than to leave him without

**S 146.** cross examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impech the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached is so manifest that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impech the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

To discover who he is and what is his position etc. As preliminary to the cross examination of a witness as to facts in the case, it is common practice to make inquiry into his relations with the party on whose behalf he was called—business social and family, also to enquire as to his feelings towards the party against whom his testimony has been given. This is permissible in order to place his testimony in a proper light with reference to bias in favour of the one party or prejudice against the other. *McKelvey v Ey* § 259. "The range of external circumstances from which probably bias may be inferred is infinite. Too much refinement in analysing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature or, as it is usually put they should not be too remote. Among the commoner sorts of circumstances are all those involving some intimate family relationship to one of the parties by blood or marriage or illicit intercourse (*Thomas v David* 7 C & P 350), or some such relationship to a person other than a party, who is involved on one or the other side of the litigation or is otherwise prejudiced for or against one of the parties. The relation of employment, present or past, by one of the parties is also usually relevant. The tendency of civil litigation between the witness and the opponent is usually relevant not only as a circumstance tending to create feeling but also as involving conduct expressive of feeling, and while the mere fact of litigation upon a disconnected matter may not necessarily show bias still it is useless to attempt to distinguish and refine for the purpose of exclusion. That the witness is or has been under indictment may have several bearings, (1) if the indictment, present or past, was had by the opponent's procurement or for an injury to him, it is relevant as having tended to excite in the witness a hostile feeling to him. (2) if the indictment was procured by the opponent against another party to the cause, it is relevant as an expression of hostile feelings usable against the opponent as a witness. (3) if it is now pending over a witness for the prosecution or for the accused in a criminal case it is relevant to show the witness interest in testifying favourably for that side. Beyond these common varieties of circumstances, no generalization can be attempted. New circumstances will constantly be presented, as suggestive of personal prejudice and the decision should be left entirely in the hands of the trial Judge." *Wigmore* § 949.

**Character, meaning of.** In explanation to section 55 of the Evidence Act, character is defined to include both reputation and disposition, so far as sections 52, 53, 54 and 55 are concerned. In this section no definition of character is given. "That which induces us to believe" says *Prof Wigmore* "that a witness is or is not likely to be speaking truthfully is usually some circumstance of his actual personalty. Just as his knowledge and his recollection his sanity and maturity of age as bearing on his qualifications for admission are actual qualities somewhere existent in or attributable to him, so also the moral character, the bias, or the corruption which tend to discredit him and affect the probability of his truthfulness are actual qualities, having probative force because conceived of as existent in or attributed to him. It may be necessary, in establishing one or more of these qualities to resort to reputation or other evidence, but the reputation is not the immediate basis of our reference as to his probable truth telling. Reputation is not resorted to at all for the purpose of discovering his



his knowledge, his recollection, and the like, and the fact that it is resorted to for ascertaining his moral disposition must not be allowed to obscure the important truth that the thing immediately important is the actual disposition, and not the reputation " *Wigmore* § 920

**Kind of character, Veracity as the Fundamental Quality** From the point of view of modern psychology, the moral disposition which tends for or against falsehood is an elusive quality. Its intermittent operation in connection with other tendencies and the difficulty of ascertaining its quality and force, make it by no means a feature peculiarly reliable in the diagnosis of testimonial credit. In determining the relevancy of character as affecting the credit to be given to a witness, the first question is what kind of character is relevant? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid in his quality or tendency as to truth telling in general, i. e., his veracity, or as more commonly and more loosely put his character for truth. This must be and is universally conceded to be the immediate basis for inference. Character for truth is always and everywhere admissible. Moreover any other trait or quality, or combination of them is relevant only so far as involving necessarily or probably, the presence or absence of this quality as to truth telling. This leads us to the chief topic of controversy in this department, namely whether bad moral character in general or some other specific bad quality in particular is admissible. The argument for the use of bad general character to discredit a witness is in brief that it necessarily involves an impairment of the truth telling capacity that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than is the latter. *Wigmore* § 922. The argument in favour of the above statement is thus forcefully stated by *Boomer J* in *State v Boswell* 2 Dev 210, "Should a witness whose general character is proverbially bad as to licentiousness and lewdness, who is in his habits regardless of the precepts of religion and reckless of the consequences of vice, be entitled to the same credit as another whose character is without stain, and whose whole life has been marked by piety, virtue and truth? An unprincipled man, although grovelling in other vices which he has long practised, may for selfish purposes artfully conceal the weakness of his character on the score of veracity. Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth? 'The arguments made in answer to these' says *Prof Wigmore* 'are chiefly three (1) that, as a matter of human nature a bad general disposition does not necessarily or commonly involve a lack of veracity and that therefore the former is of little or no bearing probatively, (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part but on personal prejudice and on mere differences of opinion on points of belief or conduct,—a chance of error which is relatively small in the specific enquiry as to the other's notorious untruthfulness and (3) that the incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses." *Wigmore* § 922. It has been truly said by *Zabriske CJ* in *Atwood v Impson*, 20 N J Eq 157, that 'with many telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling roistering or making close bargains. With others, lying is the habit or principle and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. *Wigmore Ibid*. In England for the purposes of proving character by repute, general character is excluded, and character for veracity only is stated. *Wigmore* § 923

**Intimidating and annoying questions by cross examiner** 'An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject cause embarrassment, shame or anger

S 146

in the witness may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value. These are two of the notorious abuses of cross examination and always have been, both in the early period when it was still chiefly used by Judges only, and also since the time of its mature elaboration, more than a century ago, as the greatest weapon of truth ever forged. Those abuses, it is true, are as a whole probably less to day than they formerly were, but they are in many places still not uncommon. They are too frequent when they occur at all. The just denunciations of high minded Judges have sometimes stigmatized these practices as they deserve, and there can be no doubt that the law sanctions the power and establishes the duty of the trial Judge to use a proper discretion to prevent and rebuke them. *Higmore* § 781

"The abuse of cross examination has been widely discussed in England in recent years partly in consequence of the cross examination of a *Mrs Bravo*, whose husband has died by poison. He had lived unhappily with her on account of the attentions of a certain physician. During the inquiry into the circumstances of her husband's death the story of the wife's intrigues was made public through her cross examination. *Sir Charles Russell* who was then regarded as standing at the head of the Bar both in the extent of his business and in his success in Court, and *Eduard Clark* one of Her Majesty's law officers, with a high reputation for ability in jury trials were severely criticised as 'forensic bullies' and complained of as 'lending the authority of their example to the abuse of cross examination to credit which was quickly followed by barristers of inferior positions among whom the practice was spreading of assailing witness with what was not unfairly called a system of innuendoes suggestions and bullying from which sensitive persons recoil. And *Mr Charles Gill* one of the many imitators of *Russell's* domineering style was criticised as 'bettering the instructions of his elders

"The complaint against *Russell* was that by his practices as displayed in the *Osborne* case—robbery of jewels—not only may a man's or a woman's whole past be laid bare to malignant comment and public curiosity, but there is no means afforded by the Courts of showing how the facts really stood or of producing evidence to repel the damaging charges

*Lord Bramwell* in an article published originally in *Nineteenth Century* of February 1892, and republished in legal periodicals all over the world, strongly defends the methods of *Sir Charles Russell* and his imitators. *Lord Bramwell* claimed to speak after an experience of forty seven years practice at the Bar and on the Bench and long acquaintance with the legal profession

"A Judge's sentence for a crime however much repented of, is not the only punishment there is the consequent loss of character in addition, which should confront such a person whenever called to the witness stand. 'Women who carry on illicit intercourse, and whose husband die of poison must not complain at having the veil that ordinarily screens a woman in life from public inquiry rudely torn aside.' It is well for the sake of truth that there should be a wholesome dread of cross-examination. 'It should be understood to be no trivial matter but rather looked upon as a trying ordeal.' None but the sore feel the probe such were some of the arguments of the various upholders of broad license in examinations to credit

"*Lord Chief Justice Colburn* took the opposite view of the question. 'I deeply deplore that members of the Bar so frequently unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France Germany, Holland Belgium, Italy, and a little in Spain, as well as in the United States in Canada and in Ireland, and in no place have I seen witnesses so badly treated and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying named cross-examination in our English Courts. Watch the

ne nor that passes through the frames of many persons as they enter the witness box I remember to have seen so distinguished a man as the late *Sir Benjamin Brodie*, shiver as he entered the witness box I dare say his apprehension amounted to exquisite torture Witnesses are just as necessary for the administration of justice as Judges or jurymen and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the Judges or the jurymen I venture to think that it is the duty of a Judge to allow no question to be put to a witness unless such as are clearly pertinent to the issue before the Court except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds' *Wellman's Art of Cross-examination* pp 175—178

S 147

S 148

#### 147 If any such question relates to a matter relevant to

When witness to be the suit or proceeding, the provisions of section 132 shall apply thereto  
compelled to answer

If such question etc The word such it is pre-umed refers to the last clause of the preceding section and not to the word "any" in the earlier part of that section None but relevant questions can be asked in cross examination (Section 138, clause 2) But relevancy is of a twofold character, it may be directly relevant in its bearing on, elucidating, or disproving the very merits of the points in issue In such a case the witness is not protected from answering notwithstanding the answer may criminate him For section 132 is made applicable to this case There is another kind of relevancy which is collateral to the issue Such is the character of the witness, which is always relevant because if he is dishonest no faith can be put in the story he utters Where questions are put to a witness not for the purpose of proving or disproving the point in issue but exclusively and merely to show what is the character of the witness, the Court is to decide whether the question is to be answered or not This appears to differ from section 32 of Act II of 1855 which drew no distinction between the several kinds of relevancy Under that Act a witness was bound to answer every criminating question while the proviso threw a protection over him from all criminal consequences, other than those attaching to perjury *Noti Ev* 329

#### 148 If any such question relates to a matter not relevant

Court to decide when question shall be asked and when witness compelled to answer  
want to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it In exercising its discretion, the Court shall have regard to the following considerations —

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies
- (2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a

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- slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence
- (4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable

**Scope of the section** Such questions mean the questions referred to in clause (3) of section 146. Where questions are put to a witness not for the purpose of proving or disproving the point in issue, but exclusively and merely to show what is the character of the witness, the Court is to decide whether the question is to be answered or not. Nor is it to decide whether the witness, or expose him to penalty or forfeiture. It is necessary however to make careful provision against his being oppressed or unfairly employed. It would be grievous hardship if every person who came forward to give evidence was liable to the caprice of an unscrupulous cross-examiner to have every detail of his life dragged into the light and to be forced to reply to interrogations which suggest what the interrogator dares not assert, and thus are merely slanders in disguise. To the Judge accordingly is confided the view of testing or injuring the witness's character. When a question is asked merely for this purpose the Court is to decide whether the witness is to be compelled or not to answer it. In deciding whether such a question is to be asked, the Court is to consider firstly, whether the imputation conveyed by it is such as seriously to affect the Court's opinion as to the witness's veracity, or whether from remoteness of time or from its character it would affect it only in a very slight degree, and secondly whether there is great disproportion between the importance of the imputation conveyed and the importance of the evidence given. If the evidence is very unimportant and the imputation on the witness's character very serious the question ought not to be asked. A witness for instance who proves the posting of a letter or the entry of some important item ought not to be asked questions the answers to which might blast his reputation. With a view to such considerations as these it is further provided that the Court may infer from the witness's refusal to answer that the answer if given would be unfavourable to him, but that it is not bound to do so. *Cum Zv pp 65-66*

In *Queen v Gopal Das* 3 W 271 (278), *James C J* said. Irrelevant questions should not be allowed and it may be implied from the limitation in this section (s 132) that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant. To understand this section it is desirable to consider it in connection with the subsequent sections 146, 147, 148 in as much as they together embrace the whole range of questions which can properly be addressed to a witness. By section 133 it is enacted that a witness must be examined and cross-examined as to relevant facts, and by section 146 it is enacted that, in cross-examination he may also be asked any question which may tend to test his veracity or to discover who he is and what is his position in life or to shew his credit by proceeding by character though the answer may tend directly or indirectly to criminate him. If any such question relates to a matter relevant to the suit or proceeding by which I understand no more than was meant by section 147 declared applicable to it the provisions of section 133 are by section 147 declared applicable to it. If the question is as to a matter relevant only, in so far as it affects the credit of

the witness by injuring his character, the Court is by section 148 directed, to decide whether or not the witness is to be compelled to answer, and may (I presume if it does not think fit to compel him to answer) warn the witness that he is not obliged to answer it. The decision of the Court is to whether or not it shall compel an answer is to be governed by the considerations declared in the section. When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant it is relevant only as affecting his credit by injuring his character. In the former case if the question is insisted on, the Court will compel the witness to answer it, in the latter, it will determine whether or not, in reference to the rule which is to guide its decision it should or should not compel the witness to answer.

"If the term 'compelled' in the proviso to section 132 and 'compel' in section 148 do not refer to the Court, but to the obligation of the law then the witness is left without protection if the Court arrives at an erroneous conclusion as to whether or not the question is as to a matter which the witness is bound to answer, or if he has incautiously answered an irrelevant question. On the other hand, if the term refers to the constraint put upon the witness by the authority before whom he is examined, he is protected whether that authority has decided rightly or wrongly that the question is such as the witness is bound to answer. If it had been the intention of the Legislature to protect the witness whenever he was, or believed himself to be constrained by law to give an answer criminating himself, then this intention could clearly have been expressed in very much more simple language, and if unlearned persons, not assisted by counsel, are not to be placed in a worse position than persons who are acquainted with the law or have the benefit of professional assistance I can suggest no reason why the protection should not have been extended to all answers whether relevant or irrelevant. The term of section 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give. I am led to the same conclusion by a consideration of the alteration that was called for in the English Law of Evidence, which the Indian Legislature appear to have had in view. Except where otherwise provided by special enactment, it was a rule of English Law that no witness was bound to give evidence which would criminate himself and if a witness objected on this ground to answer a question put to him and the Court considered the objection well founded, it excused him from answering it, on the other hand, if the Court improperly refused to excuse the witness, and compelled him to answer his answer could not be used against him to support a criminal charge except a charge of having given false evidence by his answer."

In the same case *Muthusami Appai J* at p 235 said "Section, 148, which confers upon a witness the privilege of not answering a criminating question that is material only in so far as it injures his character, and thereby affects his credit, expressly gives power to the Judge to warn the witness that he need not criminate himself until it is decided that the question must be answered."

Clause (2)—So remote "On analysing the nature of the argument from witness's character, we find it to be really this. The moral qualities of the person who is now speaking to us from the stand can throw some light on the probability of his truthfulness, because as he speaks they will influence him to be sincere or the reverse, let us therefore inquire into his quality in that respect. Obviously, our argument, because it believes in the present influence of the testifier's disposition upon his testimony, expects and requires us to exhibit to the tribunal his present character. This much seems indisputable. But it is equally obvious that the nature of the witness's character at the precise moment of his utterance is practically not ascertainable directly. We may have to go back only an hour or a day or a week, but we are at least going back some space of time when we call for either personal knowledge (of another witness) or reputation, which cannot possibly carry the proof down to the precise moment of utterance and, besides this the character of a former period, more or less distant, always enters into every estimate (reputed or individual) of character, even though it may be expressly predicated as of the present

S 149 moment Nevertheless, there is nothing improper, in this resorting, in put  
 S 150 or entirely to the character of a prior time We are simply adding another  
 S 151 step to the argument for while first using present character to throw light on  
 the probability of stating the truth, we then have this present character to  
 prove in its turn and we argue from prior character to the probability of its  
 persistence at the time of utterance The second step of the argument is an  
 entirely legitimate one, it is merely the ordinary argument from a past condi-  
 tion, having features of permanency, to the continuance of the condition at a  
 later time *Higmore* § 927 But questions regarding the character of a  
 witness in a very remote period should be allowed to be put by the Judge In  
*Emperor v Ghulam Mustafa* 26 A 371 the Court at p 374 said We think that  
 looking to the applicant's subsequent history it is to be regretted that a Magistrate  
 allowed such a stale charge to be dragged to light and that he would have  
 shown a wiser discretion had he, according to the principle embodied in section  
 148 of the Evidence Act refused to allow the question to be put on the ground  
 that it related to a matter which had happened thirty years before and was so  
 remote in time that it ought not to influence his decision as to the fitness of the  
 surety

**149** No such question as is referred to in section 148  
 Question not to be asked without reasonable grounds ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded

#### Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dākut This is a reasonable ground for asking the witness whether he is a dākut

(b) A pleader is informed by a person in Court that an important witness is a dākut, the informant on being questioned by the pleader gives satisfactory reasons for his statement This is a reasonable ground for asking the witness whether he is a dākut

(c) A witness of whom nothing whatever is known, is asked at random whether he is a dākut There are here no reasonable grounds for the question

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living gives unsatisfactory answers This may be a reasonable ground for asking him if he is a dākut

**150** If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession

**151** The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed

152 The Court shall forbid any question which appears S 152

Questions intended to it to be intended to insult or annoy, to insult or annoy or which, though proper in itself, appears to the Court needlessly offensive in form

**Questions in cross examination** No question is referred to in section 148 of the Indian Evidence Act ought to be asked unless the person asking it has some reasonable grounds for supposing the imputation which it conveys to be true. Barristers, attorneys and other professional persons offending against this rule are liable to be reported to the High Court or other authority to which they are subordinate. *Cun Eit* 66. The illustrations to s 149 show that the reasonable grounds which justify such questions may be much slighter than would justify a man in making an imputation under other circumstances. A barrister who is told a discrediting fact by an attorney or a villain or a pleader who hears such a fact from a person who appears to know about it is justified in so far as assuming its truth as to question a witness about it and he may even do so with no other justification than the witness's unsatisfactory reply. *Cun Eit* 381.

According to the common Law of England, "neither party, witness, counsel, jury, or Judge can be put to answer civilly or criminally, for words spoken in office." Per Lord Mansfield in *R v Skinner* 1 Lofft 55. In *Hodgson v Scarlett* 1 B & B 232, it was held by Lord Ellenborough C J that an action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue. In *Kennedy v Brown*, 3 L J C P N S 137 *Earle C J* said: "The advocate is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of human soul. His words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him in every faculty and privilege and power in order that he may attain that client's rights together with duty to the Court and himself, binding him to guard against the abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right." See also *Daulins v Lord Rokby* L R 8 Q B 255. *Muster v Lamb*, 11 Q B D 558. Section 150 refers to questions put in cross examination by any barrister, pleader, villain or attorney of the class referred to in s 148 and gives the Court the power if such Court is of opinion that such question was asked without reasonable grounds to report the circumstances to the High Court, but it limits the scope of the section to questions asked under the circumstances mentioned in section 148. *Sullivan v Norton*, 10 M 28 (35).

When Counsel in the course of cross examination makes a charge against a witness or third parties the Court is entitled to ask whether he made the charge on instruction and if so on whose. Instructions to Counsel are privileged only in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. The Court's disciplinary power over advocates in relation to questions put in cross-examination is not confined to questions reflecting on the witness personally, but extends to questions reflecting on third parties as well. It is not sufficient for Counsel in such cases even to plead instructions; they have a responsibility in the matter and are not justified in making charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward. *Donald Weston v Peary Mohan* 18 C W N 185=40 C 598.

"The bill is originally drawn up provided, in substance that no person should be asked a question which reflected on his character as to matters irrelevant to the case before the Court, without instructions and if the Court considered the question improper it might require the production of the instructions, and the giving of such instructions should be an act of defamation subject, of course, to the various rules about defamation laid down in the Penal

**S 152.** Code To ask such questions without instruction, was to be a contempt of Court in the person asking them, but was not to be defamation. This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposal were I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable, in the next place that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient, and in the third place—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind that it is of the greatest importance that the character of witnesses should be open to full inquiry. These reasons satisfied the committee, and myself amongst the rest that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. *Vide the Speech of Sir James Fitzjames Stephen in the Council.* Accordingly the new sections 149 to 152 were substituted for the old ones. As regards these sections he said, 'The object of these sections is to lay down in the most distinct manner, the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principle according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think the sections as far as their substance is concerned speak for themselves and that they will be admitted to be sound by all honourable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill since it appeared in the Gazette in its amended form about a month ago I suppose that alterations made in the Bill have removed the main objections made to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up.' *Ibid*

During the examination of the defendant by plaintiff a question was put whether she was made pregnant by a certain person. The question was objected to but the plaintiff contended that it was relevant, his case being that the witness did not inherit the property by reason of her unchastity during the life time of her husband. If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his life time, then the question would be relevant. It however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of s 146 and ss 148 to 152 of the Evidence Act. *Subala Das v. Indra Kumar*, 1923 Cal 315, see also *Panda v. Abdul*, 65 Ind Cas 693=5 N L J 138.

Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness the Court has complete dominion over them and may forbid such questions even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed the Court has no jurisdiction to forbid such questions though they may be indecent or scandalous. Advocates have ample discretion in the conduct of cases of which they are in charge and the Court cannot better their discretion by insisting that their clients should be put to this witness or that. *Mahomed v. Emperor*, 52 Ind Cas 51=20 Cr L J 666. When a question in cross-examination reflects not on the witness but on the third party, s 150 of the Evidence Act, which must be referred back to s 146 can have no application. *Pearry Mohan v. Donald Watson* 9 Ind Cas 509. There is nothing in the provisions of the Evidence Act to prevent the prosecution of a person for defamation, if he puts defamatory



questions, not in good faith, but knowing that the imputation they convey is false and with the sole object of defaming the person questioned although such question may be relevant as shaking the credit of the witness 2 Weir 819

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**153** When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but, if he answers falsely, he may afterwards be charged with giving false evidence

*Exception 1*—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction

*Exception 2*—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted

#### Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it. Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

**Principle** It is obvious that questions asked merely to discredit a witness, introduce matter altogether foreign to the enquiry, and that if controversy about the matter so introduced were allowed the Court would be occupied with deciding, not the merits of the case but the merits of the witness, and thus any suit might be indefinitely protracted. *Cun Ev* p 66. In *Attorney General v Hutch Coel* 1 Exch 194 *Alderson B* said: "When the question is not relevant, strictly speaking to the issue, but tending to contradict the witness, his answer must be taken (although it tends to show that he in that particular instance speaks falsely and although it is (thus) not altogether material to the issue) for the sake of the general public convenience, for great inconvenience would follow from a continual course of those sorts of cross-examinations which would be let in in the case of a witness being called for the purpose of contradiction. In that case *Rolf B* said: 'The laws of evidence on this subject as to what ought or what ought not to be received, must be considered as founded on

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a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible enquiry as to the truth of the statements made. But I do not see how that could be, in fact, mankind find it to be impossible. Therefore some line must be drawn." "Any other rule would tend to divert the attention of the jury from the real enquiry before them, whether the witness was entitled to credit in the evidence he had given, to the enquiry whether he had told the truth upon some collateral question and the danger encountered that, upon this collateral issue raised on the trial, evidence may become proper and so be let in, which would be illegal upon the trial of the issue between the real parties to the cause and such illegal testimony may make an improper impression upon the minds of the jury not with standing any instruction of the Court as to the proper hearing thereof." *Higmore* § 1002. It is therefore, provided that whenever a witness has answered a question asked merely for the purpose of discrediting him no evidence shall be given in the case to contradict his answer the only remedy if he answers falsely, is to prosecute him afterwards for giving false evidence. In this rule, however there are two exceptions, allowed perhaps because they are matters which admit of clear and easy proof. If a witness is asked whether he has been previously convicted and denies it, the previous conviction may be proved and if he is asked about and denies any fact tending to impeach his impartiality, as, are you not the plaintiff's brother? Or have you not received a bribe from the defendant? the fact impeaching his impartiality may be proved. *Cun Eo* 67. This general rule excluding evidence to contradict a witness on matters not relevant to the issue, as well as the exceptions to it, are based on these considerations that a witness cannot justly be expected to come into Court prepared with evidence as to every act and incident of his life (which would be necessary if evidence could be given against him thereon) and that it would indefinitely prolong the trial to allow evidence to be given on both sides as to such collateral matters, but that on the other hand a witness ought to come prepared to prove the purity and integrity of his motives in coming to give evidence and that he is never been convicted. *Att Gen v Hitchcock*, 1 Ex 91, *Wills* *Ex* 2nd Ed 326.

**Scope of the section.** Where a fact which has a direct bearing on the issue is denied by a witness, it may of course, be proved *alimunde*. See illustration (c) but where the fact inquired after is collateral to the issue,—as, for instance the character of a witness—counsel must be content with the answer which the witness chooses to give him. If he denies the imputation, the answer is conclusive for the purposes of the suit, see illustrations (a) & (b). The matter cannot be carried further at the trial except in the two cases provided by this section. The only redress which a party has, is to charge the witness with perjury and try him for it. To this rule there are however two exceptions. *Not* *Ex* p 332. So the right to cross examine to credit is subject to this rule, that with two exceptions the answers of the witness as to matters not relevant to the issue are conclusive in this sense that they cannot be contradicted by evidence in chief on the other side. *Baker v Baker*, 32 L J P D & A 145. However untrue they may be, they cannot be treated as if their truth or falsity were an issue in the cause. *Wills* *Ex* 2nd Ed 325. The rejection of the contradictory testimony may indeed some times exclude the truth, but this evil, acknowledged though it be, is as nothing compared with the inconvenience that must arise were a contrary rule to prevail. *Att Gen v Hitchcock* 1 Ex R 93, 94, 103, 104. The case of *Alcock v The Royal Exchange Insurance Company*, 13 B 292, forms no real exception to the above rule. There an action was brought by a ship owner against under writers on a policy of insurance and the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness by the plaintiff, and, on cross-examination denied that previous to the voyage insured against he had been an habitual drunkard. The defendants thereupon called witnesses to

establish that fact, and the Court held that their evidence was clearly admissible, as tending to show that the captain was not likely to have exercised a good judgment in reference to the abandonment, and that consequently the judgment actually exercised by him was not entitled to any respect from the jury *Taylor* § 1439 Sections 153 and 155 of the Evidence Act must be strictly construed and narrowly interpreted if the cases governed by the Act are to be spared the risk in many suits of prosecuting on most perfect material issues, which have no bearing upon that really in contest between the parties *Bhogilal v Royal Insurance Co*, 6 Rang 142 = 26 A L J 377 = 32 C W N 593 = 108 Ind, Cas 1 = 47 C L J 550 = 30 Bom L R 818 (P C) This section does not go far beyond, if it goes at all, the case of *Att Gen v Hutcheon*, 1 Ex. 91, on which it is based.

**Evidence to contradict relevant facts** Where witnesses have been examined by the prosecution to state that they saw the accused at a particular place at a particular time, held that evidence of other witnesses could be let in to prove that the former witnesses could not have seen the accused as stated by them. Such evidence is admissible under ss 5, 11, 153 of the Evidence Act. It is not to impeach the credit of witnesses that such evidence is let in, but to contradict evidence as to relevant facts *Reg v Sahharam* 11 B H C 166. Where on the denial by the complainant in a prosecution for forgery of ever having executed a pro-note, evidence that he has executed a pro note similar to the one in question in the charge or even that a judgment had been obtained on another note is inadmissible under s 43 or s 153 of the Evidence Act *Reg v Prabhudas*, 11 B H C 90. "It is frequently a nice question whether a particular matter is one upon which a witness may be contradicted by other witnesses. The reason of the rule which restricts the right to do so is, that it is an object of great importance to confine the attention of the jury as much as possible to the specific issues. Without some rule, many collateral questions of fact might be raised in the course of a long trial, and the specific questions to be determined be lost sight of. At the same time it is desirable that any evidence should be admitted which may assist in determining the respective value of conflicting testimony. And where the trial is by a Judge and not by a jury, there is probably less reason for the rule. We think the rule is well stated in *Greenleaf on Evidence* section 52, as excluding all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. According to *Pollock, C B*, the test is whether the matter is one which the party proposing to contradict would have been able himself to prove in evidence. *Attorney General v Hutcheon*, 1 Exch 91, 99." *Per Couch C J* in *Kazi Gulam v H H Aga Khan*, 6 B H C O C J 93(96).

**Exception I** At the common law a witness might be cross-examined as to whether he had been convicted of any felony or misdemeanour, but if he denied it he could not be contradicted, unless the commission of the offence was relevant to the issue. This state of law was altered as to civil cases by section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict C 125), and afterwards as to both civil and criminal cases by the statute 28 Vict C 18, of which section 6, enacts as follows — "A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted or by the Deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction without proof of the signature or official character of the person appearing to have signed the same." Although a witness's conviction for a felony or misdemeanour is not considered necessary, relevant to the issue, yet the effect of the statute is now to admit evidence of the conviction in all cases where it is admissible to cross-examine the witness to his credit with regard to it. *Wood v Simfield*, 49 L J C P 696, *Wills Ev*,

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2nd Ed 341 Similarly in *R v Watson*, 2 Stark 149, Lord Ellenborough observed "For the purpose of ascertaining the credit due to witnesses, the Courts indulge free cross examination, but when a crime is imputed to a witness, of which he may be convicted by due course of law, the Court knows of but one medium of proof, the record of conviction." In the above named case, it was argued for the defendant "that a man might be able to prove that a witness was not to be believed upon oath, by showing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction, that since it might be proved indirectly that the witness is not credible upon oath, it was too strong a proposition to say that the same conclusion might not be proved directly by actual proof of accumulated crimes which demonstrated the infamy of the witness that the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out, a witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a Court of justice." But Lord Ellenborough, L C J said "This is so clear a point and so entirely without a precedent that it would be a waste of time to call for a reply. The Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge, there would be no possibility of a fair and competent trial upon the subject and therefore it is never done." In the same case Bayley J said "If this evidence were admissible, it would be impossible to proceed in the administration of justice, because on every trial the Court would have to try one hundred different issues, and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. The rule is that a party against whom a witness is called may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him, for although every man may be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice. If the witness were apprised of the charges he might come prepared with evidence to show that, although there was *prima facie* evidence against him, they were in reality unfounded."

Similarly in *Att Gen v Hitchcock* 1 Exch 103 Alderson B said "Perhaps it ought to be received, but for the inconvenience that would arise from the witness being called upon to answer particular acts of his life which he might have been able to explain if he had reasonable notice to do so and to have shown that all the acts of his life had been perfectly correct and pure although other witnesses were called to prove the contrary. The reason why the party is obliged to take the answer of a witness is that if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross examined as to their conduct, such a course would be productive of endless collateral issues. Suppose for instance witness A is accused of having committed some offence, witness B is called to prove it, when on B's cross-examination he is asked whether he has not made some statement, to prove which witness C is called, so that it would be necessary to try all those issues before one step could be obtained towards the adjudication of the particular case before the Court. On the contrary, if the answer be taken as given, if the witness speaks falsely he may be indicted for perjury." So this kind of evidence is excluded on the ground of auxiliary policy: (1) the reason of confusion of issues and (2) the reason of unfair surprise. *Wigmore* § 979

But when the extrinsic testimony is in the shape of a record of a judgment of conviction for crime, both the above reasons cease to operate (a) there is no risk of confusion of issues, first because the number of acts of misconduct provable in this way is practically small and next, because the judgment cannot be reopened and no new issues (other than the occasional ones occurring in the process of authentication of the record) are raised thereby, (2) there is no danger of unfair surprise—not, however, because (as it sometimes said) the witness well knows whether he was ever convicted, this assumes the very thing

in the controversy, namely, that he is guilty, but because the judgment is conclusive and cannot be attacked, and therefore the witness could not use his supporting witnesses to prove his innocence, even if he had them in Court. It has therefore been universally acknowledged that proof of a crime by record of a judgment of conviction may be made, not because an exception is carved out of the rule, but because the reason of the rule does not apply. *Wigmore* § 980

A finger print expert was called as a witness who compared certain finger prints of the accused taken in Court with some other finger prints on a paper which contained a record of certain convictions which purported to be the convictions of the accused and pronounced them to be similar. Held that the previous convictions were not properly proved. *Ramdas v King Emperor* 21 C W N 469=39 Ind Cas 302

Whether subsequent pardon affects the admissibility of such evidence. A pardon does not remove the admissibility of the original judgment for the purposes of impeachment, for (unless otherwise expressly declared therein) a pardon does not imply a finding of innocence of the person convicted. *Mr Wingington* in arguing in *Crosby v Trial*, 12 How St Tr 1296 said "Though the offence was taken away by the pardon yet the credit of the party must be diminished thereby, and no pardon nor oblivion can so far take away consequences of a crime (though it may pardon the punishment) as to make a man a new creature, as long as the old lump and the presumption of the old malicious spirit still remains." "A pardon is not presumed to be granted on the ground of innocence or total reformation. It removes the disability but does not change the common law principle that the conviction of an infamous offence is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the Government." *Per Doe J* in *Curtis v Cochran*, 50 N H 242, *Wigmore* § 980

**Exception 2** This exception refers to matters which are easily susceptible of proof and strikes at the very root of the witness's trustworthiness. *Cun Ev* 333 Whether this can be done was the subject of much doubt in England. The legislature has taken the view of the matter as laid down in *Att Gen v Hildcock*, 1 Exch 91 (99). In that case *Pollock C B* said "My view has always been that the test whether the matter is collateral or not is this. If the answer of witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give in evidence then it is a matter on which you may contradict him. I think the expression 'as to any matters connected with the subject of inquiry' is far too vague and loose to be the foundation of any judicial decision. And I may say I am not at all prepared to adopt the proposition in those general terms that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way would contradict a part of the witness's testimony, and if it is neither the one nor the other of these it is collateral to though in some sense it may be considered as connected with the subject of the inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction as directly affecting the story of the witness touching the issue before the jury and those matters which affect the motives, temper and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as

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to what he said—not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness or his connection with either of the parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue." In the same case *Alderson B* said "The question is this, can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him of any fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue. The witness may also be asked as to his state of equal mind or impartiality between the two contending parties,—questions which could have a tendency to show that the whole of his statement is to be taken with a qualification and that such a statement ought really to be laid out of the case for want of impartiality, [and these answers may be contradicted]. Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person, the circumstance of a witness having offered or accepted a bribe shows that he is not equal and impartial. But with these exceptions I am not aware that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral." *Wigmore* § 1020

**Bias, corruption, etc.** Particular circumstances and expressions indicating bias are provable by extrinsic testimony; they are therefore also provable in contradiction. *R v Burke*, 8 Cox Cr C 49, *Wigmore* § 1005. In *Thomas v David*, 7 C & P 350, *Coleridge J* said "If the question had been whether the witness had walked the streets as a common prostitute I think that that would have been collateral to the issue, and that had the witness denied such a charge she would not have been contradicted. But here, the question is whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery just in the same way as if she had been asked if she was the sister or daughter of the plaintiff and had denied that."

A party may call evidence to show that a witness on the other side has given his evidence in the particular case from some corrupt or indirect motive, as bribery, malice or revenge, or has given it under the influence of some bias in favour of or against, one of the parties whereby suspicion is cast on the honesty of his evidence. Thus it has been decided that evidence may be called to prove that a witness has accepted a bribe, or has offered to bribe others to give evidence (*Lord Stafford's Case* 7 How St Tr 1400) but not that he has been offered a bribe as this is of no importance if the bribe was not accepted, in the words of *Pollock C B* "It is no disparagement to a man that a bribe is offered to him, it may be a disparagement to the person who makes the offer" (*Mt Gent v Hitchcock* 1 Ex 91 103). But a mere attempt by a witness to dissuade another from giving evidence on the other side does not come within the rule *Harris v Tippet* 2 Camp 637, *Wills Et* 2nd Ed p 337.

The distinction made between cases coming within the section and those within Exception 2 is exemplified in *Yewin's case* *R v Yewin*, 2 Camp 638 n. "One Yewin was indicted for stealing wheat. The principal witness against him was a boy of the name of Thomas his apprentice. *Lawrence J* allowed the prisoner's Counsel to ask Thomas in cross examination whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged on him and would soon fire him in Monmouth goal? He denied both. The prisoner's Counsel then proposed to prove, that he had been charged with robbing his master and had spoken the words imputed to him. *Lawrence J* ruled that his answer must be taken as to the former but that, as the words were material to the guilt or innocent of the prisoner evidence might be adduced that they were spoken by the witness. Note to *Harris v Tippet* 2 Camp 638, *Cun Ev* 384, *Wills Et* 2nd Ed 388.

It is allowable to ask a witness in what manner he stands affected towards the opposite party in the cause and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an

unprejudiced mind and whether he has not used expressions imputing that he would be revenged on some one, or that he could give such evidence as might dispose of the cause in one way or the other, and if he denies it, evidence may be given as to what he said, not with the view of having a direct effect but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. *Att Gen v Hitchcock*, 1 Ex 93. In an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff who was one of the attesting witnesses to the note, was asked on cross examination whether she did not constantly sleep in the same bed with the plaintiff which she denied. *Coleridge J* held that a witness might be called by the defendant to contradict her, as the question was whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with the plaintiff to support a forgery, just in the same way as if she had been asked if she was the sister or daughter of the plaintiff and had denied that. But if the question had been whether the witness had denied that the witness had walked the streets as a common prostitute, that would have been a collateral issue, and if she had denied it she could not have been contradicted. *Thomas v David*, 7 C & P 550, *Melhuish v Collier* 15 Q B 8-3, Russ Cr 2319.

**154** The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party

Question by party to his own witness

**Principle** The examination of an adverse party some times becomes necessary in which case, it need not be confined to the limits of the ordinary direct examination. As such a witness will not be disposed to state anything favourable to his opponent, if he can help it it is allowable to elicit the facts desired by the use of leading questions. In fact the examination under the circumstances partakes of the character of a cross-examination. The relaxation of the rule is usually carried to the extent of allowing such questions in any case where the witness appears to be generally hostile, whether or not necessary witness and whether or not he was known to be hostile when called. A witness who on the stand gives his testimony in a manner at variance with his statement of the facts made before trial to the party calling him becomes a hostile witness, and though not a necessary witness, if the party was justified in calling him, and has done so in good faith, he will not be bound to adhere to the ordinary rules of direct examination. And even in the examination of a friendly witness, where he seems to have forgotten some material point it may be suggested to his mind in the form of a leading question. *McLachy v Dr* § 250.

**Scope of the section** A party is not bound to accept the testimony of his own witness as correct. It is very clear that a party producing a witness may prove the truth of material facts by any other competent evidence even though the effect of such testimony is to directly contradict his own witness. "and this not only when it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief." *Green v Dr* § 443. This is now recognized as the settled law, without reference to whether the party is taken by surprise or not. "A party is not obliged to receive as unimpeachable truth everything which a witness previously called by him may swear to. If the witness has been false or mistaken in his testimony, he (the party calling him) may prove the truth by others." This common sense rule allows a party whose witness may have answered many questions satisfactorily, and some unimpeachably to bring other evidence better to prove the latter. There is no impeachment in such a case. It is merely that other evidence is brought for being used upon those particular points. It happens frequently that two witnesses to the same accident will give similar evidence as to date, time and place of the occurrence and yet differ entirely as to the mode in which it occurred. A party

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is not bound by all the statements of a witness called by him if adverse, even though no other witnesses are called to contradict him, the party may rely on part of such testimony, although in other parts the witness denies the facts sought to be proved. It has been well said that, if the other rules should prevail, "every one would be at the mercy of his own witness, and if the first witness sworn should swear against him he would lose the testimony of all the rest. This would be a perversion of justice." *Small v. Gregory*, 37 Mich 500. The right to contradict the party's own witness does not extend to every fact testified to by the witness but is limited to those which are material to the issue. The mistaken or false answer of a witness respecting a fact material to be shown at the trial of a cause may always be contradicted by other proof and which may be offered by either party, but it is otherwise as to statements by the witness of matters merely collateral. As to these the party calling the witness and making the enquiry is bound. *Burr Jones* § 857.

But the rule as regards a witness called by a party, who turns hostile is quite different. With the permission of the Court he can be cross examined. Leading questions can be put to him and he can be impeached like witness called by the adversary. The discretion of the Judge under this section is absolute and not subject to review by the Appellate Court. *Rice v. Howard*, 16 B D Q 681, *Price v. Manning*, 42 Ch D 373.

**English law as regards hostile witness.** It was an established rule of common law that a party should not be allowed to give general evidence to discredit his own witness, i.e., general evidence that he is unworthy of belief on his oath. By calling a witness a party represents him to the Court as worthy of credit or at least not so infamous as to be wholly unworthy of it, and if he afterwards attack his general character for veracity, this is not only *malafides* towards the tribunal, but, say the books it "would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him with the means in his hand of destroying his credit if he spoke against him." B N P 297, 2 *Phill Ev* 525 10th Ed, *Best Ev* § 645. A party might however, discredit his own witness collaterally by adducing evidence to show that the evidence which he gave was untrue in fact. 2 *Phill Ev* 10th Ed 526. This does not raise the slightest presumption of *malafides*, and it would be in the highest degree unjust and absurd if parties were bound by the unfavourable statements of witnesses with whom they may have no privy, and who are frequently called by them from pure necessity. But whether it was competent for a party to show that his own witness had made statements out of Court inconsistent with the evidence which he had given in it was an unsettled point, on which however the weight of authority was in favour of the negative. *Taylor 1st Ed* § 1049. 2 *Phill Ev* 528. *Melhuish v. Collier* 15 Q. B. 878. On the one hand it was urged that this falls within the principle of the general rule, that a party must not be allowed directly to discredit his own witness. *Ph & Im Ev* 904. That to admit proof of contradictory statements would tend to multiply issues that it would enable a party to get the naked statement of a witness before the jury operating in fact as substantive evidence (*Taylor Ev* § 1048 1st Ed) that there would be some danger of collusion and dishonest contrivance in as much as a witness might be induced to make a statement out of Court, for the purpose of its being reserved and afterwards used to contradict him, and that the jury might regard such a statement as substantive evidence in the cause. Moreover the use of oaths and other sanctions of truth is to extract facts which parties might be willing to conceal, and the allowing a witness to be thus contradicted holds out an inducement to him to maintain by perjury in Court any false and hasty statements he may have made out of it. *Best Ev* § 615. The following reasoning was put forward on the other side. "It may be argued the evidence is not open to the objection that the party would thus discredit his own witness by general testimony that although a party who calls a person of bad character as witness, knowing him to be such ought not to be allowed to defeat his testimony because it turns out unfavourable to him by direct proof of general bad character yet it is only just that he should be permitted to show if he can, that the evidence has taken him by surprise, and is contrary to the examination



of the witness, preparatory to the trial, that this course is necessary, as a security against the contrivance of an artful witness who otherwise might recommend himself to a opposite party by the promise of favourable evidence (being really in the interest of the party), and afterwards by hostile evidence ruin his cause, that the rule with the above exception as to offering contradictory evidence ought to be the same, whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases, that, as to the supposed danger of collusion it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of the litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings that the ends of justice are best attained by allowing a free and ample scope for scrutinising evidence and estimating its real value, and that in the administration of criminal justice more especially, the exclusion of the proof of contradictory statements might be attended with the worst consequences. *Ph & Am Ev* 905

In this state of the law the 17 & 18 Vict C 125, s 22, was passed,—which was originally applicable only to Civil Courts, but has since been extended (38 & 39 Vict C 18, ss 1 3) to all Courts of judicature as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence, and which enacts that "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by the leave of the Judge prove that he made at other times a statement inconsistent with his present testimony, but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he had made such statement." The term adverse in this section must be understood in the sense of the witness exhibiting a hostile mind towards the party calling him, and not merely in the sense that his testimony turns out to be unfavourable to that party. *Greenough v Eccles*, 5 C B N S 786, *best Ev* § 645

**Adverse witness—meaning of** In *Dear v Knight*, 1 F & F 433 *Earle J* appears to have regarded a witness 'adverse' simply because he made a statement contrary to what he was called to prove. See also *Pound v Wilson* 4 F & F 301 *Taylor* § 1426 In *Greenough v Eccles*, 5 C B N S 786=28 L J C P 160 *Williams and Willes JJ* interpreted "adverse as hostile, in distinction from mere unfavourable. So the conditions for the use of the term are (1) that the Judge shall consider him hostile and (2) that the Judge shall also give leave, which he need not do even though the witness is hostile, *Cockburn CJ* not altogether assenting. In *Coles v Coles* L R 1 P & D 70, *Sir J P Wilde* said An adverse witness is one who does not give in evidence what the party calling him wished him to give. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. See also *Luchman v Radhacharan*, 49 C 93 In *Cresswell v Jackson* 4 F & F 3, *Cockburn CJ* construed 'adverse' as merely different and unfavourable. See also *Pound v Wilson*, 4 F & F 301 *Faulner v Brune* 1 F and F 254, *Martin v Ins Co* 1 F & F 505, *Arustell v Alexander*, 16 L T R N S 840 In *Rice v Howard*, L R 16 Q B D 681 *Grove and Stephen JJ* treated 'adverse' as equivalent to hostile. In *Sunderia v Ranees Dass*, 24 C W N 560 (1899), *Mr Justice Mukerjee* said "A witness is considered adverse when, in the opinion of the Judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof, in other words, as *Wilde J* remarked in *Coles v Coles*, L R, 1 P & M 70, 71 a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth, and secondly, as *Lord Campbell CJ* observed in *Faulner v Brune* 1 F & F 254, when a witness is treated as hostile and cross-examined by the party calling him this must be done to discredit the witness altogether and not merely to get rid of part of his testimony." A witness who is called adversely by the other party is a hostile witness. *Parmeshwar v Emperor*, 31 Ind C 1926 Pat 316 see also *Buzor v Emperor*, 3 Pat 1, 3 119=11 Ind

- S 154.** A hostile witness may be defined as one who from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements by him) shows that he is not desirous of telling the truth to the Court. *Panchanon v Emperor*, A I R, 1930 Cal. 276

**Hostile witness—leading questions** A party is not allowed to put leading questions to one's own witness because the rule prevents the supplying of suggestions of false testimony to a witness who is disposed to take advantage of them. He is assumed to be friendly to the party putting him on the stand, but this is only a provisional assumption, and, accordingly, if he turns out to be hostile to the party the prohibition ceases, and conversely if on cross-examination by the other party to whom he has been assumed to be hostile he turns out to be a friendly party the prohibition equally applies on cross-examination. Thus the test for the prohibition of leading questions is ultimately and essentially independent of the superficial circumstance whether originally one party or the other put him on the stand. *Wigmore* § 909. *Mc Williams*, arguing in *Connings-mart's Trial*, 9 How., St Tr 1 (27) said: "There is a great deal of difference, I find, where you examine a man with the bar and where you examine him against the bar. Where you find it difficult to answer, you will pump him with questions and cross-interrogate him to sift out the truth." If *D Evans* to his *Notes to Pothier* said: "His unwillingness is commonly to be decided by the Judge, according to his impression of demeanour of the witness, upon the trial. The situation of the witness, and the inducements which he may have for withholding a fair account are also very proper circumstances to be taken into account in forming his decision. A son will not be very forward in stating the misconduct of his father of which he has been the only witness, a servant will not, in an action against his master, be very ready to acknowledge the negligence committed by himself."

In *State v Banner*, 64 Me 779 *Appleton C J*, said: "If the witness is from any cause adverse to the party calling him, the same reason which authorizes and sanctions cross examination more or less rigorous, equally requires it when the party finds that the witness whom the necessities of his case have compelled him to call is adverse in feeling is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be if the witness is friendly, to remove uncertainty and indistinctness and to give fullness and clearness doubly important is it, if the witness be dishonest and adverse to extract from reluctant lips facts concealed from sympathy secreted from interest, or withheld from dishonesty. Cross examination may be as necessary to elicit the truth from one's own as from one's opponent's witness. So leading questions are allowable in case of witnesses who are hostile biassed or interested by their sympathies with the opponent's cause. *Clarl v Saffery Ry & Moo* 126, *R v Chapman* 8 C & P 559 *R v Bull*, 8 C & P 745 *Ohlsm v Terreo* L R 10 Ch 129, see also *Alexander v Gibson* 2 Cumb 556, *Bradly v Ricardo* 8 Bing 57, *Friendlauder London Assurance Co*, 4 B & Ad 193. This rule is applicable in cases of witnesses unwilling for any other reason to tell all they may know. *Paulin v Moon* 7 C & P 409 *R v Murphy* 8 C & P 306, *Wigmore* § 774 *R v Ball* 8 C & P 745. Putting leading questions to one's own witness with the permission of the Court under ss 154 and 143 of the Evidence Act does not amount to declaring the witness as hostile and cross examining him so as to preclude the party who has called him from relying upon the evidence of that witness. *Per Cunningham J in Bikram Ali v Emperor* Ind Rul (1380) Cal 386. But *Lord Williams J* in the same case said: "I desire to add that in my opinion ss 143 and 154 of the Evidence Act read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of s 154 is that they may, with the permission of the Court treat a witness as hostile and cross-examine him. The wording of s 154 shows that the Legislature did not intend to distinguish the law in this country from the law which obtains in England."

**Impeaching one's own witness** In *Adams v Arnold* 12 Mod 375, the Court did not allow a party to impeach his own witness. See also *Rice v Outfield*

2 Stra. 1095, see *Fitzbarris' Trial*, 8 How St Tr 223, 369 373, *Phinley's Trial*, 8 How St Tr 447, 496, *College's Trial* 8 How St Tr 549, *Warren Hastings' Trial*, Lords Journal, Feb 9, April 10 31 Parl Hist 369. There are several reasons assigned in favour of this prohibition. The first reason is that a party is bound by his own witnesses' statement. This objection is thus answered by *Lord Ellenborough L C J* in *Alexander v Gibson* 2 Camp 555 "If a witness is called on the part of the plaintiff who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed, but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted." Similarly in *Bradley v Ricardo* 8 Bing 53, *Tindal C J* said "The object of all the laws of evidence is to bring the whole truth of a case before the jury (but if this contradicting evidence were excluded) that would no longer be just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance might be placed." *Wigmore* § 897.

The second reason for not allowing a party to impeach the testimony of his own witness is thus stated by *Prof Greenleaf* "When a party offers a witness in proof of his cause he thereby, in general, represents him as worthy of belief he is presumed to know the character of the witnesses he adduces, and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth." *Greenl Ev* § 442. Due answer to this argument would be that the supposed guarantee ought not in fairness to be allowed to burden a party when he has discovered the witness's untrustworthiness after putting him on the stand. Another and more satisfactory answer would be that the ends of truth are not to be subserved by binding the parties with guarantees and vouchings, and that it is the business of a Court of Justice, in mere self respect, to seek all sources of correct information, whatever foolish guarantees a party may or may not have chosen to make. *Wigmore* § 898. Moreover in point of fact looking at the actual conduct of trials, neither party does know, and much less does he guarantee, the character and trustworthiness of the witness called by him. *Chief Justice May*, in 11 American Law Review, at p 264 wrote "But does common experience show that, from the given fact that a witness is brought into Court by a party, it is to be inferred that he not only knows his character but also that character is such that in general he is worthy of belief? Witnesses are not made to order—at least not by honest people. The only witnesses who can properly be called are those who happen to have knowledge of relevant facts, and who there may be is pre determined by the history and course of the events which are to come under examination. The witnesses to the material facts in dispute are such persons as happen to have been cognizant of the facts and are not such as the parties have selected at their pleasure. In point of fact, it is substantially true that parties call particular persons as witnesses simply because they are obliged to and can call no others. If a lawsuit was a manufacture and the party bringing it could select his materials—facts and witnesses—, there might be some propriety in holding him responsible for the character of these materials, but as both are beyond his control, his responsibility for their character is out of the question. He come into the Court with the best materials he can get to make out his case." *Wigmore* § 898, see also *Mellish v Collier*, 19 L J Q B 493. So the Indian Legislature wisely departed from the rule of English law and under this section a person who calls a witness, may with the permission of the Court ask him questions to show his general bad character. *Cun Ev* 384.

**Prior self contradiction**—Party's own witness. Prior self contradiction neutralizes the statement on the stand, by showing that the witness can not be correct in both statements and is as likely to be wrong in the latter as in the former, and further more, that his certain error in this one respect indicates a possibility of error upon other points. But what is not to be necessarily implied from this error is any reflection upon the witness.

**S 154** character, nor indeed upon any specific testimonial quality. The implication is merely that in some respect his testimonial capacity is capable of error,—perhaps in his observation, perhaps in his memory, perhaps through bias or corruption perhaps through a dishonest disposition, but not definitely in any one of these qualities. So the principle of the rule forbidding the impeachment of one's own witness does not extend its prohibition to this sort of evidence. The policy of protecting the witness, subjectively, against the fear of being abused and held up to disgrace in case he should disappoint the expectations of the party calling him obviously can not regard the exposure of a self-contradiction as a legitimate reason for such apprehension on the part of the witness. *Wigmore* § 902, see also *Parmeshwar v Emperor* 94 Ind Cas 700 = A I R 1926 Pat 316,

**Calling the other party as a witness.** If there is any situation in which semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the opposing party is himself called by the first party, and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known. To say that the first party guarantees the opponent's credibility is to mock him with a false formula; he hopes that the opponent will speak truly, but he equally perceives the possibilities of the contrary, and he no more guarantees the other's credibility than he guarantees the truth of the other's case and the falsity of his own. *Wigmore* § 916. But it is not only illegal but improper and unfair for Courts to permit the defendant at the very outset of the case, to be put in the witness box nominally as plaintiff's witness to be cross examined in the presence and hearing of the plaintiff, before the plaintiff is even called upon to go into the box and tell his own story. *Max Mint v Shankar Das* 16 P W R 1908. But in cases where a plaintiff was compelled to call a defendant he should be allowed to cross examine him. Any refusal on the part of Court to allow such cross examination would cause miscarriage of justice. *Radhajeetun v Taramonee* 12 M I A 380 (393). This case was explained and distinguished by *Mookerjee J* in *Luchram v Radhacharan*, 34 C L J 107. His Lordship observed: "In support of this position he placed reliance upon the decision of the Judicial Committee in *Radhajeetun v Taramonee*, 12 M I A 380 = 2 B L R 79 P C = 11 W R P C 31. That decision is of no assistance to the appellant. There the witnesses summoned for the plaintiff (except one) did not appear. The plaintiff thereupon filed a petition praying that the case might be decided by his summoning the defendant in person and taking his deposition. The defendant was accordingly summoned and was asked by the Court whether the money claimed by the plaintiff was justly due from him or not. The defendant answered that he was not liable for the claim. The plaintiff then submitted that he had not intended to abide by the answer of the defendant and asked leave to cross examine him. The trial Judge refused to put any further questions to the defendant or to allow any to be put on behalf of the plaintiff and dismissed the suit. On appeal to this Court *Morgan* and *Pandit JJ* expressed their disapproval of the course adopted by the trial Judge, and when the case went up to the Judicial Committee their Lordships fully concurred in the propriety of that censure. This is clearly no authority for the proposition that if the plaintiff calls the defendant as a witness, he is entitled to cross examine him as a matter of right in the case before the Judicial Committee: the defendant was treated as a witness called by the Court. If the contention of the appellants were to prevent it would involve in substance an approval of the procedure condemned in emphatic terms by the Judicial Committee in two recent cases. In *Kishori Lal v Chun Lal*, 36 I A 9 = 31 A 116 = 13 C W N 370 = 9 C L J 122 Lord Allmon observed as follows. It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat petty kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be bound to produce the opponent so summoned as witness and thus give the Counsel for each litigant the opportunity of cross examining his own client. It is a function which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in

the result to embarrass judicial investigation as it has done in this instance. Reference may also be made in this connection to the decision of the Judicial Committee in *Lal Koer v Churanji Lal*, L R 37 I A 1=32 A 101=14 C W N 285, see also *Venkata v Palpana*, 1913 M W N 838, *In re Rangaswami Iyenger*, 1913 M W N 998. The matter must plainly be decided under section 4 of the Indian Evidence Act which gives the Court a discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The rule recognized in *Clarke v Saffery* R & M 126 and *Boston v Carew* R & M 127, namely, that when the witness stands in a situation which naturally makes him defendant is the party who desires his testimony as for example when a defendant is called as the plaintiff's witness, the party calling the witness is entitled to cross-examine him, cannot be held applicable in this country in view of the provisions of section 154 of the Indian Evidence Act. Indeed, even in England, it has been ruled in later cases that the situation in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him, unless the witness's evidence be of such a nature as to make it appear that the witness is unwilling to tell the truth, *Parlin v Moon*, 7 C & P 408, *R v Ball* 8 C & P 745, and it now appears to be settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court. *Price v Manning*, 42 Ch D 373. We must further remember that a witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. *Coles v Coles*, L R 1 P & D 70, *Grenough v Eccles*, 5 C B N S 786. *Surendra v Ram Dass*, 47 C 1043=33 C L J 34. See also *Kommu uen v King Emperor*, 92 Ind Cas 814.

**Necessary witnesses.** To prove a document one of the attesting witnesses must be called. This is specially necessary in the case of a Will (*Vide s 68*). Hence it is conceded that no rule prevents their impeachment by the proponent of the Will. *Richardson v Allan* 2 Stark 335, *Bowman v Bowman* 2 Mos & Rob 501. In *Jackson v Thommasson*, 1 B & S 745, 747, *Cochburn C J* said "I know of no authority that a party who claims under a Will, and consequently is compelled to call the attesting witnesses to it, cannot in the event of one of them disproving the Will give evidence to discredit him, as for instance by showing that he has been corrupted by the heir-at-law." See also *Jones v Jones*, 24 L R 839, *Phillips v Davies*, 1907, *Times*, Dec 13. But in *Surendra v Rance Dass* 24 C W N 860=47 C 1043, *Mr Justice Mookerjee* said "We regret to observe that the examination in chief as also the cross-examination were conducted in a manner open to grave objection. Not only were the proceedings unduly prolonged, some times by an attempt to shake the credit of a witness by introduction of evidence to contradict him in violation of the provisions of section 153 of the Indian Evidence Act, but leading questions were put in examination in chief in contravention of other provisions of the law. It has been maintained before us that as the proponent was obliged under section 68 of the Indian Evidence Act to call the attesting witness to the Will, such witness should be treated as a witness called by the Court and liable to be cross-examined, as a matter of right, by the party citing him. In our opinion this contention cannot be upheld under section 154 of the Indian Evidence Act which provides that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. There is in this respect, no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice, but the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter. In view of the provision of the Indian Evidence Act, it is thus plain that there is no room for the application, in this country, of the view taken in the case of *Bowman v Bowman*, 2 Mos & Rob 501. *Jackson v Thomason* 1 B & S 747, and *Coles v Coles*, L R 1 P & M 70 71, that a necessary witness, that is, one whom a party is compelled to call and who may therefore be considered rather the witness

**S. 155:** cross examined implies an admission by the cross examiner that all the witness's statements are falsehoods. The correct view was in my opinion expressed in *Jehanqir v Emperor*, 106 Ind Cas 100=29 Bom L R 996=A I R 1927 Bom 501. More over the opinion of *Lord Campbell* have never been followed in England and the English Law upon which the Indian Evidence Act is founded was clearly stated by *Tindal C J* in *Bradley v Ricardo*, 8 Bing 57=1 L J C P 36. *Shonar Sao v Emperor*, A I R 1930 Pat 250=11 P L T 148. But in a very recent case the Calcutta High Court took a different view *Panchanon v Emperor*, A I R 1930 Cal 276.

**155** The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him —

Impeaching credit of witness

- (1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit,
- (2) by proof that the witness has been bribed, or has accepted the offer of a bribe or has received any other corrupt inducement to give his evidence,
- (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted,
- (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character

*Explanation* — A witness declaring another witness to be unworthy of credit may not upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though if they are false, he may afterwards be charged with giving false evidence

#### Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

*Scope of the section.* Besides being asked questions tending to discredit a witness may be discredited by the evidence of other persons to the effect that (1) they from their knowledge of the witness, believe him to be unworthy of credit, (2) that the witness has been bribed or has accepted the offer of a

\*This word "accepted" in s 155 para (2) was substituted for the original word "had" by the Indian Evidence Act Amendment Act (18 of 1872) s 11.

bribe, (3) that he has on former occasions made statements inconsistent with his present evidence, and (4), in prosecutions for rape or attempts to rape in which the prosecutrix is a witness, that she was of generally immoral character. Any of the above facts may be proved by the party cross-examining a witness and, with the consent of the Court, by the party who calls him. Here, again, precautions are taken to prevent the Court going into relevant controversy by the following rule. Where a witness states that he believes another to be unworthy of credit, he may not, in his examination in chief, be asked his reasons for so believing, but in cross-examination he may be asked for his reasons and his answers to such questions cannot be contradicted, though of course, they may render him subsequently liable to a prosecution for giving false evidence. It is clear that but for some such rule, there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable. *Cun Ev* 67. Cross-examination is by no means the only method of impeaching the credit of a witness. What he states is fact may always be disproved by other independent witnesses. Generally speaking a party cannot discredit his own witness. He puts him forward as the witness of truth, and though the story he tells may not be so favourable as was anticipated, that affords no just ground for seeking to induce the Court to believe that the witness is not worthy of credit. Where the witness turns round upon the party who calls him, is evidently hostile, or the like, the case is different, and the section provides that the party, with the leave of the Court, may proceed to impeach the credit of his own witnesses. *Nort Ev* 334. 'In addition to counter proofs and cross-examination,' says Mr. Best, "there are three ways of throwing discredit on the testimony of an adversary's witness (1) By giving evidence of his general bad character for veracity & the evidence of person who depose that he is in their judgment unworthy of belief, even though he made the statement on his oath. And here the enquiry must be limited to what they know of his general character, on which alone judgment should be founded, particular facts cannot be gone into, (2) By showing that he had on former occasions made statements inconsistent with the evidence he has given. (3) By proving misconduct connected with proceedings or other circumstances showing that he does not stand indifferent between the contending parties. Thus it may be proved that a witness has been bribed to give his evidence or has offered bribes to others to give evidence for the party whom he favours, or that he has used expressions of animosity and revenge towards the party against whom he bears testimony etc." *Best* s 644. The Indian Legislature have accepted the first two instances *in toto* and has taken only that part of misconduct which consists in taking bribery. It is always admissible to prove that a witness has taken bribe to give his evidence. *Langhor's Case*, 7 How St. Tr 446. *Att Gen v Hitchcock*, 1 Lx Ch 91. The last instance is also taken from the English law but it is only applicable in a case of rape and when the prosecutrix is examined.

Under the provisions of section 155 of the Evidence Act the credit of a witness may be impeached by proof of former statements inconsistent with any part of the statement which is liable to be contradicted. *U Po Sang v G Kyi Maung A. I R* 1927 Rang 247=6 Bur L J 86=104 Ind Cas 377=A I R 1927 Rang 247. This section does not allow evidence of witness's general bad character to be brought in. *Yaung San v Emperor*, Ind Rul (1930) Rang 91.

Clause (1). This clause is chiefly based on *Queen v Brown*, L R 1 Q C R 70=36 L J M C 59. At the close of the case for the prosecution the counsel after having called several witnesses to character proposed to call witnesses to prove that they would not believe the witnesses for prosecution, on their oaths. The Court decided on refusing to receive such evidence. The defendants were found guilty, but were admitted to bail to appear at the next Court of Quarter Sessions for the North Riding of Yorkshire, to receive judgment. At the request of the defendant's counsel, this case was submitted by the Court for the opinion of the Court of Criminal Appeal, whether the evidence tendered by the defendant's counsel ought to have been received or not. The Court consisting of *Kelly C B*, *Martin B* and *Byles Keating* and *Shee JJ* declining to hear any further argument on the subject observed that all the text-writers were agreed that the

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evidence could be given, and that the practice was so ancient and hitherto so undoubted, that it would not be altered now unless by the authority of the legislature. So evidence in all cases is admissible to show that an opponent's witness bears such a character and reputation that he is unworthy of belief. *R v Watson* 2 Stark 139. Garrow's proposed questions being, 'Have you the means of knowing what the general character of his witness was?' and 'From such knowledge of his general character would you believe him on his oath?' *Mason v Hartink* 4 Esp 1102 (1802), followed in *R v Brown* L R 1 C C R 70, Lord Ellenborough said 'The question might be put in that way as it would then be open for the opposite side to ask about the means of knowing the witness's character so that it could be judged of what degree of credit was due to the assertion, for the means that witness then called had of informing himself and forming his judgment.' In practice the question may be shortened thus: 'From your knowledge of the witness would you believe him on his oath?' *Phips* 478. In *Layser's Trial* 16 How St Tr 253, counsel asked 'Is he a man as may be believed even upon his oath, or not?' Witness 'I must tell you that I found him in so many mistakes about his own wife that by God I would not take his word for a half penny.' So the law is that 'you may ask, whether the witness is to be believed upon his oath which the course of law not going to particular facts.' Per Lord Eldon in *Anon* 3 Ves & B 93 see also *Carlos v Brook* 10 Ves Jr 49 per Lord Eldon, L C, *R v Rudge* Park Add Cts 232, *Mc Donough's Trial* 30 How St Tr 20, *Flueder's Trial*, 30 How St Tr 214, *Peterson's Trial*, 30 How St Tr 259, *Waltmore v Dickinson*, 2 Ves & B 268. In *Sharp v Seoging*, Holt N P 541 *Gibbs C J* said 'When you endeavour to destroy the credit of a witness you are permitted to call after witnesses who know him, and ask them this general question would you believe such a man upon his oath?' See also *Thistlewood's Trial*, 33 How St Tr 842, *Davidson's Trial*, 33 How St Tr 1440 1441, *Moy v Brown*, 3 B & C 126. In the last-named case *Bayley J*, said 'When the credit of a witness is objected to general evidence that he is not to be believed on oath is admissible, but specific evidence that at some period he had committed a particular crime is not admissible.' Similarly in *R v Watson*, 2 Stark 154=32 How St Tr 495 *Abbott J* said 'The usual question put for the purpose of discrediting the testimony of a witness is, would you believe that witness upon his oath.' In the same case *Bayley J* said 'The witness may state that he is not a man to be believed upon his oath.' See also *R v Clarke*, 2 Stark 241, *R v Bingham*, 4 C & P 392, *R v Hemp* 5 C & P 468, *R v Nichols*, 5 C & P 600, *R v Tissington*, 1 Cox Cr 48 *R v Duffy*, 7 State Tr N S 79. So 'the regular mode is to enquire whether they have the means of knowing the former witness's general character and whether from such knowledge they would believe him on his oath.' *Phillips's Evidence* 1st Ed 109. Commenting on this passage *Prof Wigmore* says 'We are now in a position to understand the language of the classical treatise-writers of the early 1800's. In Phillips's passage for instance, so often quoted in his country, he used 'general character' not in the sense of 'reputation, but of general traits or qualities as distinguished from particular acts and from specific quality of credibility. This is shown by a collection of the statements of other text writers of the time. They had two important rules in mind (1) that you cannot give evidence of particular acts and (2), that (as just pointed out) you cannot against a witness speak of his general qualities unless you follow it up with specific quality of credibility, and it was in trying to make this plain that they employed the term. general character, any meaning of 'reputation,' as distinguished from personal knowledge, was far from their minds and would have been repudiated. In modern practice, the ruling, in *R v Routon* L & C 520, seems not to have been regarded as affecting testimony to a witness character and the orthodox and traditional use of personal knowledge still obtains, both in practice and in law.' *R v Brown*, 10 Cox Cr 153, *Wigmore* § 1932.

*Mr Evans* in his notes to *Pothier* said 'It is an established rule that witnesses examined with a view to discredit the testimony of others cannot be admitted to depose to particular facts of criminality but can only express their general opinion whether the party is or is not entitled to be believed upon his oath. Vide 1st Ed II, 260. So also *Mr Stephen* in his *History of Criminal*



Law Vol I, at p 437 said "The witness may, however, be impeached by witnesses who will swear in general terms that he is not worthy of credit on oath" So the law in England all along is that in examination in chief evidence is to be given of several traits or qualities as distinguished from particular acts. The same law is laid down in this section also, as will be apparent from the explanation, which enjoins that in cross examination he may be asked his reasons for his belief

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**Estimate of a witness in another case** Evidence of a particular estimate formed by a Judge in another case of the credit to be attached to the testimony of a witness who is cross examined in a subsequent trial, is inadmissible. In the matter of *Pasumarti Jagappa* 4 C W N 684, see also *Seamen v Vetherclift*, L R 2 P D 53, R v *Bottomly*, Times, Feb 7, 1893. The question whether a witness is entitled to credit or not must be decided by a Court on the evidence before it, and not on what another Court thought of the witness in another case, and therefore the opinion of Court in another case as to the witness cannot be put in to impeach his credit. *Chandreshwar Prasad v Bisheswar Prasad*, A I R 1927 P 61=101 Ind Cas 289=5 P 777

**Re establishment of credit** "Where the general reputation of a witness has been thus impeached, the party calling him may re-establish his credit, by cross-examining the witnesses (vide *Explanation*), who have spoken against him as to the means of knowledge and grounds of their opinion (*Mawson v Hart* 4 Esp 103 104,) or as to their hostile feelings towards the person whose testimony they have discredited, or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness (*R v Murphy* 19 How St Tr 724, 725), or to attack in their turn the general reputation of the impeaching witnesses" *Taylor* § 1473. "When B is brought forward to impeach A, and C to impeach B, it is obvious that not only might there be no end of this process, but the real issues of the case might be wholly lost sight of in a mass of testimony amounting to not much more than mutual verification. Three courses are open to pursue first, to exclude absolutely the impeachment of the character of an impeaching witness, secondly, to admit the impeachment of an impeaching witness, but no more, thirdly, to admit it only to such an extent as the discretion of the trial Court deems best. The preferable rule is the third" *Wigmore* § 895

**Foundation for discrediting a witness** By the English law it is necessary, before giving evidence for the purpose of discrediting a witness to lay a foundation for the evidence to be given by the interrogation of the witness himself and his denial. This is not necessary under the present Act. *Gun Ev* 386

**Clause (2)**—By proof that the witness has been bribed or has accepted the offer of a bribe etc. The word "accepted" was substituted by Act XVIII of 1872 for the word "offered". This substitution was probably made in accordance with the rule of law laid down in *111 Gen v Hutchcock* 16 L J Ex 299=1 Ex 91, where the defendant a maltster, was charged on information with having used a cistern for the making of malt, without making an entry thereof, as required by Act of Parliament. A witness, having sworn that the cistern had been used, was asked if he had not said to one Cook that the excise officers had offered him £20 to say the cistern had been used, and he denied that he had made such statement. The defendant's Counsel thereupon called Cook, and proposed to ask him whether the witness had told him so. The evidence was disallowed. *Pollock C B* in delivering his judgment said "In the present case it would not be proved that a bribe was offered to the witness and not accepted, for such a fact is clearly irrelevant to the matter in issue. The offer of a bribe is a matter of no importance, if it be not accepted for it does not disgrace the party to whom it is offered." In the same case *Alderson B* said "The offer of a bribe by a witness to another, or the fact of a bribe having been accepted by him, tends to show that he is not impartial." *Rolfe B* added "The offer of a bribe if rejected, has no bearing upon the credit of the witness." The alteration, says *Mr Justice Cunningham* like several of the amendments introduced by Act XVIII of 1872, appears to have been made

- S 155. without adequate regard to the considerations which led the original framers of the Act to word it as they did' *Can I v* 137. But it must be admitted that where the witness in question has merely been offered a bribe, no inference of any sort as to the witness's testimony can be drawn, the rejection of the bribe deprives the offer of all its force in that respect. From the point of view of the party offering it, of course such an attempt at corruption is admissible against him as showing his consciousness of a bad cause, but this involves the necessity of proving the identity of the offer with the party,—a matter not always feasible. *Wigmore* § 962.

**Receipt of money for testimony.** The witness's receipt of money for testimony may indicate corruption in two ways: first, from the conduct in receiving it, may be inferred a willingness to speak falsely, secondly, from the fact of its having been received or promised, may be inferred an interest in favour of the cause of the giver, just as any fact of pecuniary interests make probable such a partiality. *Wigmore* § 961.

**Clause (3)—Evidence of former inconsistent statement.** *Vide illustrations (a) and (b).* Any statement, verbal as well as written, may be used for this purpose. The witness must be specifically asked whether he made such and such statements, before he can be contradicted by them through another witness. Where the statement is in writing, *vide ante*, section 145. *Norton Et* 331. "Another thing" says *Chief Baron Gilbert* "that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts, and thus takes from the witness all credibility in as much as contraries cannot be true. Now that which sets aside his credit and overthrows his testimony is the repugnancy of his evidence, if what he says be contradictory, that removes him from all credit for things totally opposite cannot receive belief from the attestation of any man." *Gilbert's Evidence* pp 117, 150. We simply set the two against each other, perceive that both cannot be correct and immediately conclude that he has erred in one or the other, but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus we do not necessarily accept his former statement as replacing his present one, the one merely neutralizes the other as a trustworthy one." *Wigmore* § 1018. It is no violation of the Hearsay Rule because Hearsay Rule simply forbids the use of extra-judicial utterances as credible testimonial assertions: the prior contradiction is not offered as a testimonial assertion to be relied upon. *Ibid*. In *1st Gen v Hitchcock*, 1 Ex ch 104, *Alderson B* said: "When the question is not relevant, strictly speaking to the issue but tending directly to contradict the witness, his answer must be taken [although it tends to show that he in that particular instance speaks falsely, and although it is (thus) not altogether immaterial to the issue] for the sake of the general public convenience for great inconvenience would follow from a continual course of those sorts of cross-examinations which would let in in the case of a witness being called for the purpose of contradictions." So for reasons of auxiliary policy inconsistent statements on collateral matters cannot be shown, this section lays down the same rule. In *Khadyah v Abdool Kurreeem* 17 C 344 *Wilson J* said: "I am inclined to think that in s 155 (3) of the Evidence Act the words, 'which is liable to be contradicted,' mean 'which is relevant to the issue.'" Now the question is what matters are not relevant. The only test in vogue that has the qualities of a true test—definiteness, concreteness, and ease of application—is that laid down in *Attorney General v Hitchcock*, *supra*. Could the facts, as to which the prior self contradiction is predicated have been shown in evidence for any purpose independently of the self contradiction?" In that case *Pollock C B*, said: "My view has always been that the test whether the matter is collateral or not is this. If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give in evidence then it is a matter on which you can contradict him." In the same case *Alderson B* said: "The question is this, can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him any

fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue."

The language of s 155 (3) of the Evidence Act is *prima facie* wide enough to permit such questions as asking the investigating officers if certain witnesses made certain statements. But where the evidence has been reduced into writing it is undesirable to permit the putting of such questions. In such a case the written record made by the police officer is the only proper and right thing to prove to discredit the witnesses. If police diary is used the provisions of s 145 Evidence Act and s 162 of the Criminal Procedure Code will have to be borne in mind. A copy of the statement made before the police cannot be used as against the witness till he has been confronted with it. The right procedure then when a prosecution witness is contradicting himself is to ask the Judge to look into the diary and decide whether the accused person should not have a copy of the statement. *Kashu Ram v Emperor* 26 A L J 130=A I R 1928 All 280=109 Ind Cas 120. The first information report against the accused is admissible under this section and may be relied on by the defence to impeach the informant's credit. *Axumuddy v Emperor*, 44 C L J 253=A I R 1927 Cal 17.

Statements made by third parties to the police in the course of their investigation are admissible to impeach the credit under s 155 of the Evidence Act provided the person who made the statement is called as a witness. *Axumuddy v Emperor* 44 C L J 253=A I R 1927 Cal 17. Statements made before a police officer and reduced to writing are admissible in evidence under this section to contradict a witness subject only to this that the provisions of section 145 of the Evidence Act had been complied with in the matter of putting specific part of it which were to be relied upon, to the witness in cross examination. *Thomas v Kedar Nath* 30 C W N 835=91 Ind Cas 801=A I R 1925 Cal 1017, see also *Ram Charitar v Emperor*, 3 Pat L J 568=4 Pat L W 325=45 Ind Cas 272=19 Cr L J 512.

A statement made by a witness before a Coroner under the Coroner's Act is admissible in evidence at the trial of the accused. *Emperor v Ragho* 22 Bom L R 775=97 Ind Cas 37=27 Cr L J 1061=A I R 1926 B 404, *In re Bayana*, 2 Weir 821. When the persons who made certain statements are called as witness then those statements become admissible, not as substantive evidence in the case, but merely as evidence to corroborate or contradict their statements in Court. *Nagina v Emperor* 19 A L J 447, see also, *Malaya Goundan In re*, 14 L W 612=(1921) M W N 872.

The statements of witnesses examined in a judicial proceeding cannot be used in any subsequent judicial proceedings when any of the conditions laid down in section 33 of the Evidence Act are wanting. But such statements can be used either to contradict them under s 155 (3) or to corroborate them under s 157 of the Act. *Hussania v Sahib Nur*, 86 P W R 190=7 Ind Cas 505.

It is not illegal to examine a police officer for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused at his trial having previously given a statement to the police officer different from and inconsistent with his subsequent statement at the trial. *Emperor v Jagordeo*, 27 A 469=A W N 1905 64.

Former statement made by two persons implicating the accused can be used under s 155 (3) of the Evidence Act for discrediting their evidence given in the case. *Emperor v Cherath* 26 M 191=2 Weir 820, *Harbans v Emperor*, 16 C W N 431=13 Cr L J 445=15 Ind Cas 77, *Queen Empress v Sitaram*, 11 B 657. In a police investigation where the statement is not reduced to writing the officer may be examined to impeach the credit of a witness who made such statement, under s 155 of the Evidence Act. *Reg v Ullamchand*, 11 B H C 120. The record of statement made by witnesses during police investigation is not admissible as an independent evidence. But such statement may be proved either to contradict or to corroborate the testimony of the same witness in Court. *Bahawal v Empress*, 17 P R. 1886 Cr.

Section 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his

- S 155.** evidence which is liable to be contradicted, but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing when it is sought to be tendered in evidence for contradicting a witness is provided in s 145. In other words s 155 is controlled by s 145 and is not independent of it. *Gopichand v Emperor*, A I R 1930 Lah 491

When a Receiver appointed by the District Court sent a report to the Court, about 24 hours after the occurrence, to the effect that he was wrongfully confined and obstructed in the discharge of his duties by a number of persons it is open to the defence to use it under this section to impeach the credit of the receiver. *Emperor v Ramchandra* 55 C 879=111 Ind Cas 327=A I R 1928 Cal 732

Section 27 of the Evidence Act remains unaffected by the latest amendment of s 162 of the Criminal Procedure Code but ss 155 and 157 are affected except in the only instance mentioned in the proviso of s 162, Cr Pro Code. *Emperor v Nqa Tha Din* A I R 1926 Rang 116=4 Rang 72=27 Cr L J 1061=5 Bur L J 30 (F B)

Previous depositions of witnesses examined for the prosecution in a criminal trial can not be used to contradict what the witnesses state in their cross examination in the present trial. *Jamal v Emperor*, 86 Ind Cas 153=96 Cr L J 713=A I R 1925 Pat 381

A recital as to the date of birth in a guardianship application is not by itself admissible in evidence but if the persons who made the statement is dead or cannot be found or had special means of knowledge it will be admissible. If he is examined as a witness his credit may be impeached by producing the same. *Prohlad v Ramsaran* 38 C L J 213

**Preliminary warning.** To obviate the objection of unfair surprise, a natural expedient is to ask the witness, while on the stand under cross examination, whether he made the supposed contradictory statement. He is thus warned that it will be offered against him by testimony later produced and he may thus either prepare to deny it if he claims not to have made it or explain it, if he admits having made it. The rule is thus stated by *Abbott C J* in *The Queen's Case*, 2 B & B 313. "If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause the witness is first asked upon cross-examination, whether or not he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary and the witness has an opportunity of giving such reason, explanation or exculpation of his conduct if any there be as the particular circumstances of the transaction may happen to furnish, and thus the whole matter is brought before the Court at once, which in our opinion is the most convenient course."

[If the witness denies the utterance or claims the privilege of silence], the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as I have before alluded to. So that if evidence of this sort could be adduced on the sudden and by surprise without any previous intimation to the witness or to the party producing him, great injustice might be done.

and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise as far as practicable, upon any person who may appear therein'. *Wigmore* § 1025. If the previous deposition was intended to contradict the witness at the trial it was contrary to principle to admit the evidence in the manner adopted without first drawing the attention of the witness to every point upon which it was to be used to contradict him. If the statement was intended to corroborate the witness as a whole, it could not have been put in cross-examination. *Emperor v Lakshman Totaram* 17 Bom L R 590=31 Ind Cas 351=16 Cr L J 751. If a Magistrate finds that a witness is recorded in the police investigation as having made a statement different from that he has made before him and he considers that the discrepancy should be brought to light, he ought to ask the witness if he has made the statement attributed to him by the police papers. If he admits it, he should be given an opportunity of explaining why the contradiction has occurred. If

he denies having made such a statement, then the statement must be duly proved before it can be used to impeach his credit. It is not like a deposition made in the committing Magistrate's Court which could be taken off the file of that Court and brought on the record of the Court of Session without any proof because the deposition proves itself. Not so a statement attributed to a witness on police papers. *Nga Pyn v Emperor* 18 Cr L J 814=41 Ind Crs 669=10 Bur L T 259. Under this section, a witness cannot be contradicted by his previous statement if his attention has not been drawn to it as required by s 145 of the said Act. *Mt Amir Begam v Mt Begam*, 9 P W R 1911=127 P L R 1914=22 Ind Crs 861.

**Proviso (4)** One of the relevant uses is that of the character of a rape complainant for chastity. The non-consent of the complainant is here a material element, and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent. *Wigmore* § 62. In *R v Ryan*, 2 Cox Cr 115 *Platt B* said: "It is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man because if her habits however irresponsible she might be were loose and indecent, there might be a probability of consent being given and a jury might not think it safe to conclude that she was not willing, partly." General evidence, therefore, of this kind will be received though the woman be not called as a witness and though if called she be not asked, on cross-examination, any questions tending to impeach her character for chastity (*R v Clarke*, 2 Stark R 241 *R v Chase*, 1r R 275) but it seems that the counsel for the defence cannot go further and prove specific immoral acts with the prisoner unless he has first given the prosecutrix an opportunity of denying or explaining them. *R v Cockcroft* 11 Cox 410 *R v Martin* 6 C & P 61, *R v Robins*, 2 M & Rob 512. It further appears to be the law that although the prosecutrix may be cross-examined as to particular acts of immorality with other men, she may decline to answer such question and if she answers them in the negative witness cannot be called to contradict her. *R v Cockcroft* 11 Cox 410 *R v Holmes and Furness*, 41 L J M C 12 *Taylor* § 363. It thus becomes necessary to discriminate between the general character or trait for unchastity and the specific acts of unchastity. *Wigmore* § 62. The reason in favour of the above rule is thus strongly put by *Strong J* in *People v Jackson* 3 Park Cr 398: "In any case a single aberration from virtue in one whose general character for chastity is otherwise unimpeachable, would raise so slight an inference, if any, of non-resistance to a brutal outrage from a person (or indeed any one except him to whom she has already yielded) that it could not justify a departure from the ordinary rules of evidence. Besides, if proof of particular instances should be admissible, rebutting evidence would be allowable, and thus there might be one or more collateral issues to occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant, but as no such notice can be enacted, there would be no means of meeting the evidence, of the disolute companions of the accused, however mistaken or corrupt it might be, and thus the character of an innocent and greatly abused female might be sacrificed and the ends of public justice be defeated." In a rape case the general immoral character of the woman is relevant evidence as enacted in this clause. *Keramat v King Emperor* A I R 1926 Cal 320=92 Ind Cas 439=27 Cr L J 263=42 C L J 524. The prosecutrix may be cross-examined as to particular discreditable transactions (*R v Barker* 3 C & P 589), and as to her having had connection with the prisoner previously to the alleged rape (*R v Martin*, 6 C & P 562) and if she denies such connection the prisoner may shew that he had been previously connected with him. *R v Ismail*, 3 Stark Ec 3rd Ed. 952, appeared in *R v Ruby*, 18 Q B D 151.

**Explanation.** In the examination in-chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in the cross-examination. But it is very dangerous in cross-examination to ask a witness his reasons for believing a witness to be

**S. 156.** untrustworthy He is, by such a question, enabled to state any unfavourable fact without fear of contradiction *Cum I* 388

**Impeaching credit of one's own witnesses** A party is not obliged to receive as unimpeached truth every thing which a witness called by him may swear to. If his witness has been false or mistaken in his testimony, he may prove the truth by others. *Brown v Bellous*, 1 Pick 187, 191 (Am). According to English law "a party is never permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke from him with the means in his hands of destroying his credit if he spoke against him." *Buller's Trials at Assi Prius* p 297. But against this reason it is said "(It is improper that) an untruth or incredible or unreliable witness by reason of moral infirmity may not be unmasked by any party in interest. What more absurd than to ask a jury to find truth upon the testimony of a witness notorious for not speaking the truth, all the while concealing from them the fact that he is or may be a false witness, and how can it be of importance to the main purpose of the trial how or by whom the fact that the witness is not to be relied upon is made known? If he betrays the party who calls him, and falsifies in every statement which he makes, the opposite party will of course accept the treason, say nothing of impeachment, and leave the jury no alternative but to find an unjust verdict upon evidence which both the parties know to be rankst perjury. Certainly a rule which may produce such a result ought to be at once discarded unless it can be shown to be of some special use in the general purposes of legal controversy that a Court of justice should permit such a miscarriage on the merits, because it sees or fancies it sees a shadow of unfairness in one of the parties in a matter collateral to the suit and in no way touching the justice of the case, is a reproach which ought to be done away. No body can profit by the rule but the witness and the antagonist of the party who calls him and they only by the defeat of the ends of justice." *May C J in Some Rules of Evidence* 11 *American Law Review* p 267, *Wigmore* § 899. The Indian Legislature wisely departed from the English law and provides that a party may impech the credit of his own witness with the consent of the Court. The evidence of a witness who is hostile to the Crown may be impeached by reference to the police diary. If in the course of a trial a witness is called upon and says that offence was committed by an entirely different person it is only fair that the Crown should be allowed to use the diaries under s 155 of the Evidence Act, to disabuse the jury of the effect of a wilfully false statement. *Ramcharia v Emperor*, 3 Pat. L J 568=4 Pat. L W 325=45 Ind Cas 272=19 Cr L J 512

**156** When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies

#### Illustration

A an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

**Scope of the section** This section provides for the admission of evidence given for the purpose not of proving a relevant fact but of testing the witness's truthfulness. There is often no better way of doing this than by

ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be themselves irrelevant. While, on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross-examination and exposure is offered in the case of a false witness. In order to prepare the ground of their corroboration, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes the provision *Cun Ev* 388. This section, in effect, declares evidence of certain facts to be admissible, and if it had not been inserted the Judge would have had to determine the relevancy of these facts by reference to sections 7 and 11, and he might perhaps have been influenced by the practice in England which has been against the admission of such evidence *Markby Ev* 109, 110. Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue and although happening before the date of the fact to be corroborated. But facts which are not more consistent with the truth of such testimony than the reverse are inadmissible. The corroborative facts and evidence must however, be proved otherwise than by the testimony of the witness to be corroborated, and the question of their admissibility is one of law for the Judge and not one of fact for the jury *Phips Ev* 482-3. It is not incumbent on a party to give corroborative evidence of statements not challenged by the other party. *Moulvie Mahomed v Will is*, 11 C W N 946.

**Corroborative evidence, meaning of.** The statutory definition is that corroborative evidence is additional evidence of a different character, to the same point. *Underhill* defines it as additional evidence proving similar facts or facts calculated to produce the same results as facts already given in evidence. This distinction between corroborative and cumulative evidence is clearly marked, although ordinarily, corroborative evidence simply means fortifying evidence, whether it is evidence of different or similar facts, or additional evidence of the same fact. *Burr Jones* § 8(b).

**157** In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

**English law.** Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue and although happening before the date of the fact to be corroborated. *Wilcox v Godfrey*, 26 L J N S 481. But facts which are not more consistent with the truth of such testimony than the reverse are inadmissible. Whenever the testimony of a witness is challenged by cross-examination or otherwise, corroboration thereof is allowable, and in certain cases no verdict can be obtained without the production of such evidence. The corroborative facts and evidence must however be proved otherwise than by the testimony of the witness to be corroborated. Formerly the fact that a witness had made a previous statement similar to his testimony in Court could always be proved to confine his testimony. But afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination to confirm his testimony, or on re-examination to re-establish his credit, when impeached by proof of a previous contradictory statement. (*Phipson Li* 149). When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it, for, even if it be an improbable or untrustworthy story, it is not made more probable or more trustworthy by a number of repetitions of it. Such evidence would be both irrelevant and cumbersome to the trial, and is rejected in all Courts. *Wignore* § 1121.

S 157.

Reasons of objection under English law to corroborative evidence before any impeachment In *Elliot v Pearl*, 10 Pat 139, *Story J* said "His testimony under oath is better evidence than his confirmatory declarations not under oath, and the repetition of his assertion does not carry his credibility further, if so far as his oath" Similarly in *State v Parish*, 79 N C 612, *Reade J* said "It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. The idea that the mere repetition of a story gives it any force or prove its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed it has never been supposed by any writer or Judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness. If he stood before the Court unimpeached it was unnecessary and mischievous to encumber the Court and oppress the defendant with his garrulousness out of Court and when not on oath. *Wigmore* § 1124

Whether this section violates the Hearsay Rule "Though Hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself. *Gilbert Evidence*, 68, 150 In this instance the utterance is used otherwise than as an assertion to be credited, and therefore the Hearsay rule is not applicable. *Wigmore* § 1792

Scope of the section This section following Act II of 1855, in opposition to the generally received rule in England, allows a witness to be corroborated by proof that he has said the same thing on a previous occasion, the only condition being that his previous statement shall have been made either about the time of the occurrence or before a competent authority. This condition is, to some extent, a safeguard against fictitious statements designedly made to support subsequent evidence, but it is obvious that the corroborative value of such previous statement depends entirely on the circumstances of each case, and that they may easily be entirely valueless. As independent evidence of a fact statements are by section 8, relevant as conduct, if they accompany and explain facts other than statements. The mere fact of a man having on a previous occasion made the same assertion adds but infinitesimally to the chances of its truthfulness, and Judges should distinguish it from really corroborative evidence. *Cun Ev* § 157. In *Reg v Malapa*, 11 B H C Rep 196, *Namabhas Naradas, J* said section 157 of the Evidence Act, no doubt provides that any former statements made by a witness at or about the time when the fact in issue took place, or before any competent authority may be proved to corroborate his testimony, and accordingly the Session Judge has made use of *Mergia's* statements made on different occasions to his parents and to Police Officers shortly after the murder. But such corroboration we think, hardly suffices. It can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoner's guilt by some independent reliable evidence. But his statement whether made at the trial or before the trial, and in whatever shape it comes before the Court is still only the statement of an accomplice and does not at all improve in value by repetition. The force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered, there is a motive for it and should the value of such a corroboration ever come to be rated higher than it now is, nothing would be easier than for designing an unscrupulous person to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences, and afterwards making statements, to different people at different times and places, implicating those innocent men



This section provides an exception to the general rule of excluding hearsay evidence and in order to bring a statement within the exception, the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. *Mangat Rai v. Emperor*, 10 Lih L J 262=110 Ind Cas 676=29 Cr L J 740=A I R 1928 Lih 617. There is no obligation on the Crown to call witnesses whose evidence will be merely relevant under s 157 of the Evidence Act. *Muthu v. Emperor*, 10 Pat. L J 117=8 Pat. 625=A I R 1929 Pat 313. A statement by the father in the vaccination register made after three years after the birth of the child does not satisfy the terms of s 157 of the Evidence Act and the same cannot be relied upon to prove the paternity of the child. *Kinnaphan v. Kullimmal*, 1929 M W N 696. A sale deed dated 1910 by one N in favour of B recited all the circumstances leading to the sale. It also contained a recital as follows:—“About a year ago I came to Pooni and asked my uncles and my step brothers to effect a partition and to allot to me my one ninth share of our ancestral property but they refused to give my share.” It was contended that the recitals in the deed were not admissible as evidence against the uncles or cousins of N on the issue whether N demanded a share of the property in 1909 as it did not come within s 157. Held that though the particular statement did not come within s 157 on the ground that it was not made at or about the time of N's alleged interview with his uncle in 1909 but the deed was admissible in evidence as corroboration of the evidence given by N and his witnesses upon other material matters. *Radhoba v. Aburao*, 36 I A 316=53 B 699=31 Bom L R 1030=27 A L J 1031=33 C W N 6006.

Sections 157 to 167 Criminal Procedure Code leave no doubt that Police officers entitled to investigate in offence are the Police officers referred to in the Criminal Procedure Code, i.e., the Station House officer or his superior officer within the limits of the local area of this jurisdiction. Therefore an inspector of the C I D who is not one of such officers is not ‘legally competent to investigate’ and so his evidence is not admissible under s 157 of the Evidence Act. The power to investigate must be given to him by law. Whether any authority is legally competent to investigate the fact or not is not a question of fact or a mixed question of fact or law. *King Emperor v. Nilalant*, 1912 M W N 207=13 Cr L J 305=22 M L J 490=11 M L F Sup 1=35 M 247=14 Ind Cas 819. The object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court. Such deposition is testimony within the meaning of s 157 of the Evidence Act, while a prior statement by the witness during the police investigation is admissible in evidence to corroborate. *Mam Chand v. The Crown*, 5 Lah 324=82 Ind Cas 129=25 Cr L J 1201. In a suit for possession of land if the opposite party disputes the boundaries of the land in suit, it is open to the plaintiff to produce the documents relating to neighbouring lands in which there is recital as to particular boundaries of the land in suit, and such documents will be admissible to prove the plaintiff's title if the persons in whose favour the documents are executed are examined and admit the correctness of the boundaries. *Mohun Chandra v. Kanailal*, A. I R 1930 Cal 311=33 C W N 1193.

**Absence of substantive evidence.** In the absence of substantive evidence, first information report and other reports by witness cannot be used as corroborative evidence consequently, where a prosecution witness has gone back on the original complaint made to the police the previous statement cannot be used as corroborative evidence. *Emperor v. Nga Hiang*, 6 R 481=A I R 1928 Rang 293. Earlier statements cannot be let in under section 157 of the Indian Evidence Act if there is nothing in the deposition of the witness in the present trial which may be corroborated by the earlier statements. *Ahymuddin v. Emperor*, 42 C L J 509. Entries in the police diaries and the complainant's statements recorded after the investigation commenced cannot be substantive evidence. *Gurimalla v. Government*, 3 Mys L J 237.

**Time for giving corroborative evidence.** Before corroborative evidence is admissible, the evidence sought to be corroborated must have been given



can be used as corroboration under s 157 of the Evidence Act, provided the person who made the statement is called as a witness. *Azimuddy v Emperor*, 14 C L J 253 = A I R 1927 CIL 17. Statements made by a witness to the police are relevant only for the purpose of contradicting his testimony and the statements made to the Deputy Commissioner and to the committing Magistrate only for the purpose of contradicting or corroborating that testimony. These statements cannot be treated as substantive evidence like the statements made by a witness at the trial. It is impossible to place any reliance on the statement of a witness at the trial when it is in hopeless conflict with her previous statements. *Ramlaran v Emperor*, 7 Lah L J 371 = 26 P L R 659 = A I R 1927 Lah 493. Oral accounts of statements made by witnesses to the police in the course of an investigation under s 151 Cr Pro Code are admissible under section 157 of the Evidence Act to corroborate the statements of those witnesses at the trial, although the written records of such statements are rendered inadmissible under s 162 of the Code of Criminal Procedure. *Baladeo v Emperor*, 6 Pat L J 241 = 2 Pat L T 565 = 61 Ind Cas 785 = 22 Cr L J 433. Statements of witnesses made to the police should not be used to corroborate them except in very special circumstances. *Ram Chariter v Emperor*, 4 Pat L W 325 = 3 Pat L J 568 = 45 Ind Cas, 272 = 19 Cr L J 512.

Whether this section is affected by s 162. Section 157 of the Evidence Act is affected by s 162 of the Criminal Procedure Code so far as statements to the Police taken under s 161 whether oral or recorded are concerned. *Emperor v Abu Tha Din* 4 Rang 72 = 96 Ind, Cas 145 = 27 Cr L J 881 = 5 Bur L J 30 = A I R 1926 Rang 116 (F B). The main object of the legislature in enacting this section was to prohibit the use of the statements of prosecution witnesses as corroborative under s 157 of the Evidence Act. *Jagua Dhanul v Emperor* 5 Pat 63 = 93 Ind Cas 831 = 7 Pat L J 396 = 27 Cr L J 484 = A I R 1926 Pat 232. The general rule laid down in section 157, Evidence Act, is controlled by the special provisions contained in s 162 of the Criminal Procedure Code. Not only is the record of the statement of a witness to the police taken under s 161 excluded from evidence but even the proof of such statement by oral evidence for the purpose of corroborating the prosecution evidence. *Balha v The Crown*, 26 P L R 304 = 6 Lah 171 = A I R 1925 Lah 399. The words 'legally competent' in s 157, Evidence Act mean having power under same law statutory or otherwise. Section 157, Evidence Act is clearly controlled by s 162 Criminal Procedure Code. *Emperor v Kumarasanthan Pillai*, 25 M L T 879 = (1919) M W N 199 = 50 Ind Cas 834 = 20 Cr L J 351, *Ruston v King Emperor* 7 A L J 468 = 6 Ind Cas 101 per Knox J.

Section 162 Criminal Procedure Code prohibits only the use, as evidence of the writing which records the statements of the witnesses made to the investigating Police officer, that section, so far as oral statements of the witnesses are concerned, is not in conflict with s 157, Evidence Act, and the oral statements made to Police officer may be proved by calling him as a witness in order to corroborate the testimony of the witnesses. *Bhulal v K E*, 13 C W N 197. *Per Karamat Hussam J* in *Ruston v King Emperor* 7 A L J 468 = 11 Cr L J 235 = 6 Ind Cas 101. See also *Emperor v Hanmasuddi*, 16 Bom L R 603 = 26 Ind Cas 139, *Imperatrix v Hyrbhai*, 22 B 396, *Bhulal v King Emperor* 13 O C 7 = 5 Ind Cas 357 = 11 Cr L J 117.

Deposition before committing Magistrate. The effect of section 283 of the Criminal Procedure Code is to place the deposition of a witness before the committing Magistrate exactly on the same footing as the deposition in the Sessions Court. It is 'testimony' within the meaning of s 157 of the Evidence Act and statements made by the witnesses before the investigating officer are admissible for the purpose of corroborating such testimony. It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by statements made before the investigating officer. *Felliah Kone, In re*, 45 M 766 = 43 M L J 222 = 16 L W 239 = 31 M L T 143 (H C).

**S 157** *Astarnee v Rai Aundo*, 5 C W N XVI It is doubtful whether s 136 gives the Court any discretion to allow evidence to corroborate a witness to be given under s 157, before the witness himself is examined. *M. Hyn v King Emperor* 5 L B R 19 Cr L J 76=2 Ind Cas 349 Ordinarily, before corroborative evidence is admissible, the evidence sought to be corroborated must have been given. The Court has no doubt a discretion to allow evidence to be given under s 157 out of the regular order, but such discretion should be rarely used and only for very special reasons. To allow a witness to be corroborated, before he is examined, is not only inconvenient, but likely to cause the Judge or Jury to give undue weight to the hearsay statements of the corroborating witness. It is not clear that such a discretion is given by s 136 of the Evidence Act. *Shere Ali v King Emperor*, 3 L B R 210=5 Cr L J 111

**Test identification** Any Magistrate is competent to hold a test identification and can prove the statements made before him under s 157 of the Evidence Act even though he is not empowered to deal with the matter under enquiry. Also s 161, Criminal Procedure Code, covers the case where a Magistrate acts under s 157, Evidence Act, and records a statement made to him. *Samuiddin v Emperor*, 32 C W N 616=109 Ind Cas 225=29 Cr L J 197=A I R 1928 Cil 500 Evidence of identification in the trial cannot be treated as substantive independent evidence in the trial. Such identification amounts to statements, either express or implied, made by certain persons whom they recognize as having been concerned in a particular crime. These statements are not made on oath and are made in the course of extrajudicial proceedings. When the persons who made those statements are called as witnesses, then those statements become admissible, not as substantive evidence in the case but merely as evidence to corroborate or contradict his statements in Court. When such a person states in Court that he can identify no one there is obviously nothing to corroborate and so the evidence of identification in the trial is not admissible. *Nagina v Emperor*, 19 A L J 947 For corroborating a witness his statement before competent police officer at the identification parade held by the police in the course of the investigation may be proved by oral evidence though the written record of the statement is not admissible. *Emperor v Wahiduddin* A I R 1930 Bom 153=32 Bom L R 327

**First information report** The first information report against the accused is admissible under s 157 of the Evidence Act to corroborate prosecution case. *Azumuddy v Emperor*, 44 C L J 250=A I R 1927 Cal 17, *Chogatta v Emperor* 91 Ind Cas 697=27 Cr L J 121=A I R 1926 Lah 179 Section 154 of the Criminal Procedure Code clearly contemplates the first information received to be recorded and not a statement made by a witness during investigation after the Sub Inspector has actually arrived on the scene and himself seen what has happened. Technically speaking it may be conceded that a first information report taken down by a police officer amounts to an entry in an official record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty and in the performance of a duty specially enjoined by law under which such record is kept. But that would simply make it a relevant fact. A report of the commission of an offence made at a police station or even the deposition of a witness previously made would be admissible for the purpose of corroborating him or of throwing doubt on his statement in Court but would be inadmissible for the purpose of proving the facts stated in it is correct. *Chittoor Singh v Emperor*, 47A 280=23 A L J 14=80 Ind Cas 650 The first information report although a document of great importance is not a piece of substantive evidence, and can be used only as a previous statement admissible to corroborate or contradict the author of it and for no other purpose. In *re Sankaralinga Phelan*, Ind Rul (1930) Mad 698 see also *Antar Singh v Emperor* 21 Ind Cas 882=17 C W N 1213=14 Cr L J 642 *Azumuddy v Emperor* 99 Ind Cas 227=41 C L J 203=A I R 1927 Cil 17=28 Cr L J 237, *Sankarlinga v Emperor*, A I R 1930 Mad 632=58 M L J 397

**Statements made to police by third parties in the course of investigation**  
Statements made by third parties to the police in the course of their investigation

can be used as corroboration under s 157 of the Evidence Act, provided the person who made the statement is called as a witness *Azimuddy v Emperor*, 44 C L J 253=A I R 1927 CIL 17 Statements made by a witness to the police are relevant only for the purpose of contradicting his testimony and the statements made to the Deputy Commissioner and to the committing Magistrate only for the purpose of contradicting or corroborating that testimony These statements cannot be treated as substantive evidence like the statements made by a witness at the trial It is impossible to place any reliance on the statement of a witness at the trial when it is in hopeless conflict with her previous statements *Rambaran v Emperor* 7 Lah L J 371=26 P L R 659=A I R 1925 Lah 483 Oral accounts of statements made by witnesses to the police in the course of an investigation under s 151 Cr Pro Code are admissible under section 157 of the Evidence Act, to corroborate the statements of those witnesses at the trial, although the written records of such statements are rendered inadmissible under s 162 of the Code of Criminal Procedure *Baladco v Emperor* 6 Pat L J 241=2 Pat L T 565=61 Ind Crs 785=22 Cr L J 433 Statements of witnesses made to the police should not be used to corroborate them except in very special circumstances *Ram Chariter v Emperor*, 4 Pat L W 325=3 Pat L J 568=45 Ind Crs 272=19 Cr L J 512

Whether this section is affected by s 162 Section 157 of the Evidence Act is affected by s 162 of the Criminal Procedure Code so far as statements to the Police taken under s 161 whether oral or recorded are concerned *Emperor v Nju Tha Din* 4 Rang 72=96 Ind Crs 145=27 Cr L J 381=5 Bur L J 30=A I R 1926 Rang 116 (F B) The main object of the legislature in enacting this section was to prohibit the use of the statements of prosecution witnesses as corroborative under s 157 of the Evidence Act *Jagua Dhanul v Emperor* 5 Pat 63=93 Ind Crs 834=7 Pat L J 396=27 Cr L J 484=A I R 1926 Pat 232 The general rule laid down in section 157, Evidence Act is controlled by the special provisions contained in s 162 of the Criminal Procedure Code Not only is the record of the statement of a witness to the police taken under s 161 excluded from evidence but even the proof of such statement by oral evidence for the purpose of corroborating the prosecution evidence *Balha v The Crown* 26 P L R 304=6 Lah 171=A I R 1925 Lah 399 The words "legally competent" in s 157, Evidence Act mean having power under same law statutory or otherwise Section 157, Evidence Act is clearly controlled by s 162 Criminal Procedure Code *Emperor v Kumaramu than Pillai*, 25 M L T 879=(1919) M W N 199=50 Ind Crs 834=20 Cr L J 354, *Ruston v King Emperor* 7 A L J 469=6 Ind Crs 101 per Anon J

Section 162 Criminal Procedure Code prohibits only the use as evidence, of the writing which records the statements of the witnesses made to the investigating Police officer, that section, so far as oral statements of the witnesses are concerned, is not in conflict with s 157 Evidence Act and the oral statements made to Police officer may be proved by calling him as a witness in order to corroborate the testimony of the witnesses *Bhulal v A E*, 13 C W N 197 *Per Karamat Hussain J* dissenting in *Rustan v King Emperor*, 7 A L J 468=11 Cr I J 235=6 Ind Crs 101 See also *Emperor v Hanmasuddi*, 16 Bom L R 603=26 Ind Crs 133, *Imperatrix v Jyibhai*, 22 B 596 *Bhulal v King Emperor* 13 O C 7=5 Ind Crs 357=11 Cr L J 117

Deposition before committing Magistrate The effect of section 283 of the Criminal Procedure Code is to place the deposition of a witness before the committing Magistrate exactly on the same footing as the deposition in the Sessions Court It is 'testimony' within the meaning of s 157 of the Evidence Act and statements made by the witness before the investigating officer are admissible for the purpose of corroborating such testimony It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by statements made before the investigating officer *Velliah Kone In re*, 45 M 766=43 M L J 222=16 L W 239=31 M L T 175 (H C)

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What former statement can be given as corroborative evidence Where the owners of the lands adjacent to the disputed land were examined as witnesses in the case and certain documents evidencing their purchases were sought to be let in evidence, the documents are admissible in order to corroborate the oral testimony of the witnesses and that once they are admissible, the Court may look into their contents as it may think fit since there is no provision in the Indian Evidence Act which prohibits such a course *Sheikh Ketabuddin v Asfor Chaudia*, 11 C L J 532=99 Ind Cas 907=A I R 1927 Cal 230 The trial Judge in a civil suit permitted an officer in charge of the Record of Right proceedings to be called as the very first witness and to produce the statements of witnesses recorded in those proceedings, which were exhibited notwithstanding the objection raised in that behalf Held that only parts of such statements, as were necessary to corroborate or contradict the witnesses when they were examined in the case, could be put in through them under the provision of s 157 *Mt Hafima v Mt Jandi*, 103 Ind Cas 670=A I R 1927 Sind 209 A petition put in by a client for adjournment on the ground that her pleader could not appear on account of *hatal* is admissible in evidence in proceedings under the Legal Practitioners Act under s 157 of the Evidence Act in corroboration of the evidence which the witness has already given at the time, when his attention was directed to its contents and when he said the contents were true to his knowledge *Emperor v Rajan*, 49 C 732=26 C W N 589=35 C L J 356

The entries in the diary of a deceased *chaudidar* relating to birth and death are not admissible under s 32 sub-section (2) of the Evidence Act Where from the evidence it appears that the entries were not made by the *chaudidar* at all as he was an illiterate person but by other persons who deposed that they made the entries at the request of the *chaudidar* Held that the entries are admissible in evidence under s 157 or s 159 of the Evidence Act or possibly under both sections *Naina Koor v Gobordhan* 1919 Pat 332=2 Pat L J 42=37 Ind Cas 124, *Baldeo v Abhoy Ram* 12 A L J 945=24 Ind Cas 540

Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act but it may be relied on under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama*, 4 Bom L R 434

Where the question is whether a transaction is a sale or a mortgage and a person sues to reduce the property on the ground that the transaction is only a mortgage, but the defendant contends that it is a sale, the burden of proof rests on the defendant to prove the sale, at any rate in the first instance If mutation of name has taken place the *pyatpaing* or outerfoil of the revenue register of mutations if not signed by the owner of the land, is not admissible in evidence to prove the report of the transaction made to the headman or surveyor who maintains the register But if such officer is called as a witness and gives evidence of the terms of the report from his own memory then such *pyatpaing* is admissible in order to corroborate his testimony under s 157 *Shue Pan v Maung Po* 3 L B R 250

A statement made by a witness to a chief constable can only be used under s 157 of the Evidence Act to corroborate the evidence of the first witness at the trial Such a statement standing by itself can furnish no legal basis for a conviction *Queen Empress v Yakub*, Rat Un Cr C 503

Previous statements might be used to corroborate or contradict statements made at the trial not to corroborate statements made prior to trial *Emperor v Akbar Badu*, 12 Bom L R 663=7 Ind Cas 933=11 Cr L J 542=34 B 599

A police inspector is an officer legally competent to investigate the fact under s 157 of the Evidence Act, and therefore statements made to him by the approvers are admissible under that section *Muthu Kumara Swami v Emperor* 1912 M W N 549=13 Cr L J 352=14 Ind Cas 896=35 M 397

Where a letter written by a witness to a third person was missing and the witness wrote another letter to which he got a reply containing a statement of

what that witness had written previously to such person held that the reply was not admissible in evidence to corroborate the evidence of the witness. *Held* that the oral testimony of such person, if he was alive, may be admissible under s 157 Evidence Act. Evidence of the fact that a statement was made by a third person to the witness is admissible but evidence of the terms of the statement is inadmissible. *In re Subrahmanya*, 2 Weir 823. S 157.

Deposition of a witness in the previous Sessions trial is admissible under this section. *Empress v Ishri Singh*, 8 A 672 = 4 W, N 1886, 257.

A statement by a person at an inquest can only be used to corroborate or to contradict a subsequent statement of the same person admissible as evidence. But when the subsequent statement is itself unworthy of credit it cannot be materially strengthened by showing that the witness had previously (at the inquest) made a statement partly in agreement and partly in direct material disagreement with it. *In re Bayanna* 2 Weir 821.

Under the general provision of law any body who has seen a place may be examined as to what he saw. A Kanungo making the inquiry may give his deposition and his report is admissible under s 157 of the Evidence Act in order to corroborate his own sworn testimony. *Achambit v Sarada* 12 Cr L J 480 = 12 Ind Cis 88.

It is doubtful whether a statement as to an event, made three days after its occurrence is admissible under s 157 of the Evidence Act, to corroborate the witness who made the statement. *Logana Fluor* 6 M L J 17 = 11 Cr L J 30 = 4 Ind Cis 700.

The record of statements made by witnesses during a police investigation is not admissible as an independent evidence. But such statements may be proved either to contradict or corroborate the testimony of the same witness. *Bihawal v Empress* 17 P R 1886 Cr. A statement of a raped girl that she had been raped in answer to enquiries by persons who saw her raped is admissible under s 157 of the Evidence Act. *Goora Lal v Emperor* 25 Cr L J 1211 = 92 Ind Cis 112.

What statement cannot be used as corroborative evidence. This section cannot be invoked to let in statements made by some body else as evidence for the purpose of corroboration of a witness examined in the case. *Ambera Chaman v Humud Mohan*, 110 Ind Cis 521 = A I R 1928 Cal 893. A letter written by a Police officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under s 157 properly receivable in evidence for any purpose. *Bhogilal v Royal Insurance Co*, 6 Rung, 142 = 25 A. L. J 377 = 12 C W N 593 = 103 Ind Cis 1 = 47 C L J 530 = 30 Bom L R 818 = 23 L W 276 = A I R 1923 P C 51 = 34 M L J 545 (P C). Oral statements by witnesses in Police investigation which do not corroborate their evidence at the trial are inadmissible. *Venkata Subbiah v Emperor*, 48 M 610 = 21 L W 190 = 1925 M W N 68 = 86 Ind Cas 409 = 26 Cr L J 721 = A I R 1925 M 579 = 48 M L J 195. A statement made to a Police officer, not being a first information under s 151 of the Code of Criminal Procedure, can be proved only by the Police officer that the particular statement was made to him. *Salun v Emperor*, 61 Ind Cis 640 = 22 Cr L J 110. The previous statement of an accomplice is no corroboration of his evidence. It must be corroborated as regards every material particular and the identity of the accused must be proved by reliable independent testimony. *Pai v Malappa* 11 B H C 196. Although the mere repetition of a statement without contradiction of material discrepancy, is under section 157 Evidence Act some corroboration of the truthfulness of that statement that section does not justify the use against accused persons of a previous statement by an approver relevant to contradict his retraction. *Pattana v Emperor* 3 P R 1904 Cr. Where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child was the father of the illegitimate child, is made three years after its birth the entry does not satisfy the terms of s 157, and is not admissible in evidence. *Kanaiyappa v Kulkarni* A. I R 1930 Mad. 191 = 1929 M. W N 696.

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What former statement can be given as corroborative evidence Where the owners of the lands adjacent to the disputed land were examined as witnesses in the case and certain documents evidencing their purchases were sought to be let in evidence, the documents are admissible in order to corroborate the oral testimony of the witnesses and that once they are admissible, the Court may look into their contents as it may think fit since there is no provision in the Indian Evidence Act which prohibits such a course *Sheikh Ketabuddin v Nafar Chandra*, 44 C L J 582=99 Ind Cas 907=A I R 1927 Cal 230 The trial Judge in a civil suit permitted an officer in charge of the Record of Right proceedings to be called as the very first witness and to produce the statements of witnesses recorded in those proceedings, which were exhibited notwithstanding the objection raised in that behalf Held that only parts of such statements, as were necessary to corroborate or contradict the witnesses when they were examined in the case, could be put in through them under the provision of s 157 *Mt Halima v Mt Jandri* 103 Ind Cas 870=A I R 1927 Sind 209 A petition put in by a client for adjournment on the ground that her pleader could not appear on account of *hatal* is admissible in evidence in proceedings under the Legal Practitioner's Act under s 157 of the Evidence Act in corroboration of the evidence which the witness has already given at the time, when his attention was directed to its contents and when he said the contents were true to his knowledge *Emperor v Hajam*, 49 C 732=26 C W N 589=35 C L J 356

The entries in the diary of a deceased *chaudidar* relating to birth and death are not admissible under s 32 sub section (2) of the Evidence Act Where from the evidence it appears that the entries were not made by the *chaudidar* at all as he was an illiterate person but by other persons who deposed that they made the entries at the request of the *chaudidar* Held that the entries are admissible in evidence under s 157 or s 159 of the Evidence Act or possibly under both sections *Naina Koei v Gobordhan* 1919 Pat 352=2 Pat L J 42=37 Ind Cas 424, *Baldci v Abhoy Ram*, 12 A L J 945=24 Ind Cas 540

Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act but it may be relied on under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama*, 4 Bom L R 434

Where the question is whether a transaction is a sale or a mortgage and a person sues to reduce the property on the ground that the transaction is only a mortgage, but the defendant contends that it is a sale, the burden of proof rests on the defendant to prove the sale at any rate, in the first instance If mutation of name has taken place, the *pyatpang* or outerfoil of the revenue register of mutations if not signed by the owner of the land, is not admissible in evidence to prove the report of the transaction made to the headman or surveyor, who maintains the register But if such officer is called as a witness and gives evidence of the terms of the report from his own memory then such *pyatpang* is admissible in order to corroborate his testimony under s 157 *Shue Pan v Maung Po*, 3 L B R 250

A statement made by a witness to a chief constable can only be used under s 157 of the Evidence Act to corroborate the evidence of the first witness at the trial Such a statement standing by itself can furnish no legal basis for a conviction *Queen Empress v Yalub*, Rat Un Cr C 508

Previous statements might be used to corroborate or contradict statements made at the trial, not to corroborate statements made prior to trial *Emperor v Akbar Badu*, 12 Bom L R 613=7 Ind Cas 933=11 Cr L J 542=34 B 599

A police inspector is an officer legally competent to investigate the fact under s 157 of the Evidence Act, and therefore statements made to him by the approvers are admissible under that section *Muthu Kumara Suami v Emperor* 1912 M W N 549=13 Cr L J 352=14 Ind Cas 896=35 M 397

Where a letter written by a witness to a third person was missing and the witness wrote another letter to which he got a reply containing a statement of



what that witness had written previously to such person held that the reply was not admissible in evidence to corroborate the evidence of the witness. *Held* also that the oral testimony of such person, if he was alive may be admissible under s 157 Evidence Act. Evidence of the fact that a statement was made by a third person to the witness is admissible, but evidence of the terms of the statement is inadmissible. *In re Subrahmanya*, 2 Weir 823

Deposition of a witness in the previous Sessions trial is admissible under this section. *Empress v Ishu Singh*, 8 A 672 = A W, N 1886, 257

A statement by a person at an inquest can only be used to corroborate or to contradict a subsequent statement of the same person admissible as evidence. But when the subsequent statement is itself unworthy of credit it cannot be materially strengthened by showing that the witness had previously (at the inquest) made a statement partly in agreement and partly in direct material disagreement with it. *In re Bajanna* 2 Weir 821

Under the general provision of law any body who has seen a place may be examined as to what he saw. A Kamungo making the inquiry may give his deposition and his report is admissible under s 157 of the Evidence Act in order to corroborate his own sworn testimony. *Ichambit v Sarada* 12 Cr L J 480 = 12 Ind Cis 88

It is doubtful whether a statement as to an event, made three days after its occurrence is admissible under s 157 of the Evidence Act, to corroborate the witness who made the statement. *Logana Phuar*, 6 M L J 17 = 11 Cr L J 30 = 4 Ind Cis 700

The record of statements made by witnesses during a police investigation is not admissible as an independent evidence. But such statements may be proved either to contradict or corroborate the testimony of the same witness. *Bihawal v Empress* 17 P R 1886 Cr. A statement of a raped girl that she had been raped in answer to enquiries by persons who saw her raped is admissible under s 157 of the Evidence Act. *Goora Lal v Emperor*, 25 Cr L J 1214 = 82 Ind Cis 142

**What statement cannot be used as corroborative evidence.** This section cannot be invoked to let in statements made by some body else as evidence for the purpose of corroboration of a witness examined in the case. *Ambera Chavan v Kuntud Mohan*, 110 Ind Cis 521 = A I R 1928 Cil 893. A letter written by a Police officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under s 157 properly receivable in evidence for any purpose. *Bhogilal v Royal Insurance Co*, 6 Rang 112 = 26 A L J 377 = 32 C W N 593 = 103 Ind Cis 1 = 47 C L J 550 = 30 Bom L R 818 = 28 L W 276 = A I R 1928 P C 51 = 51 M L J 545 (P C). Oral statements by witnesses in Police investigation which do not corroborate their evidence at the trial are inadmissible. *Venkata Subbiah v Emperor*, 19 M 640 = 31 L W 190 = 1925 M W N 68 = 86 Ind Cis 209 = 26 Cr L J 721 = A I R 1925 M 579 = 48 M L J 197. A statement made to a Police officer, not being a first information under s 151 of the Code of Criminal Procedure, can be proved only by the Police officer that the particular statement was made to him. *Salim v Emperor*, 61 Ind Cis 640 = 22 Cr L J 410. The previous statement of an accomplice is no corroboration of his evidence. It must be corroborated as regards every material particular and the identity of the accused must be proved by reliable independent testimony. *Rej v Malaya* 11 B H C A C 196. Although the mere repetition of a statement, without contradiction of material discrepancy is under section 157 Evidence Act, some corroboration of the truthfulness of that statement, that section does not justify the use against accused persons of a previous statement by an approver relevant to contradict his retraction. *Pattala v Emperor* 3 P R 1904 Cr. Where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child was the father of the illegitimate child, made three years after its birth, the entry does not satisfy the terms of s. 157, and is not admissible in evidence. *Kannappa v Kullammal* A I R 1930 Mad. 191 = 1929 M W N 696

**158** Whenever any statement, relevant under section

What matters may be proved in connection with proved statement relevant under section 32 or 33

**Scope of the section** The statements admissible under sections 32 and 33 are exceptional cases and the evidence is only admitted from the improbability or great inconvenience of producing the authors of the statements. It is only just therefore that all the same safeguards for veracity should be provided as if the authors of the statements were themselves before the Court and subjected to oath and cross examination. *No 1 Evidence*, 305. This section places a person whose statement has been used as evidence under s 32 in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him. Therefore a statement which has been admitted in evidence under s 33 may be contradicted by another statement of the same person made to police during investigation. *Hari Ram v Emperor*, A I R 1926 Lah 122. Under this section the question whether a witness is entitled to credit or not must be decided by a Court on the evidence before it and not on what another Court thought of the witness in another case because there are no means of judging whether the finding as to the credibility of the witness in the other proceeding is a right finding or not. *Chandreswar v Bisheswar*, 5 Pat 777. Where the statement of a witness previously made is used as evidence under the provisions of ss 32 and 33 then any other statement made by that witness can be used by virtue of s 153 for the purpose of contradicting that witness as if such witness had appeared in Court and was cross examined on such previous statement and on question being asked had denied the facts mentioned in the same. *Niamat Khan v Emperor* A I R 1930 Lah 409.

159 A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document
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Provided the Court be satisfied that there is sufficient reason for the non-production of the original

An expert may refresh his memory by reference to professional treatises

**Principles** When a witness statement is offered as the basis of an evidential inference to the truth of his statement, it is plain that at least three

distinct elements are present, or put in another way, there are three processes, in the absence of any one which we cannot conceive of testimony. First, the witness must know something, to this element may be given the generic term Observation. Secondly, the witness must have a recollection of those impressions, the result of his observation, this may be termed Recollection. Thirdly, he must communicate this recollection to the tribunal, that is, there must be Communication, or Narration or Relation. *Wigmore* § 478. Now the element of Recollection thus stands between the element of Observation or Knowledge which it reproduces and the element of Communication or (Narration) by which it is in turn reproduced and made apprehensible by others. The general canon applicable to Recollection is simple: the Recollection should (as far as can be expected) correspond to and represent the impressions originally gained by observation or knowledge. Various situations are conceivable in which this essential quality of Recollection may be lacking, and various detailed requirements with reference to curing or avoiding these possible deficiencies are also conceivable. *Wigmore* § 725. The cardinal principle of Narration is this, that it must correspond to the Recollection, the story told by the witness, whether orally or in writing, must represent his knowledge and recollection. *Wigmore* § 734.

It is to day generally understood that there are two sorts of recollection which are properly available for a witness,—past recollection and present recollection. In the latter and usual sort, the witness has either a sufficiently clear recollection or can summon it and make it distinct and actual if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it,—in particular of using written or printed notes, memoranda, or other things as representing it. In the former sort, the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. This use of a past recollection depends of course on certain conditions, while the stimulation of an actual present recollection need be subject to fixed rules, and it is through the improper application of the limitations of the one case to the other that some confusion of decisions has arisen. *Greenl. Ev.* § 439. (1) section 159 deals with Present Recollection and section 160 refers to Past Recollection.

**Present Recollection whether there should be any fixed rules of limitation.** "Here the witness is proceeding to testify from a present and existing recollection, but he is unable to produce that recollection by an undirected effort, and the question is whether a resort to notes, etc., to stimulate and receive it is under the circumstances improper. The vagaries of memories being infinite, it will be futile for the law to attempt to determine by fixed rules what things have or have not a potency to stimulate recollection. It can only rest on the circumstances of each case, excluding the desired aid only when it is apparent or likely that the witness is not really aided but is repeating a form of words of whose truth he has no knowledge. (1) Accordingly, so far as concerns stimulation by reference to a writing or the like, the fundamental notion is that any paper may in the circumstances be properly used for this purpose. (*Laues v. Reed*, 2 Lew. Cr. C. 15; note, *Henry v. Lee*, 2 Chitty 124). In particular, (2) that the paper is not written by the witness himself is no objection. (*Hurry v. Lee*, *supra*; *Laues v. Reed*, *supra*; *Smith v. Morgan*, 2 Moo. & R. 257; *R. v. Watson* 3 C. & K. 111, *R. v. Williams*, 8 Cox Cr. 313), and it is therefore incorrect (confusing this with the Past recollection) to require that the paper be one written by the witness or under his direction or known to him to be correct. Nevertheless, papers prepared by others may, under the circumstances of the case, be so suspicious or questionable as to make their use improper. (*Noel's Motion* 3 F. R. 752, *Hoel v. Ins. Co.* 13 Q. B. D. 292, 305, *Layser v. Haysstaff*, 5 Beav. 462). (3) Further more it is not an objection that the paper is a copy, and not an original, provided it does in fact serve to revive the recollection. *Turner v. Taylor* 3 T. R. 751, *Doe v. Perkins* 3 T. R. 749, *anon* 1 Lew. Cr. 101, *R. v. Williams*, 6 Cox Cr. 313. (4) Again, it is equally

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immaterial that the paper was not made at or about the time of the event, for it is not used as a record of past memory and its power to stimulate and revive the memory by the allusions which it contains must be precisely the same whether it was made at the time or not. This is the necessary result of the principle involved and is maintained by a number of Courts (*Bank v. Zure* 11 S C 111 *Tolson v. Long Writing Co.*, 11 Wis 602), but many, misled by the limitation applicable to a record of past recollection, require that the paper should be one contemporaneous with the event. (*Stemheller v. Denton*, 9 C & P 111 *Whitfield v. Ward* 2 C & K 1015) (5) Upon the erroneous view just referred to it has recently been declared that on being surprised by the testimony of one's own witness one may not refer to former testimony or a deposition by the same witness and endeavour to stimulate the memory to a correction by using this result chiefly on the supposed principle that the reference for refreshing must always be to a contemporary writing. That this supposed principle, as applied to refreshing by deposition or former testimony, is wholly unsound may be understood by noting the numerous decisions in which this mode of refreshing has been allowed (*R v. Watson* 1 C & K 111 *R v. Williams*, 8 Cox Cr 313, *Smith v. Morgan*, 2 Moo & R 277), while, independently of this supposed principle, there is no reason why refreshment may not be equally well attained by the counsel's oral reference to or reading from the deposition, etc. as by the witness's own perusal of it, and the precedents abundantly sustain this practice. (*R v. Edwards*, 8 C & P 26(31), *R v. Barnes* 1 Cox Cr 269 *R v. Ford* 5 Cox Cr 181, *R v. Williams*, 8 Cox Cr 313, *R v. Quinn*, 21 & P 818) (6) As a matter of fairness and to prevent imposition, the paper must be produced in Court on demand, for inspection and cross-examination by the opponent. (*Hardy's Trial* 21 How St Tr 824, *R v. Ramsden* 2 C & P 603, *Lord v. Colvin*, 2 Drex 201) (7) But since in *Lord Ellenborough's* words, it is not the memorandum that is the evidence but the recollection of the witness, (*Henry v. Lee*, 2 Chitty 124), the party whose witness uses it has no right to have it read to or handed to the jury, (*Gregory Turner*, 6 C & P 231), it is only the opponent who may do this in case he wishes to cast doubt on the reality of the refreshment of memory (*Greenl Fv* § 139(c))

**Scope of the section** It is a well settled and undisputed principle of the law of evidence, that a witness under certain legal restrictions, may refer to written or printed memoranda, documents, papers or letters for the purpose of refreshing, assisting and stimulating his recollection and memory with regard to the facts about which he is testifying. The rule requires that a witness should testify only to such facts as are within his own knowledge and recollection, but this requirement is not violated by permitting him to refresh his memory in the manner above indicated. Bentham has pointed out the advantages and disadvantages of allowing a witness on the stand to consult notes or memoranda for the purpose of refreshing the memory. 'On the one hand, what you want is a prompt and unpremeditated answer. If you allow him time to consult notes, you surely lose the advantage of that lively and quick examination which does not give him time to think.' Bentham, *Rationale of Judicial Evidence* cited in *Gondale* 40 207. On the other hand, if this assistance is denied, the witness will often be unable to give accurate and complete testimony and the whole object of the judicial investigation may be defeated. It is universally agreed that the balance between the two inconveniences is by no means equal, and that under proper limitations witnesses may resort to memoranda or writings in aid of memory. Such is the ordinary human memory that very few witnesses would be able to testify as to particular dates, numbers, quantities and sums after the lapse of a few years if they were not permitted to refer to papers and writings which they knew to be correct at the time they were made. Burr Jones § 874. Mr Justice Strong in the United States Supreme Court, said "How few papers, not evidence per se, but proved to have been true statements of facts at the time they were made, are admissible in connection with the testimony of a witness who made them has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why they should not be? Quantities and values are retained in the memory with great

difficulty. If at the time when an entry of aggregate quantity or value was made, and the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness." *Insurance Co v Wicks*, 14 Wall (81 U S) 375. A witness, who has the means in his power, can lawfully be required to look at such papers, to enable him to ascertain a fact with more precision to verify a date or to give more exact testimony than he otherwise could as to times, numbers quantities and the like. *Burr Jones s* 874. 'Although in general' says *Mr Sturte* 'leading questions are not to be put to a witness, yet where his memory has failed, he may even during examination, read, or if necessary, hear the contents of a document read for the purpose of reviving his former recollection. And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence. A witness is of course, competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect and the means of restoration may be the subject of comment in cases to which any suspicion is attached. *Sturte on Evidence* p 209. "Generally speaking an instrument used for the purpose of refreshing memory, ought to be in the handwriting of the person using it, and as nearly as possible contemporaneous with the fact which it records, at the same time, neither of these conditions is absolutely indispensable. A witness may refresh his memory from a document written by another if it, or about the time it was made, he has seen and inspected it, if he examined it at the time and found it correct, and if it is the case that it does bring the fact to his memory. For instance, if a ship's log book is usually written up by the mate yet the captain would be permitted to refresh his memory by it if he could swear that he examined it shortly after the time of the entry and that it was correct, and that by looking at the entry he remembered that the circumstance which it narrated had taken place. So a shop keeper who has himself sold goods of which the accounts are kept by one in his employ, if he has inspected the entries within reasonable time after the entry was made, would be allowed to refresh his memory by the memorandum, notwithstanding it was made by a third person, but it is evident that the weight to be attached to such testimony will vary according to circumstances. A man may refresh his memory as to the day on which certain proceedings at which he was present took place by referring to a newspaper containing a report of the proceeding which he read at the time the facts were fresh in his memory, and he knew the facts were correctly reported. *Dyer v Best*, 4 H & C 189. A Judge will attach much more weight to the evidence of a person speaking from a contemporaneous entry made by his own hand, than to that of one to whose memory the fact was recalled by a memorandum made by a third party, and which perhaps he had not seen for some time after it was made.

"In accordance with the rule which requires the production of the best evidence, the memorandum itself must be produced, not a copy of it, unless indeed, the Court is satisfied that the non production of the original has been sufficiently accounted for. It frequently happens that a witness makes an extract from his books, which would be themselves good sources for refreshing his memory, while the extract is a mere copy of such books is not receivable." *Sturte on Evidence* cited in *Nort Ev* 338 339. A witness who being asked in reference to any particular transaction, if he had made any entry in a register or book at or about the time when an occurrence took place such as the posting of a letter of which an entry was made might refer to such entry or memorandum to refresh his memory but beyond that he cannot go. *Queen Empress v Sayad Surfuddin*, Rat Un Cr C 344.

Where a witness during cross-examination is asked to refresh his memory by referring to a privileged document, he may be told that the consequence of his so referring to the document, would be to allow the other side to have a look at the document. *Nem Chand v Wallace*, 4 C. L. J 268=10 C W N 107=4 Cr L J 247. A most regularly kept private diary containing records of facts contemporaneously made may be used for contradicting or corroborating a witness or refreshing his memory and the like under ss 111 157 and 159 of the Act, but such user does not make the document itself evidence.

# THE INDIAN EVIDENCE ACT

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*Mulundaram v Dayaram*, 10 N L R 44=23 Ind Cas 893, see also *Nama Koer v Gobordhan*, 2 Pat L J 42=37 Ind Cas 424. A certificate of age of a private patient is not relevant as a public record under s 35 of the Evidence Act but could only be used for the purpose of refreshing the memory when he is examined as a witness. *Venkata Rangappa v Subbaraya Gandan*, 33 Ind Cas 142. A reference can be made to an old document for refreshing the memory as regards the date of death of a certain person. *Syenudain v Samiuddin*, 72 Ind Cas 985=1923 Cal 378. If the witness be blind the paper may be read over to him for the purpose of exciting his recollections. *Taylor* § 1410. If the witness cannot read and write, the proper practice is, not to read the memorandum to him in the presence of the jury, but to allow him to retire with counsel on each side and to have the memorandum read in his presence without comment. *Commonwealth v Fox* 7 Gray (Mass) 585, *Durr Jones* § 884.

The dying statement of a deceased person must be taken in the presence of the accused, if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. *Empress v Samiuddin*, 8 C 211. A medical expert can refer to his report to refresh his memory. *Roghun v Empress*, 9 C 457. (401)=11 C L R 569. When a dead body is sent to the Civil Surgeon in order to the making of a post mortem examination, a printed form is sent therewith, which the Civil Surgeon fills up on examining the body. This report is not itself legal evidence but it is usually placed in the hands of the Civil Surgeon, who refreshes his memory from its contents when giving his testimony. *Field v 7th Ed* 531-532. The record of the statement of the accused made by the head constable cannot be used by itself as evidence. That is forbidden by section 162 (1) of the Criminal Procedure Code. Properly speaking it could only be used by the Sub Inspector as a writing from which he refreshed his memory as to what was said by the accused. *Emperor v Robert* 31 C 1050. Memorandum by witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory. *Keyarsook v Gobard*, A I R 1930 Nag 24, see also *Mulundaram v Dayaram*, 16 N L R 41=23 Ind Cas 893.

**Any writing.** This section entitles a witness to refresh his memory by any writing. So he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book. So a ledger, a log-book, a work man's time book, previous deposition, letter, bill of articles furnished, etc. can be seen by a witness to refresh his memory. *Taylor* Ev §§ 1400-1410. The *pyatpang* or outerfoil of the revenue register of mutations, may also be used for refreshing the memory of a witness. *Shus Pan v Maung Po*, 3 L B R 250, see also *Ma Dun v Lee* O 5 L B R 10=2 Ind Cas 535. For purposes of section 159 Indian Evidence Act 1872, it is not requisite that the writing used to refresh the memory of a witness should have been admitted in the purview of a 159 of the Evidence Act. The weight of the provisions of Order XIII, r 2, C P C, may nevertheless be referred to by the party producing it or his witness to refresh his memory of the document and is otherwise within the purview of a 159 of the Evidence Act. The weight of the evidence, the objection to the document upon the ground that it is not having been produced at the proper time renders its authenticity the subject of suspicion and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous document might lead to a grave injustice. *Jeevan Lal v Nilmam*, 33 I A 107=7 Pat. 305=30 Bom L R 305=107 Ind Cas 337=47 C L J 302=32 C W N 563=A L R 1929 P C 80=26 A L J 121. The word "writing" used in this section also includes printed matter. *Sam Chandra v Emperor* A L R 1930 Lah 371. The writing may have been made either by the witness himself, or by others, providing in the latter case, that it was read by him when the facts were fresh in his memory, and he knew the statement to be

correct *Phup Er* 445 The witness must be able now to assert that the record accurately represents his knowledge and recollection at the time The usual phrase requires the witness to affirm that he "knew it to be true at the time" *Wigmore* § 747 A witness may refresh his memory by referring to *Jama uasil baki* papers when it was prepared by him on receiving the rent *Uhlul v Naya*, 10 C 248, *Keramani v Bejoy*, 7 W R 533, see also *Mohomed v Safar*, 11 C 407, 409

**At the time of the transaction** The document must have been written either at the time of the transaction or so shortly afterwards that these facts were probably fresh in his memory *Burrough v Martin* 2 Camp 112, *Whitefield v Aland*, 2 C & K 1015, *Talbot v Cusack*, 17 Ir C L R 213 But so far as the present recollection as embodied in section 159 is concerned the fact that "the paper was not drawn up about the time of the events" should not be a fault The recollection may be equally refreshed by a recent note or by some contemporaneous record It might in fact be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment where the paper was one confessedly having no value as a contemporaneous record of past recollection There is adequate authority for the result thus required by principle Yet the greater number of decisions, and most of the *obiter dicta* announce as a requirement that the memorandum used must have been made 'contemporaneously or nearly so' with the events 'at or near the time' with the same varying phrases used in the rule for Past Recollection" *Wigmore* § 761 The framers of the Indian Evidence Act in this respect also following the English rule did not make any discrimination between Present Recollection (s 159) and Past Recollection So now the rule is that a witness may make use of notes taken at the time the fact happened *Kinlock's Case* 25 How St Tr 937 "Where the witness goes back to a past recollection which can less easily be tested by cross examination, he may properly be asked for something more positive,—something of a quality satisfactory in itself and not merely the best available This quality the law has attempted to define, and even to test by an arbitrary rule There is found first, a general principle that the recollection, when recorded, should have been fairly fresh,—each instance being dealt with on its own circumstances, and, secondly, there is more commonly, an arbitrary list defining the recollection as recorded at or near the time of the events" *Wigmore* § 745 In England it is not essential that the memorandum should have been made at the very time of the transaction, it is enough if it has been made by the witness, or by another with his privity, at the time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact *Russ Cr* 2304 *Wood v Cooper* 1 C & K 645, 646 But in India the document must have been written either at the time of the transaction, or so shortly afterwards that the facts were probably fresh in his memory *Burrough v Martin*, 2 Camp 112, *Whitefield v Aland*, 2 C & K 1015, *Talbot v Cusack*, 17 Ir C L R 213 A delay of fortnight was held not to be fatal *R v Longton*, 2 Q B D 296 but an interval of several weeks or six months was held to be so *R v Gordon Kinlock*, 25 How St Tr 934, *Jones v Shonel* 2 C & P 196, *Whitfield v Aland*, *supra*, *Steiniller v Newton*, 9 C & P 315

**Writings made by any other person** But this, testimonial guarantee of correctness being all that is needed, it is generally immaterial whether the witness was or was not the person who actually wrote or printed the record It may have been manually prepared by another, but from the moment when the witness saw it and passed judgment upon its correctness, it became for him a correct record As the mere fact of his writing it would count for nothing in itself so the mere fact of his not having been the writer is immaterial *Wigmore* § 748 If the witness saw the writing soon after it was made, and the entry corresponded with what he had himself then observed, that was tantamount to an entry made by himself *Digby v Steelman* 1 Esp 328, see also *Jacob v Lindsay*, 1 East 460, *Burton v Plummer*, 2 A & E 341, *Toppin v Mc Gregor*, 1 C & K 320, *R v Philpots*, 5 Cox Cr 329, *Anderson v Walley*,

S 159 3 C & K 54 *R v Longton*, L R 2 Q B D 296 In *Burrough v Martin*, 2 Camp 112 Lord Ellenborough said "If a witness looked at the log book from time to time, while the occurrences mentioned were recent, and fresh in his memory, it is as good as if he had written the whole with his hand." Similarly in *Lord Talbot v Cusack* 17 Ir C L R 213, O'Brien J said "(The use of memoranda made by the witness himself) has been extended to the case of entries which though not in the witness's hand-writing, were either made in his presence and read by him at the time of the transaction, and were read and examined by him shortly afterwards when the facts were fresh in his recollection and when he was enabled to ascertain that the facts stated in the entry were true." *Wignmore* § 748. When a witness wants to refresh his memory under this section, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification for his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction to which it relates. *Ramchandra v Emperor*, A I R 1930 Lah 371.

**Inadmissible documents** The document need not be admissible in evidence *per se*. Thus, an invalid lease (*Dillon v Tomlin*, 5 A. & E 856), or an irregular deposition (*R v Mann*, 49 J P 743), or an unstamped document (*Birchall v Bullough* 1896 1 Q B 325), may be referred. *Phy Ev* p 417.

**Copies of documents** Whether the witness can refresh his memory by referring to a mere copy of his original memorandum is a question of some difficulty and doubt in England. *Taylor* § 1408. That the paper is a copy, not an original, is no essential fault. The only question is whether in fact it is genuinely calculated to revive the witness's recollection, and for this purpose a copy may conceivably be entirely satisfactory. *Tanner v Taylor*, 3 T R 754, *Duchess of Kingston's Case*, 20 How St Tr 619. *Doe v Parfins*, 20 How St Tr N S 785 (827). *Gurdner Peerage Case* Le Marchant's Rep 63, *Anon*, 1 Law Cr C 101, *R v Williams* 6 Cox Cr 343. On principle there is no necessity of accounting for the original in any way in the case of Present Recollection, *Wignmore* § 760. But as neither the English law nor the Indian Evidence Act makes any distinction between Present Recollection (s 159) and Past Recollection, use cannot be made of copies of a document unless the Court be satisfied that there is sufficient reason for the non production of the original. *Ur Stakie* lays down the rule as follows "In accordance with the rule which requires the production of the best evidence the memorandum itself must be produced not a copy of it unless, indeed, the Court is satisfied that the non production of the original has been sufficiently accounted for. It frequently happens that a witness makes an extract from his books which would be themselves good sources for refreshing his memory while the extract as a mere copy of such books is not receivable." *Nort Ev* 339. On principle if a copy is to be admitted under section 160 as a record of Past Recollection a great stringency should be observed in allowing the witness to use it. "It remains to make sure" says *Prof Wignmore*, "that the record which the witness now puts forward as a record of his prior knowledge is in fact the genuine embodiment of his past recollection. While the witness's guarantee of its correctness may be accepted the law may well insist on the production of his guaranteed paper, not merely as verifying the fact of its existence but also as insuring the correctness of his story as throwing additional light on his veracity, as affording a means of testing him and as the best proof of what was really recorded. In short, the original record itself must be used in testifying if it is procurable. This rule is almost universally recognized and of course, if the original is lost or otherwise unavailable a copy may then be used. *Tanner v Taylor* 3 T R, 754, *Doe v Parfins*, 3 T R, 754, *Jones v Stroud*, 2 C & P 196. *R v Harrey* 11 Cox 546. *R v St Martins*, 2 A. & E 210, *Horne v Mackenzie* 6 Cl & F 628, *Topham v McGregor*, 1 C & K. 320, *Lord Talbot v Cusack*, 17 Ir C L R 213. It is true that the use of a copy lacks certain advantage, but this defect is no greater than in the ordinary instance of a contract



or a deed which cannot be produced, nor is the importance of using the original here any greater" *Wignore* § 719. Thus a sale was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste book kept by himself *Burton v Plummer*, 2 A & C 341. A surveyor has been allowed to refer to a printed copy of a written report made by him to his employers, which latter was substantially but not literally transcribed from rough notes taken by him at the time *Horne v Mackenzie* 6 C & F 628, *contra*, *Murray v Mason* 18 Ir R L R 8, *Phip* Ex p 416. The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of the first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except, in a very clear case of miscarriage *Angava v Ramappa* 1 Bom L R 703=28 B 94. Where the plants in suits upon bonds by the same plaintiff having been destroyed by fire, while under the Court's custody through no fault of the plaintiff, suits were re-instituted upon duplicate copies of the plants prepared from a register containing particulars of the lost bonds held that the register though it might not be secondary evidence of the contents of the bonds was a document that might be used for refreshing a witness's memory under s. 159 of the Evidence Act. *Isaiah Nath v Jeamat Nasya*, 5 C 153. A copy of the statement of injuries recorded in the register of medico-legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be treated as evidence *Mahomed v Emperor* A I R 1926 Lib 51.

S 159.

**Expert** In all cases where skilled witnesses are called to pronounce their opinions on some scientific question they may refresh their memory by referring to professional treatises, tables, calculations lists of prices and the like. For instance an attorney might refer to 'the Carlisle Table' when called upon to give evidence respecting the value of an annuity on joint lives (*Rouley v N W Ry Co*, 42 L J Ex 153), and an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. So, although medical books are not directly admissible in evidence, no good reason can be given, why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority or why he should not be asked, after such a reference, whether his judgment was or was not thereby confirmed *Taylor* § 1422.

**Statement reduced to writing by police officer** A statement reduced to writing by a police officer under s. 162, Criminal Pro Code cannot have the effect of a deposition, but though it is not evidence the police officer, to whom it was made, may use it to refresh his memory under s. 159 of the Evidence Act, and may be cross-examined upon it by the counsel against whose case the testimony aided by it has been given *Queen Empress v Sitaram* 11 B 657 see also *Reg v Uttamchand*, 11 B H C R 120, *Crown v Baloch*, 4 S L R 38 Cr = 7 Ind Cas 38=14 Cr L J 498, *R v Ismail*, 11 B 659, *Rogham v R*, 9 C 455. Documents wherein statements of persons examined by a police officer during an investigation have been under s. 119 of the Cr Pro Code reduced to writing, may be used to refresh such police officer's memory, when giving evidence but the documents themselves cannot be used as evidence in being read out to a jury to point out discrepancies *Rogham Singh v Emperor* 9 C 155=11 C L R 569, *R v Stewart*, 31 C 1050. A witness is not entitled to insist upon a police officer refreshing his memory, during his examination in Court, by referring to certain notes prepared by such officer under s. 119 of the Code. In the matter of the petition of *Kali Churn Churni*, 8 C 151=10 C L R 51.

**Confession** A Magistrate who took down a confession, may while being examined as a witness, be allowed, under s. 159 or s. 160 Evidence Act, to refresh his memory by referring to his record of that confession *Emperor v Chaitu Gahera*, 16 C P L R. 122.

**Special diaries** A criminal Court may permit the police officer, who made the special diary, to look at it for the purpose of contradicting such police officer. Where the Police officer does look at an entry in the diary for the

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160 purpose of refreshing his memory, the provisions of section 161 of the Indian Evidence Act apply and the accused or his agent is entitled to see such diary and to cross examine such police officer thereupon. A special diary cannot be used to enable any witness other than the Police officer who made it to refresh his memory by looking at it and it cannot be used to contradict any witness other than such Police officer. It is the Court which is entitled to use the special diaries for the purpose of seeking for sources and times of enquiry, and for the names of persons who may be in a position to give material evidence. Neither the accused nor his agent is entitled to see the special diary for any purpose, unless it has been used by the Court for enabling the Police officer who made it to refresh his memory for the purpose of contradicting him. In no case is it to be used by the accused or his agent to see a copy of the special diary or any part of it. This right is limited to that of inspection in certain cases. *Queen Empress v. Mannu* 19 A 390 (F B) = A W N 1897, 11

Arbitration proceeding. A witness who was present at an arbitration, and had compiled the draft and fair copy minutes made by the clerk and found the latter to be correct, was allowed to refresh his memory as to what occurred at the arbitration, by reference to the fair copy minutes made by the arbitrator's clerk. *Astarnee Dass v. Aundo Lal Dass*, 5 C W N XVI

Police diary. If, upon the question being asked of a witness there is a lapse of memory, on his part and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time and the Court invites the witness to refresh his memory with reference to the writing the witness is under an obligation to do so, it being his duty to lay the whole truth before the Court to the best of his ability. *Har/hu v. Emperor* 19 A L J 76

160 A witness may also testify to facts mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document

## Illustration

A book keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Scope of section 160.—Past recollection. The record (memorandum note, entry etc.) must have been made at or about the time of the event recorded. Whether in a given case it was made so near that the recollection may be assumed to have been then sufficiently fresh must depend on the circumstances of the case. *Anderson v. Whally* 3 C & K 51. The witness need not have made the record himself. *Burrough v. Martin* 3 Camp 113. *Green v. Gault* 16 Md 573. *Jacob v. Lindsay* 1 East 560. *R v. Philpotts*, 5 Cox Cr 329. *R v. Langdon* 2 A & E 210. The original record should be produced, not a copy to guarantee that the record actually represented his recollection at the time and this he may be able to do, either by virtue of his general custom in making such records or (as in the common case of attesting witness) by his assurance that he would not have made the record if he had not believed it correct. *Pearson v. Wrightman* 1 Mills Court 344. *Mansham v. Hubbard* 2 M & Ry 3 R v. *St. Martin* 2 A & E 210. The original record should be produced, not a copy. *Do v. Perkins* 3 T R 751. *Dorne v. Cusack* 17 Ir C L R 213. *Topham v. Me Gieger*, 1 C & K 320. *Lord Salbot v. Macfarlane* 5 Cl & F 623. Nevertheless a copy may be used if the original is lost or otherwise unavailable. Since the process of making a copy of it is a distinct thing from the process of making the original record, there is no reason why the copy may not be one made by another person, if properly proved by the other person on the stand. This being so

why is not a copy receivable of a report originally oral? The situation is the same, except that the salesman, workman, etc., instead of handing the book keeper, clerk, etc., a written statement of the transaction, makes an oral statement, which is transcribed, and in effect represents the first person's recollection as orally reported by him. The joint testimony of the two ought to be receivable on principle, and such is the result generally reached by the Courts, though usually the reports are required to have been made in the regular course of business. *Green v. Ev* § 439(b). When a written record brings to the mind of a witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine, the witness may be allowed to refresh his memory by looking at the record. *Abdul Satim v. Emperor* 49 C 573=35 C L J 279=26 C W N 680=69 Ind Cts 145=23 Cr L J 657. The meaning of the expression "if he is sure that the facts, etc." is that the witness must satisfy the Court, with reference to ordinary probabilities, of his right to be sure that the record relied on by him is correct. *Yesudayan v. Subba Naicker*, 52 Ind Cts 704. In a suit for damages for negligence in supervising a building an Engineer's Report is admissible to prove quantity of damages, provided the Engineer makes the contents of the report a part of his deposition by using it to refresh his memory. *Nagendranath v. Nagendra Bala*, 43 C L J 479=97 Ind Cas 200=A I R 1926 Cal 988.

**Difference between section 159 and section 160** Under section 159 of the Indian Evidence Act, it is not necessary that the witness must be sure, that what was reduced to writing by him is a correct record. It is enough if, on reading it, the true facts are recalled to his memory. But if he does not actually recollect himself what the appellant said if the words are not called to his memory, then the notes may be admitted under s. 160 of the Evidence Act, if he is sure that the facts are correctly recorded in the notes. If the words have not been correctly recorded but only the writer's impressions of those words are recorded, then the notes will be inadmissible under s. 160 of the Evidence Act. *In re Mylapore Krishnaswami*, 5 M L T 393=9 Cr L J 456=32 M 334=2 Ind Cas 33.

**161** Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it such party may, if he pleases, cross-examine the witness thereupon.

**Right of adverse party as to writing used to refresh memory** Principle The fundamental purpose of the rule requiring the use of the original is to protect against error and to give the opponent an opportunity to verify the exact nature of the document and to ascertain its value. Even where a copy is permitted, there is still a need in fairness or furness for the opponent to see the document in order to prepare, to test the witness upon its contents. Thus it is a necessary implication that the document used, whether an original or a copy, when produced in Court, shall be shown to the opponent on his request, to inspect and to use in cross-examination. In *R v. St Martin*, 2 A & E 210, *Patteson J* said "If he could not recollect the facts independently of the writing, the original writing ought to have been in Court in order that the other party might cross examine, not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness refreshing his memory in every part." "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him of the accuracy of which he knows nothing. The right of a party to protection against the introduction against him of false, forged, or manufactured evidence, which he is not permitted to inspect, must not be invaded a hairs breadth". *Mullin J* in *Tibbels v. Sterbery*, 66 Barb 201.

**Scope of the section** In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,—and

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**S 161.** if the witness has no independent recollection of the fact, it is necessary,—that they should be produced at the trial and that the opposite counsel should have an opportunity of inspecting them, in order that in cross or re examination, he may have the benefit of the witness's refreshing his memory by every part. Neither is the adverse party bound to put the document in, as part of his evidence, merely because he has looked at it or examined the witness respecting such entries as have been previously referred to, but if he goes further than this, and asks questions as to other parts of the memorandum, it seems, that he thereby makes it his own evidence. *Paylor* § 141. The grounds upon which the opposite party is permitted to inspect a writing are (1) to secure the full benefit of the witness's recollection as to the whole of the facts, (2) to check the use of improper documents and (3) to compare his oral testimony with the written statement. The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper document, but it is doubtful whether he is entitled except for this particular purpose, to question the witness as to other and independent matters contained in the same writing. *In re Shubboo Lallan* 8 C 739 745. A *pyatpang* or the outer foil of Land Records Register IX not signed by the person making the report of the translation to which it refers is not admissible in evidence to prove the report. But when the official making the entry gives oral evidence about the oral report he can refresh his memory by referring to *pyatpang*. When used in that way the entry becomes evidence within the definition of the term in section 3 of the Evidence Act and should be placed on the record. *Ma Dun v Lee* O, 5 L B R 40=2 Ind Crs 335

The question sometimes arises whether *memoranda* used to refresh the memory, are themselves to be admitted in evidence. Of course the memoranda under discussion in this chapter must not be confused with such writings as books of account which on grounds elsewhere discussed, are competent as evidence when properly verified. When the witness, after examining the memorandum finds his memory so refreshed that he can testify from recollection independently of the memorandum there is no reason or necessity for the introduction of the paper or writing itself and it is not admissible. In such case the jury have no knowledge of the contents of the paper, unless opposing counsel calls for such contents for cross-examination. Of course the cross-examiner has the right to inspect and use the document in order that he may test the candour and credibility of the witness and to show that it could not properly refresh his memory. *Burr Jones* § 883. It is almost needless to add that a statement prepared by the witness and to show that it could not therein set forth. Thus in a personal injury action a statement by the facts of the condition of the plaintiff at the time of his attendance referred to in his deposition as an accurate description of the matters therein set forth, was in admissible as evidence. Although it is clear that the witness that he recollects them and can testify from his actual recollection it has frequently been held that another rule prevails when the witness, after examining the memorandum, cannot testify to an existing knowledge of the fact, independently of the memorandum but can testify that, at or about the time the writing was made, he knew of its contents and of its truth or accuracy. In such cases, both the testimony of the witness and the contents of the memorandum are held admissible. The two are the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum. *Hancock v Kelley* 81 Alr 386. There are many every day transactions in commercial establishments which after a little time could not be otherwise proved. "It is not to be supposed that officers and clerks in large trading and other establishments can call to mind all that has been done in the course of their employment, and when their original entries and memoranda have been duly authenticated and there is nothing to excite suspicion there can be no ground for allowing them to be read before the jury. *Monroe Bank v Chelver* 2 Hill (N Y) 531. But where the witness testifies fully as to all the matters in the memorandum, its rejection is not error. If the witness neither recollects

the facts nor remembers to have recognized the writing as true while the facts were fresh in his memory, then the paper is nothing more than Hearsay, and is incompetent evidence *Bondurant v State Bank*, 7 Ala 830, *Burr Jones* § 883

§ 162

No oral statements of witnesses should be recorded in the "special" diary kept by a police officer under s 172 of the Criminal Procedure. Whether incorporated or not, in the special diary records of statements of witnesses taken by the police falls under s 162 Criminal Procedure Code, and are liable to be produced but only under the conditions laid down under that section, i.e. the accused may at the time the witness appears before the Court, ask the Court to refer to them, and the Court may, if it thinks expedient, in the ends of justice, furnish him with copies of such statements for the purpose of impeaching the credit of the witness. But the police officer who recorded the statements, cannot be cross-examined under s 145 or s. 161 of the Evidence Act with regard to such statements, such examination being allowable only with regard to the entries properly recorded in the diary kept under section 172 Criminal Procedure Code, if the police officer refers to such entries for the purpose of refreshing his memories *Dadan Gazi v Emperor*, 33 C 1023=10 C W N 890=4 Cr L J 79

**162** A witness summoned to produce a document shall,

Production of documents if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code

**Scope of the section** If the person is required to produce a document he is served with a *subpoena duces tecum*. A *subpoena duces tecum* ought to specify the documents required, and the Court will not enforce a *subpoena* which is too general, but if a person served with a *subpoena* admits that he has the documents required with him he must produce them *Lee v Angus* L R 2 Eq 59 *Re Emma Silver Mining Co* L R 10 Ch 191. A sealed packet may be a document and therefore liable to production under the *subpoena* *R v Daye* (1903) 2 K B 333. A witness who is merely called to produce a document need not be sworn, and in that case he cannot be cross examined *Wood v MacInson*, 2 M & R 273, *Corl* 197. But he may be asked what documents he has with him, and he is bound to answer the question without being sworn and produce the documents. The witness produces the document to the Court and not to the parties and the Court decides whether it is to be used or not. The witness can, of course, take any legal objection to producing the documents *Powell Ev* 653, see also *Pickering v Noyes* 1 B & C 262. If he objects he is to state the grounds of his objection *Griffith v Rickells*, 7 H 299. If he does not attend on such a *subpoena* or attends and refuses to produce the writing on any other ground but that of privilege secondary evidence will not be admissible, but the witness will be punishable for contempt *R v Llanfaethly*, 2 E & B 940. A person cannot, of course be compelled by

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- § 162. subpoena to produce documents not in his possession or under his control Thus a secretary of a company served with a subpoena to produce the books of the company was held not to have disobeyed the subpoena by not producing the books, they having been removed from him since the service of the subpoena by the board of directors of the company *R v Stuart* 2 F L R 141, *Pouell* 631 Any person summoned merely to produce a document shall be deemed to have complied with the summons if he crosses such document to be produced instead of attending personally to produce it *Civil Procedure Code, Order XVI, rule 6*

An order cannot be made for the inspection of the books of persons not parties to the action [*Stairer v Reynolds*, (1880) 22 Q B D 262] although such persons may be ordered to attend and produce them before the Court or Judge or examiner *Re Smith Williams v Frere*, (1891) 1 Ch 323 Section 123 makes the production of evidence as to unpublished official records of affairs of State entirely dependent upon the discretion of the head of the department concerned It is therefore unnecessary for the Judge to have the right to inspect any document of this character but he may inspect a document which falls under section 130 or 131 in order to judge of its admissibility The person in custody of what he considers a privileged State document should bring it with him to Court to be prepared for the Court deciding that it is not so, but there is no necessity is in England for him to state that he objects to the production on the grounds of public policy *Aam v Famer* 37 L F R N 5 469 The Herd of the department can give or withhold his permission as he thinks fit *Vide s 123* The proviso to this section expressly precludes the Court from even inspecting documents referring to matters of State *Nort Ev* 340

If a person has the document in his actual legal possession he must produce it on summons though the legal custody belongs to a third person But documents in a public office are not in the possession of the clerk as to justify his bringing them into Court *Nort Ev* 340 A subpoena asking all documents relating to the questions in issue or documents relating to the case if he has any is not enforceable *Lee v Angus*, L R 2 Eq 59, *Re Emma Silver Mining Co* L R 10 Ch 194, *Buchard v McFarlane*, (1891) 2 Q B 241 (247) The subpoena should not be oppressive *Steele v Savory*, 8 L R 94 This subpoena is incidental to the power of Courts and necessary to the due administration of justice *Amev v Long* 9 East 473 It is a writ of compulsory obligation which the witness must obey like all other subpoenas He has no more right to determine whether the documents shall be produced than whether he shall appear as a witness It is his duty to attend and to bring with him the documents according to exigency of the writ *Doe v Kel y* 4 Dowl 273 *Reg v Russell* 7 Dowl 693 It is for the Court to determine whether they should be produced and exhibited *Inev v Long* 9 East 473, *Re v Duxon*, 3 Burr 1687 Thus the Court will determine whether the documents should be withheld is evidence on the ground that they will deprive the witness of his title, charge (*United States v Reynolds* 6 Pat 352 *Whitaker v Wood*, 2 Launt 110), or whether the document is in the nature of a confidential communication to an attorney (*Re v Duxon* 3 Burr 1687 *Copeland v Watts*, 1 Stark 95 *Bustios v White* 1 Q B D 123 *Lycell v Kennedy* 27 Ch D 1 *vide ss 126 127*), or whether his excuse for not producing the same is valid or reasonable *Bull v Loreland* 10 Pick (Mass) 9, *Bur Jones* § 601

In a case where an attorney claimed the protection of his lien, the Court said The exemption to the general rule of production seems to me a reasonable one. If an attorney's lien on his client's papers should not be permitted to embarrass a third person in no way liable for the debt is reasonable but, if an attorney's lien upon his client's papers amounts to anything I think he may assert it as against the client even when summoned by him to produce the papers by a subpoena *duces tecum* The value of the lien often lies almost altogether in the power to withhold the papers from use as evidence and that the debtor client should be allowed by a subpoena *duces tecum* to make practically worthless his creditors lien seems to me unjust *Davis v Davis* 90 Fed 791 see also *Hoye v Luddell*, 7 De G M & E 331, *In re Cameron & Coolbrook*, etc *R Co* 25 Bar 1, *Brassington v Brassington*, 1 Sum

& S 155, *Kemp v King*, 2 Moody & R 437. So a Court will punish the witness for his failure or refusal to produce documents, if properly subpoenaed in case he has no excuse for such failure or refusal. *Vide s 175 of the Indian Penal Code, R v Daye*, (1903) 2 K B 333. A subpoena duces tecum is only to be employed to secure the production of books and papers that are to be introduced in evidence in the trial of an action, it is not to be used to secure papers to refresh the memory of a witness. It cannot be used for the production of things. *Burr Jones* § 801.

The fact that the documents are in the possession of a corporation does not prevent their production. A corporation has no right to withhold papers which a private individual would have to produce. In cases of diplomatic officers, ambassadors and consuls, a subpoena will not be issued for the production of their official papers. *Burr Jones* § 802.

Where the witness declines to produce an instrument on the ground of professional confidence the Judge should not inspect it to see whether it was one which he ought to withhold (*Doe d Carter v James* 2 M & Rob 47, *Volant v Soyer*, 13 C B 231 = 23 L J C P 83), and it seems that the mere assertion on oath by the solicitor that it is a title-deed or other privileged document, is conclusive. *Roscoe N P 153*. If the document be brought into Court by a witness who says that he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpoenaing the owner himself to make the objection in person. *Phelps v Preu*, 3 E & B 430 = 23 L J Q B 140. It seems to be sufficient if one only of several interested parties objects. *Per Maule J in Aulton v Chaplin*, 19 L J C P 374, *Keasley v Philips*, 10 Q B D 465. When the production is excused, secondary evidence is admissible. *Marston v Downes*, 1 Ad & E 31, *Doe d Gilbert v Ross*, 7 M & W 102, *Roscoe N P 1585*.

If a Court decides to summon a government official for the production of certain documents it should only do so after careful consideration and once the summons had been issued, productions should ordinarily be insisted on if the party who obtained the summons so desires. *Lazman Rao v Vithoba*, 45 Ind Cas 398.

Statements made before the Income Tax Collector do not relate to affairs of state and so are not governed by s 123 of the Evidence Act. The Income Tax Collector, summoned to produce, is bound to produce the books in his possession, in spite of the rules made under s 38 of the Income Tax Act forbidding disclosure. Under s 162 of the Evidence Act a witness should not decline to bring documents into Court on the ground of privilege. Under the same section the Court has power to inspect the documents for the purposes of deciding objections regarding production or admissibility. The provision relating to the non disclosure of information given or obtained "in official confidence" does not apply to the production of documents in a Court of justice. *Venkatachella v Sampathu*, 4 M L T 317 = 32 M 62 = 19 M L J 263 = 1 Ind Cas 705. The inspection of an official document of which privilege is claimed is entirely within the trial Court's discretion under this section and its refusal to inspect them is not an improper exercise of discretion. *Nagaraja v Vythianatha*, (1911) 2 M W N 369.

### 163 When a party calls for a document which he

Giving as evidence of document called for and produced on notice

has given the other party notice to produce, and such document is produced and inspected by the party calling for its production he is bound to give it as evidence if the party producing it requires him to do so

**Principle.** The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them so as to become acquainted with their contents in which case he is obliged to use them as his evidence (*Calvert v Fowler* 7 C & P 336, *Wharam v Routledge* 5 Esp 235 *per Lord Ellenborough*), at least if they be in any way material to the issue. *Wilson v Bouie*, 1 C & P 10, *Sayer v Kitchen*, 1 Esp 210,

## THE INDIAN EVIDENCE ACT

*Taylor* § 1817 The reason for this rule is, that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of whatever he inspects evidence of both parties. *Taylor* § 1817 *Green* L. § 563 'A party who gives notice to produce a paper in evidence must be supposed to speculate through the contents of it. If he does not he ought not to be permitted to speculate through the contents of the paper. If he obtains from his adversary the inspection of any paper or document he may choose to demand. Such a privilege could be liable to abuse.' *Radcliffe* J in *Lawrence v Vai Hoine*, 1 *Cannis* 276, 285, *Wigmore* § 2125

Scope of the section. The mere calling for the documents from the opposite party is not enough to make them evidence. But when the party calling for the document inspects them he is bound to give it as evidence if the party producing it requires him to do so. *Burr Jones* § 226. If the party giving the notice declines to use the papers when produced this though matter of observation will not make them evidence for the issues. *Wilson v Bouie* 1 *C & P* 10. *Cheliet v Fowler*, 7 *C & P* 386, *Wharam v Routledge* 5 *Esp* 235, *Roscoe v P. El* 13. Inspection by a party includes inspection by an agent as well as personally. *Norrey v Acep* (1909) 1 *Ch* 557 565. This section is intended to prevent the somewhat indignant squabbling which frequently takes place in England, as to whether a document which the other party has received notice to produce should be put in. *Mal* L. p. 113. In *Cheliet v Fowler* 7 *C & P* 386, the documents called for were books of account. In that case counsel turned over several pages so as to look at the contents of the papers or books. In *Wharam v Routledge*, *supra*, *Lord Ellenborough* said 'You cannot ask for a book of the opposite party and then not use upon the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side if he think fit to use it.' In *Wilson v Fowler* 1 *Carr* p. 10 the paper produced was a receipt which was not material to the case and *Parl* J said 'If the plaintiff's counsel call for a paper and look at it, he must read it in evidence if it is all material to the case. If it does not bear on the case he need not read it. This paper is of the latter kind and the plaintiff's counsel may go on without reading the paper or calling the subscribing witness. This implies that the party calling for a paper must prove it. So where a party to a case calls for a document from the other party and inspects the same under s. 163 of the Evidence Act 1872 he takes the risk of making it evidence for both parties. *Mahomed Ali v Abdul Rahman* 5 *Bom* L. R. 380. Under this section it is the duty of the plaintiff to require the defendant who has taken inspection to tender the account books as evidence of both parties. Such account books need no further proof and are admissible in toto. *Ashkan Ghule v Paransa* 106 *Ind* Cis 305 = A. I. R. 1928 Nag 119. There is no authority for the proposition that evidence which is admitted under the special provisions of this section must be deemed to be conclusive evidence against the party who has inspected the documents. There is certainly nothing in the language of the section itself to justify such a conclusion. All that happens is that the documents which the other party has produced become evidence in the case for what they are. *Ram Dhan v Ram Dayal* 23 *O C* 156 = 57 *Ind* Cis 923. In a pending trial the defendant produced certain account books and gave inspection of the same to the plaintiff on his request. The plaintiff however did not admit the genuineness of those accounts. The Court admitted the documents in evidence without proof and asked the plaintiff to adduce rebutting evidence if any held that the procedure of the lower Court was not justified by s. 163 of the Evidence Act. Section 163 does not render it a proof of the document to be executed unnecessary or after the normal incidence of that burden. It is doubtful whether section 163 of the Evidence Act is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun. *Iya Gopala v Ramanuja*, 1923 *M W* A 292 = 72 *Ind* Cis 409 = 1923 *Ind* 607 = 18 *L W* 165. Application of this section is not restricted to



civil proceedings only. It is applicable also to criminal trials and even though the Crown is the prosecutor. Where therefore, notice to produce statements made to a Magistrate during departmental enquiries is given to the Crown by the defence and such statements are produced, inspected and used for cross examination of several witnesses the Crown is entitled to have the whole of the statement as evidence. Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements therefore are not public documents, and section 163 can be applied to such statements. *Government of Bengal v Santiam Mandal*, A I R 1930 Cal 370.

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S 165

**164** When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Using as evidence of document production of which was refused on notice

#### Illustration

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

**Principle** Where an opponent in possession refuses to produce on demand he is afterwards forbidden to produce the document in order to contradict the other party's copy or evidence of its contents. This is in one sense a proper penalty for unfair tactics but the original refusal may also be regarded as a judicial admission in advance, of the correctness of the first party's evidence to this extent. *Wignmore* § 1210. In *Doe v Cockell* 6 C & P 525 528 Alderson B said 'You must either produce a document when it is called for or never.' See also *Lewis v Hartley*, 7 C & P 407, *Doe v Hodgson*, 12 A & E 135.

**Scope of the section** If the opponent having a document in his possession refuses to produce it when called upon at the hearing to do so he is not at liberty afterwards to give the document in evidence for any purpose. *Doe v Hodgson*, 12 A & L 135. *Collins v Gashon* 2 F & F 47. Since it is generally to the interest of a party against whom a document is intended to be adduced that his opponent should have no opportunity of mistaking its terms, and the refusal to comply with the notice to produce a document in his possession has the effect of letting in secondary evidence such notice is generally effected to insure the production of the document. *Wills El* 2nd Ed 361. If he once refuses he cannot when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness. *Edmonds v Challis*, 7 Com B 413 439, *Jackson v Allen*, 4 Sarl R 74. Neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witness for the purpose of cross examination (*Doe v Cockell* 6 C & P 527 528) or to produce and prove it as part of his own case. *Doe v Hodgson*, 12 A & E 135. He is not entitled to show that there are attesting witnesses who should be called (*Jackson v Allen*, 3 Stark 71, *Edmonds v Challis* 7 C B 134), or to refresh the memory of a witness (*Till v Insworth Bristol* 1874, *Wilde C J W S*), or it seems for any purpose (*Collins v Gordon* 2 F & F 47, *Byles J*). He is, in effect, bound, by any legal and satisfactory evidence produced on the other side. *Roscoe V P El* 13. *Shoolram v Ram Lal*, 9 W R C R 219, *Nort F* 252.

**165** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties.

Judge's power to put questions or order production

**S 165.** about any fact relevant or irrelevant, and may order the production of any document or thing, and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive if the question were asked or the document were called for by the adverse party, nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149, nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

**Principle** 'Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section, is that in order to get to the bottom of the matter before it the Court will be able to look at and enquire into every fact whatever.' *Steph Intro Ev Act* p 162. 'We know of no limit' says *Lumplin J* in *Epps v State*, 19 Gr 118 (Am) to the right which belongs to the Court of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honourably and impartially exercised is not to be tolerated for a moment. When they see therefore that a material fact has been omitted which ought to have been brought out, it is not only right but the duty of the presiding Judge to call the attention of the witness to it, whether it makes for or against the prosecution. His aim being neither to punish the innocent or screen the guilty, but to administer the law correctly.'

**English rule** The sporting theory of the common law in which litigation was a game of skill to be conducted according to the specific rules and to be decided by the combined effects of skill strength and luck tended to place the Judge primarily in the position of the umpire of a game whose duty it was to interfere only so far as needed to decide whether the rules of the game had been violated. This tendency never dominated (so far as the Judge's functions were concerned), in the orthodox English practice the Judge there has never ceased to perform an active and vital part as a director of the proceedings and as an administrator of justice. One of the natural parts of the judicial function in its orthodox and sound recognition, is the Judge's power and duty to put to witnesses such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his function was never doubted at common law the Judge could even call a new witness of his own motion and could seek evidence to inform himself judicially, much more could he ask additional questions of a witness already called but imperfectly examined. Fortunately in spite of the strong but subtle tendency to force the purely judicial function into the back ground, the tradition of the common law has never been lost the right of the Judge to interrogate as he thinks best has always been preserved in theory. *Wigmore* § 781. So under the English law a Judge has always discretionary power with which the Court above is very unwilling to interfere (*Middleton v Barnard*, 4 Ex R. 243 *Per Parke B*) of recalling witnesses at any stage of the trial, and of putting such legal questions to them as the

exigencies of justice require *R v Watson*, 6 C & P 653 *Taylor* § 1477 So a judge may put all such questions to a witness as the interests of justice require (*R v Remnant*, R. & R 836 *R v Watson* 6 C & P 653, *R v Jameson*, Times, July 24, 1896), and these questions may be based not only on matters arising in the case but on his own local or scientific knowledge (*R v Antrim*, 21 R 603, *Shott v Robinson*, 63 J P 295) So the jury may ask admissible though not inadmissible questions *R v Lillyman*, (1896) 2 Q B 167, 177, *Phil Ev* 151 So *Mr Edmund Burke* in arguing in *Mr Warren Hastings Trial* said 'It is the duty of the Judge to receive any offer of evidence apparently material, suggested to him, though the parties themselves through negligence, ignorance or corrupt collusion, should not bring it forward He has a duty of his own, independent of them, and that duty is to investigate the truth If no prosecutor appears (and it has happened more than once), the Court is obliged, through its officer the clerk of the arraigns to examine and cross-examine every witness who presents himself, and the Judge is to see it done effectively, and to act his own part in it *Report of Committee on Warren Hastings Trial*, 31 Part Hist 318

**Scope of the Section** It seems to be the general rule, well supported by the decided cases, that the trial Judge has the right to propound such questions to witnesses as may be necessary in order to elicit pertinent facts, in order that the truth may be established *Barr Jones* § 81 A Judge presiding at a trial is not a mere moderator between contending parties, he is a sworn officer charged with grave public duties In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice There is nothing wrong in the Court's asking the witness any question the answer to which would likely throw any light upon the testimony *Per Bechell CC in Hoffman v Couble* 86 Ind 591, 596 (Am) In *Bartley v State*, 55 Nebr 294=75 N W 832, *Harrison C J* said 'It is undoubtedly necessary that the Judge who presided should acquire as full a knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and incorrectly, to the extent his duty demands, shape the determination of the litigated matters, that justice may not miscarry, but may prevail, and doubtless it is allowable at times, and under some circumstances, for the presiding Judge to interrogate a witness The exact extent or (times) when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement, but it may be said that the right here in question is one which should be very sparingly exercised, and, generally counsel for the parties should be relied on and allowed to manage and bring out their own case The actions of the Judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause *Wigmore* § 781

As regards the inclusion of this section in the Indian Evidence Act *Sir James Fitzjames Stephen* in his speech said 'Passing however from the case of English Barristers to the case of pleaders and vilds, and the Courts before which they practice, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true and whether the main provision founded upon them—the provision which empowers the Court to ask what question it pleases—is not essential to the administration of justice here In saying that the Bench and the Bar in England ply their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court so that the Judge has nothing to do but to sit still and weigh the evidence produced before him In India in an enormous mass of cases, this neither is nor can be so It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that section 165 which has been so much objected to has been framed *Speech of the Honble Fitzjames Stephen on the 12th March 1872, in submitting the Report of the Committee to the Council*'

S. 165.

"We come next to the Judge's power" says Mr Justice Cunningham 'to ask questions. It frequently happens that the parties do not in their questions elicit all the facts necessary to a good view of the merits of the case. A plaintiff may have some weak points in his case which he is afraid of betraying and so dexterously avoids, or a defendant may fail to perceive the import of some answer given and allow it to pass uncriticized in any such case it is highly important that the Judge should be armed with full power enabling him to get at the facts. He may accordingly, subject to conditions to be immediately noticed, ask any question he pleases in any form at any stage of the proceedings about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without the Court's permission, to cross-examine on the answers given. This general power, however, is very clearly restricted. In the first place the question must be based on relevant facts, and those relevant facts must have been duly proved, next the Judge cannot compel a witness to answer any question or to produce any document which he would be entitled to refuse to answer or produce at the instance of the opposite party nor may the Judge ask any of the questions as to credit which would be improper if asked by the adverse party nor can he dispense with primary evidence of a document unless the facts of the case show that secondary evidence is admissible. A Judge, accordingly, cannot by the exercise of the powers conferred by this section impart into the decision of the case any fact which is not relevant under the Act, nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit except such is would be permitted if asked by the parties. Thus restricted, the power of asking questions is of obvious utility in a country like India, where in the vast majority of cases no advocate is employed but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witness.' *Cun Fv* 70

'A Judge may ask any questions in any form, at any stage of the case, and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure, for if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by technicality to secure inductive evidence, and in criminal cases to assist in fixing the amount of punishment. *Best Ev* § 86. So it is within the power of the Court to propound pertinent and properly framed questions to a witness. The exercise of the power if the questions propounded by the Court are directed to crucial points of the case, is most likely to arouse the serious apprehension of the one or the other of the parties and certainly places counsels in a situation of great embarrassment if they conceive a question asked by the Court as leading and suggestive in form or improper for any cause.

It is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding Judge in entering upon and conducting an exhausted examination of a witness and the exercise of a sound discretion will seldom deem such action necessary or advisable. *Dun v People*, 173 Ill 582, 595. 'Therefore whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted the full development of the truth or whenever he can effect a better accomplishment of that purpose he not only has the right but it is his duty to take part. The Judge should not place himself in the attitude of helping or hurting either side, but whenever it appears to him proper he should fearlessly endeavour to develop the truth with all possible clearness and certainty whichever side the truth may help or hurt. The Judge will always have a personality of his own which he cannot disguise or conceal. But the only fact he can display is sincerity, and so long as he is sincere he need feel no timidity in the discharge of his public duty because of the possible tone or inflection of his voice or the play of his features. It is natural that able and masterful attorneys should be intolerant and resentful of any participation by the Judge in the examination and cross-examination of witnesses.' *Burch J in State v Keel* 85 Kan 765, 11 ignore § 781.

Of course, the examination by the Judge must be done in a reasonable and impartial way so as not to indicate his opinion of the facts and thereby prejudice the rights of the parties. His questions should be propounded, not to support the case of either litigant, but with the sole desire to elicit and bring out the truth that justice may prevail. Having in fact no feeling for or against either party, it should not be difficult for him to refrain from exhibiting such feeling. It is the primary duty of the parties to bring out their own evidence. But it would be a reproach to the law if the Judge were required to sit still in either a civil or criminal trial, and see justice defeated through failure of counsel to ask a witness a pertinent question. The respective counsels are presumed to be thoroughly familiar with the facts of the case, and as a rule the trial will proceed in the most orderly and satisfactory manner when they are allowed to manage and conduct the examination of witnesses. But it is important that the trial Judge should also become acquainted with the facts and if in his judgment it is necessary to elicit the truth he may interpose with questions to the witness either in direct or cross-examination and he may put leading questions or suggest the form of a question and it has even been held that a Judge may call a witness and examine him and permit or refuse either side to cross-examine such witness. *Coulson v. Dishborough*, (1894) 2 Q. B. 316. It is obvious that these privileges of the Court should be so exercised as not to prejudice the rights of the parties, or to unduly interfere with the presumption of the course of action or defence. The discretion of the trial Court will not be interfered with except in a clear case of abuse. While the Judge may of course state the grounds of his rulings in receiving or rejecting testimony comment upon the weight of the evidence at the time of its introduction should be avoided as an invasion upon the province of the jury. The Court may often with great propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case, but should never indulge in remarks to witnesses, or in comments upon their testimony which may either magnify or diminish its effect upon the jury as to credibility or value. While the Judge may so interpose questions, his comments if any, should be so guarded as not to prejudice the parties, even though not directed against them. For example, when the Judge said "I don't think going over the same ground so much does any good. I suppose that the jury knows more about forest fires than any of the witnesses that are testifying or any of the attorneys in the case," the Court held the remark improper as an invitation to the jury to use their own knowledge of forest fires in determining the issues in the case rather than the testimony of the witnesses. *Bell v. Stewart*, 160 Mo. App. 706. Except prejudice is shown, an improper comment or remark is not sufficient to call for a reversal. *Phillips v. Beene*, 16 Ala. 720. And the error has been held cured by proper instructions to disregard the statement. *Chicago City R. Co. v. Jordan*, 116 Ill. App. 650. *Burr Jones*, § 815. "I think that under section 165 of the Indian Evidence Act the judgment must be based upon facts declared by the Act to be relevant and duly proved." *Shah J. in Ismail v. Emperor*, 26 Ind. Cas. 995=16 Bom. L. R. 934=16 Cr. L. J. 83=2 Bom. Cr. C. 252. When the defence is based on s. 84 of the Indian Penal Code, the Sessions Judge may under section 54 of the Criminal Procedure Code and section 165 of the Indian Evidence Act, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide and if accused has been kept in a lunatic asylum, record medical evidence of the facts observed there, and of the opinion formed as to his particular form of lunacy. *Queen Empress v. Dongor*, Rat. Un. Cr. C. 279.

The provisions contained in this section and in Order XIII r. 10 of the Civil Procedure Code are intended to arm the Court with a power of initiative in getting at the truth. The essential duty of the judicial office is not to decide which party has made the better fight, but to ascertain as far as judicially possible on which side the truth lies and to adjudicate accordingly. The act of sending for a document under s. 165, Evidence Act, or for a record under Order XIII r. 10 does not *ipso facto* make such document or record evidence in the case. If the document is itself relevant, it must be duly proved after it has been formally introduced into the case. *Punya v. Bhadu*, 9 N. I. R. 11=18 Ind. Cas. 857.

S 165

Under this section a Magistrate is entitled to put to a witness any question at any time and in any form *Pratap v Emperor*, Ind Rul. 1930 Nag 273

**Construction of the section** This section is capable of two widely different interpretations (a) It may mean that the Judge may introduce into the case, without any restrictions except those stated in the second proviso, any irregular evidence he pleases, that he might for example, ask a witness what some respectable persons had told him about the matter in dispute, evidence which, though properly speaking, is inadmissible might be quite trustworthy. But then what is the meaning of the first proviso? How is the Judge to make use of the irregular evidence at all, if he is not allowed to base his judgment upon it, at least to some extent? Even if he uses it only to corroborate other evidence, he still has his judgment partly upon it (b) The other possible construction of the section is that it only empowers the Judge to ask irregular questions in order to discover or obtain proper, that is, regularly admissible, evidence. For example in a case of murder, when the weapon, had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. The statement, being hearsay, would be inadmissible but the Judge, by means of it, might be able to direct an enquiry which would lead to the weapon being found. Upon the second of these two constructions of the section the first proviso would prevent less difficulty. But then it is not easy to see why the last clause of the second proviso was inserted. This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence, but why should not a Judge who was merely hunting up evidence look to a copy in order to see whether it was worth while to endeavour to procure the original. It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself, it appears to be mere surplusage, as the first proviso has already declared that the facts must be duly proved, i.e., where the fact is contained in a document primary evidence of that document must as a general rule be given. In the first view, it would modify the rules of evidence to a very considerable extent. In the second view the section would add little, if anything, to the already existing law. *Markby Ev* pp 114 115. Under this section, a Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts, but if he asks questions with a view to criminal proceedings being taken against him he is not bound to answer him and cannot be punished under s 179 I P Code. *In re Hari Lal shman*, Cr Rg 14 10 1885.

**Ask any question** 'The ordinary practice in a properly constituted Court is that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness box in order that the defence may have an opportunity of cross-examining him, and certainly, where the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross examination.' *Per Jackson J in Empress v Grish Chandra* 5 C 614. Under s 165 of the Evidence Act a Judge has power to ask any question he pleases about irrelevant facts if he does so in order to discover or obtain proof of relevant facts. *Queen Empress v Hari Lalshman* 10 B 185, see also *R v Atin*, 2 I R 603. It is not the province of the Court to examine the witness, unless the pleaders on either side have omitted to put some material question or questions and the Court should as a general rule leave the witness to the pleaders to be dealt with as laid down in s. 133 of the Act. The Judge's power to put questions under s 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case. *Per Garth C J in Noor Bux v Empress*, 6 C 279. The Court is not entitled to put questions with regard to the statements made by witnesses to the investigating officer in order to show that the witnesses had made contradictory statements to the police and before the Court. Section 165 of the Evidence Act does not give such a power to the Court, as it amounts to introducing evidence in contravention of the law. *Section 163 of the Criminal Procedure Code* *Keramat v Emperor* 42 C L J 523 = A I R. 1926 Cal 147 = 92 Ind Cas 453. The provision of section

165 cannot be used in contravention of 162 of the Criminal Procedure Code *Maung Hlin Gyaw v Maung Po*, 4 Rang 471=99 Ind Cas 1019=28 Cr L J 219=A I R 1927 Rang 74 The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony *Luchram v Rudha*, 34 C L J 107, *Bhaguan v Shamser*, 33 P L R 1918=44 Ind Cas 433 A Court of appeal cannot set things right on appeal unless it is established that the intervention with questions of a trial Judge, with a view to clear up obscurities, and generally to elicit the truth, exceeded the bounds of the provisions of s 165 and so impeded the legitimate work of counsel engaged in the cause as to amount to a material error leading to failure of justice *Surendra Krishna v Ramee Dasee*, 17 C 1043=24 C W N 860=33 C L J 34=59 Ind Cas 814 A Judge is justified in using his knowledge about the character of the parties in a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them *San Hla v Mt Khorow*, 9 L B R 160=45 Ind Cas 734=11 Bur L T 98

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Cross examinations on answers given to the Court In *Sukham v Mundy*, 11 B H C R 509 at p 510, *West J* said When the counsel for the prisoner has examined or declined to cross examine a witness, and the Court afterwards, of its own motion, examined him the witness cannot then, without the permission of the Court, be subjected to cross examination When after the examination of a witness by the complainant and the defendant, the Court takes him in hand he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form, about any fact relevant or irrelevant (s 165 Indian Evidence Act) and he is therefore, at the same time placed under the special protection of the Court, which may at its discretion, allow a party to cross examine him but this cannot be asked for as a matter of right This principle applies equally whether it is intended to direct the examination to the witness's statements of fact or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers and of each of them just as much as one that may bring out an inconsistency or contradiction It is then a cross-examination upon answers—upon every answer given to the Court—and is subject to Court's control In *Coulson v Disborough*, (1894) 2 Q B 316, *Lord Esher M R* said "If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties, the Judge would no doubt allow, and he ought to allow, the party's counsel to cross examine the witness upon his answers A general fishing cross examination ought not to be permitted" This dictum was approved by *Farwell L J* in *re, Enoch and Zarety* 79 L J K B 363=(1910) 1 K B 327 C A The words "any witness" in this section include a Court witness It is doubtful how far the right to cross examine such a witness is an absolute right or requires the leave of the Court *Mahund Singh v Mt Ghafurunnissa* 9 O & A L R 549=74 Ind Cas 108 The Court should not examine a witness without notice to the parties or their pleaders and without affording them an opportunity to cross examine him or to rebut his statements section 165 of the Evidence Act does not justify such procedure When a Court examines a witness without notice to the pleaders and bases its decision upon the evidence of the witness, it acts with material irregularity in the exercise of its jurisdiction within the meaning of s 115 of the Civil Procedure Code *Pearlal v Pearlal*, 22 Ind Cas 407

It follows that a Judge's questions may be leading in form "Folly my lords" said *Lord Ellenborough, C J* "has said that in examining the witness, we put leading questions? The accusation is ridiculous, it is almost too absurd to deserve notice In the first place, admitting the fact, can it be objected to a Judge that he put leading questions, Can it be objected to persons in the situation of the commissioners that they put leading questions? I have always understood after some little experience that the meaning of a leading question was this, and this only that the Judge restrains an advocate who produces a witness on one particular side of a question from putting such interrogatories as may operate as an instruction to that witness how to reply to favour the party for whom he is adduced The Counsel on the other side, however, may put what questions he pleases, and frame them as best suits his

**S 166** purpose, because then the rule is changed, for there is no danger that the witness will be too complying. But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the party calling him, then again the rule does not prevail, and the most leading interrogatories are allowed. But to say that the Judge on the bench may not ask what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age." 25 *Hansard Part Deb* 207

**Proviso (1)** Having regard to the stringent provision of this section a judgment based on irrelevant facts cannot be sustained. *Ponnusami v Singaram* 41 M 741=34 M L J 526=46 Ind C 849, but see *Jinnab v Hyder* 43 M 609=56 Ind C 957. "The Evidence Act prescribes that the judgment of the Court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that the Court should decide rights upon suspicions unsupported by testimony." *Per Jenkins C J in Sreemulley Mohun Bibi v Saral Chand*, 2 C W N 17 (27) see also *Ismail v Emperor*, 26 Ind Cas 995=16 Bom L R 934, *Luchnam v Radha*, 31 C L J 107, *Bhaquan v Shamser* 33 P L R 1918=44 Ind C 433, *Queen v Ptdamber* 7 W R Cr 25, *Emperor v Jadub Das* 27 C 295=4 C W N 129. Court ought not to comment adversely on witness's conduct relying on matters which are not evidence. *Amar Nath v Emperor* 80 Ind C 143=26 Cr L J 463=A I R 1925 Lah 187. The proceeding of a confidential inquiry containing an opinion on an *ex parte* investigation is inadmissible in evidence. It is the duty of the Judge to record a finding on the evidence adduced by him. *Buldeo v Sheoraj* 66 Ind Cas 807.

**Proviso (2)** Where the question is asked with a view to criminal proceedings being taken against the witness the witness is not legally bound to answer it, and he cannot be punished under s 179 I P Code for refusing to answer. *Queen Empress v Hart Lakshman* 10 B 185. A witness should not be coerced to answer a question. *Queen Empress v Ishri*, 8 A 672 (675).

**166** In cases tried by jury or with assessors, the jury

Power of jury or assessors to put questions	or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper
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**Scope** The privilege to examine witnesses has long been extended to jurors when exercised to draw out or clear up some uncertain point. *Schaefer v St Louis* 128 Mo 64. *Burr Jones* § 815. *R v Lillyman*, (1896) 2 Q B 167. The assessors may also, like the jury be allowed to put questions through the Court to witness under examination. *Empress v Jerumal*, 24 M 523. It is often desirable that the jury should have an opportunity of viewing the spot in controversy since the knowledge derived by those means is far more satisfactory than any obtainable by the mere examination of maps or places which are often inaccurate and obscure and may perhaps have been prepared with an express view to mislead. *Taylor* § 538, see also *In the matter of petition of Lajp* 19 A 302. section 293 of the Criminal Procedure Code. But the jurors and assessors can only view the scene of the alleged offence and cannot examine any witnesses on the spot, because by sub section (2) of s 293 the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them. *Queen v Chutterdhoore*, 5 W R. 59.

## CHAPTER XI

### OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

**167** The improper admission or rejection of evidence

No new trial for improper admission or rejection of evidence	shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court
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before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision

**Scope of chapter XI** The Act concludes with repeating the provision of Act II of 1835 to the effect that the improper admission or rejection of evidence is not ground for a reversal of the judgment or for a new trial of the case if the Court considers that, independently of the evidence improperly admitted, there was evidence enough to justify the decision, or that if the rejected evidence had been admitted, it ought not to have varied the decision. When therefore an appeal is grounded on the improper exclusion or admission of evidence the appellant must be prepared to show not only that there has been an improper admission or exclusion, but that a miscarriage of justice has been thereby caused. *Cun Ev* 70, 71. In his introduction to the Indian Evidence Act, Sir James Fitzjames Stephen observed in connection with sections 5—11 "Important as these sections are for purposes of study and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise to litigation or to any distinction. The reason is that s. 167 of the Evidence Act which was formerly s. 57 of Act II of 1835, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that improper admission and rejection of a single question and answer would give right to a new trial in a civil case, and would upon a trial be sufficient ground for quashing of a conviction before the Court for Crown Cases Reserved. The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge moreover if he doubts as to the relevancy of a fact suggested, can if he thinks it will lead to anything relevant, ask about it himself under s. 165." *Steph Introduction* p. 73.

**Retrospect in English law** Whenever the Court admits irrelevant evidence the party infected by such evidence, should then and there make objection to it. An objecting counsel is entitled to an immediate ruling, before the close of the proponent's case, declaring the evidence admissible or inadmissible. By orthodox English rule two remedies were open to the party against whom the trial Court gives the ruling (1) 'He may tender a bill of exception, or he may first ask the Judge to make a note of the tender, and if the request is denied then tender his bill of exception.' *Per Lord Abinger C B* in *Gibbs v Pit*, 9 M & W 351, 360. An exception is an objection taken at the trial to a decision upon matter of law. An exception is a protest against a ruling of the Court. It is notice to the Court and opposing counsel that the objector does not acquiesce in the ruling. *State v Laundry*, 206 Pat 290. The exception must be written, for its main object is to preserve in it the fact and the terms of the dispute. The exception, must contain all that is necessary for determining the issue made. It must therefore include the offer of evidence, the objection with its reasons, the ruling, and the notice of exception taken. *Wigmore* § 20. The other remedy open to an aggrieved party is by a motion for a new trial. By the orthodox English practice the remedies of new trial and of bill or exceptions were regarded as alternative and mutually exclusive. Moreover, the bill of exceptions came to be only rarely chosen for establishing errors in evidence rulings, partly because of its greater formality and expense, partly because the tradition persisted (ever since the statute of Edward I) that a bill of exceptions involved in some degree a reflection on the trustworthiness of the trial Judge as being incapable or unwilling to note correctly the point in dispute. *Gibbs v Pit*, 9 M & W 351, *Wigmore* § 20.

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Material error, new trial under English law The original and orthodox English Rule is plain. An erroneous admission or rejection of a piece of evidence was not sufficient ground for setting aside the verdict and order a new trial, unless upon all the evidence it appeared to the Judges that the truth had thereby not been reached. In *R v Ball* R & R 133, the Court observed 'Whether the Judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the Jury, it would be otherwise.' Wigmore § 21. Such was the rule in the King's Bench in criminal cases (*Tindler's case* R & R 133 *R v Feal* 11 East 311 *R v Preble*, 164) as well as in civil cases *Tryphut v Wynne*, 2 B & Ald 554, 559. The same rule was adopted by Lord Mansfield C J in *Haiford v Wilson*, 1 Taunt 12 14, in the Common Pleas. In that case the learned Chief Justice, said 'Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury.' This rule was also explicitly approved in *Doe v Tyler*, 6 Bing 561. Such was equally the practice in Chancery, when issues had been sent to a jury in a Common Law Court. Wigmore § 21. In *Pemberton v Pemberton* 11 Ves 50, 52, Lord Eldon, L C said 'If upon the whole record he is satisfied that justice has been done, though he may think, that some evidence was improperly rejected at law he is at liberty to refuse a new trial.' Similarly in *Lorton v Kingston*, 5 Cl & F 213 340, Lord Coltenham L C said 'The true consideration always is whether upon the whole there appears to be such a case as enables the Judge in equity satisfactorily to administer the equities between the parties without the assistance of another trial.' All this lasted down to the decade of 1830. In that decade the Court of Exchequer in *Crease v Barnett* (1835) 1 C M & R 919 announced a rule which in spirit and in later interpretation signified that an error of ruling created *per se* for the excepting and defeated party a right to a new trial. Wigmore § 21. see also *Doe v Langfield* 16 M & W 497, 515. The new Exchequer rule was speedily accepted in the other Courts. (Vide *Rutzen v Farr*, 4 A & E 53, *Wright v Tatham* 7 A & E 313 330), and for something more than a generation it remained the law of England until it was reformed away, for civil causes in 1875. Wigmore § 21. In *R v Gibson*, L R 18 Q B D 547 540 Lord Coleridge C J said 'Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury the party against whom it was given was entitled to a new trial.' See also *Campbell v Loader*, 34 L J Ex. 53.

Now the civil cases in England are governed by the Judicature Act, 1873 and Rules of the Supreme Court. Rule 6 of Order 39 of the same runs as follows: "A new trial shall not be granted on the ground of misdirection or of improper admission or rejection of evidence. Unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial." So a new trial will not be granted unless the evidence had been admitted would have had some legitimate effect on the verdict [*Manley v Patane* (1895) 73 I F 93] nor when the evidence has been prematurely admitted but which would have become admissible in the course of the trial [*Fannel v Wallace*, (1876) 35 L J 361]. And the same rule applies where evidence has been wrongly admitted. If there is other evidence to sustain the verdict and no substantial wrong or miscarriage has occurred in the trial the verdict must stand. *Tait v Beggs* (1905) 2 I R 527 C A. See for examples, *MacLarm & Sons v Davis*, (1890) 6 T L R 372, *Lians v Myther*

*Tydfil Urban Council*, (1899) 1 Ch 241, *Ratcliffe v Evans*, (1892) 2 Q B 524 For a case where a new trial was granted because evidence of an illegal agreement was wrongly admitted in support of the claim for damages, see *Harper v Epyolfsson* (1914) 2 K B 411 In England the rule 6, is not applicable to the Divorce Court *Allen v Allen*, (1894) P 255 "I doubt the possibility of formulating any general rule" said Lord Watson "applicable to the construction of Rule which would be useful, and I do not doubt the inexpediency of making the attempt Each case must depend upon its own circumstances" *Bray v Ford* (1896) A C 44 (50) In the same case Lord Halsbury said 'A substantial wrong is occasioned where the defendant has not been permitted to present his case to the jury, or in important and serious topic has been practically withdrawn from the jury' See also *Lionel Barber & Co v Deulch Bank*, (1919) A C 304 H L, *Yearly Practice* 1921 p 603

The fact that evidence was improperly admitted or rejected at the trial is a good *prima facie* ground for granting a new trial The onus of proving that no substantial wrong or miscarriage was thereby occasioned lies on the respondent *Anthony v Halstead*, 37 L T 433, *Bray v Ford* (1896) A C 44, *Tait v Beggs* (1905) 22 Ir R 525 The Court of Appeal will not entertain technical objections to the admissibility of documentary evidence not taken in the Court below and which if taken might have been met by calling further evidence *Bradshaw v Waddington*, (1902) 3 Ch 430, *Powell Ev* 704

So far as criminal cases were concerned, the Judge had a discretion to state a case for the Court of Crown Cases Reserved under the Crown Cases Act, 1848 (11 & 12 Viet C 78) where admission or rejection of evidence was improperly made The jurisdiction under this Act was transferred to the Judges of the High Court by the Supreme Court of Judicature Act of 1873 and though sections 3 and 5 of the Crown Cases Act were repealed by the schedule to the Criminal Appeal Act of 1907 (7 Ed VII, C 23,) the right to reserve a question in a point of law to the Court of Crown Cases Reserved was not affected by it In practice however such cases are now submitted to the Court of Criminal Appeal *Steph Dig Ev* Art 143 Section 20 (1) of the Criminal Appeal Act, 1907 (7 Ed VII C 23) runs as follows "The powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases are hereby abolished" Where the trial has been a nullity the Criminal Court of Appeal has power to order a *Venue de novo*, although the Cr Appeal Act of 1907 does not expressly confer that power on the Court *Crane v Public Prosecutor*, (1921) A C 299=94 L J K B 1160 *Dennis v Parler*, (1924) 1 K B 863=96 L J K B 388, *R v Hussey*, 18 Cr A R 121 In *King v Beecham*, (1921) 3 K B 464 the Court observed that even if the illegal evidence had not been admitted still the jury must have found the defendant guilty of man slaughter

English and Indian Law differentiated. Under Rule 6, Order 39 of the Rules of Supreme Court, the Court will interfere only when some substantial wrong or miscarriage has been occasioned on the trial by improper admission or rejection of evidence, but in India such interference is legal when such improper admission or rejection of evidence would have varied the decision In the second place under the English law in such cases only a new trial can be granted but under this Act the decision may also be reversed

Scope of the section This section is verbatim reproduction of section 57 of Act II of 1855 This rule has been adopted from the Common Law Courts of England In *Hughes v Hughes*, 15 M & W 701 (1846), *Alderson B* said 'The Court will not grant a new trial if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict.' The reason of the rule is thus forcefully stated by *Porter J* in an American case "These circumstances which were established by evidence, confessedly competent, were so conclusive as to the guilt of the prisoner that no honest jury could refuse to convict him of the crime To acquit him would be to shield guilt from justice and deny the protection of law to the innocent. If therefore, the Court below is right in holding that the Judge erred in admitting addi

**S 167.** tional evidence tending to the same conclusions, we think it was clearly wrong in reversing the conviction, for, upon the facts disclosed, the supposed error could work no legal injury to the prisoner. As it was shown, beyond all question, by undisputed and competent proof, that the accused was one of the murderers, we are under no legal or moral obligation to assume that the jury might have rendered a false verdict of acquittal but for the erroneous admission of other and needless evidence. In this respect there is no distinction between civil and criminal cases. The reception of illegal evidence is presumptively injurious to the party objecting to its admission, but where the presumption is repelled and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt that the result would have been the same, if the objectionable proof had been rejected, the error furnishes no ground for refusal. *Higmore* § 21. This section affirms a reasonable principle often before laid down authoritatively by the Privy Council. If, after sitting aside what has been improperly rejected or omitted, the residue of the evidence is sufficient to support the finding of the original Court, no Appellate Court should set it aside. Thus, in *Rance Surnamoyee v Maharajah Sulttan Camander Roy Bahadur*, 10 M I A 125, where the case had been sought to be supported by false evidence, the Court considered the case on its merits on the independent evidence, apart from the forged *Nori* Ex 167, see also *Suaje Baya v A. Gopalar v Chumma Varayana* 10 M I A 171, *J P Hise v Sunduloomissa*, 7 W R P C 13=11 M I A 171, *Moharajah Juggut v Bhayo Parnee*, 11 W R C R 19, *Mohur v Ghuriba* 6 B L R P C 495. In *Mohar Singh v Ghuriba*, 6 B L R P C 495 the Court said "It seems to their Lordships that giving full weight to all these objections there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give him to the finding of an Indian Court upon evidence against which no objection can be challenged. But they are not in the position of a Court of Law in this country before which on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in those cases are not Judges of fact, and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships who are Judges of the fact in such a case as this to consider whether throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. Their Lordships nevertheless must express their regret that the Court of first instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal. See also *Unde Rajah Raje Bommarane Bahadur v Pemmasamy Tenkatadry*, 7 M I A 128, *Nori* Ex 343.

In cases of doubt the Judge should decide in favour of admissibility of the evidence under consideration rather than of inadmissibility. *Collector of Gorakhpur v Palakdhar*, 12 A 1 (F B).

This section is equally applicable to civil and criminal cases. This section applies to criminal as well as to civil cases whether or not the trial has been had before a jury. *Imperatrix v Pitamber*, 2 B 61. *Queen v Hurrbole Khunder* 1 C 207=25 W R C R 36, *Reg v Navroji*, 9 B H C R 358. The words "in any case" in s. 167, Evidence Act, are wide and include criminal trials by jury. *Queen Empress v Ramchandria*, 19 B 749.

If it shall appear to the Court, etc. The expression in this section "the Court before which such objection is raised," includes the reviewing of Appellate Court. *Imperatrix v Pitamber*, 2 B 61. This section applies as well to the High Court sitting as a Court of original jurisdiction as to the same Court sitting for the consideration of a reserved point. *Reg v Navroji Dada Bhai*, 9 B H C 358 per *Green J*. The provisions of this section are made applicable by the clearest possible words to all judicial proceedings in or before any Court, and are, therefore, applicable to the High Court, sitting under s. 26 of the

Letters Patent, "to determine the point of law reserved and pass such judgment and sentence as to the Court shall seem right" *Ibid*, per *Straight C J* in *ibid*, *contra* per *Bayley J* in *ibid*. This section applies to criminal trials by jury in the High Court. *Reg v Navon Dadabhai*, 9 B H C 358

**Effect of improper admission and rejection of Evidence in civil cases**  
The improper admission of the copy of a deposition of a living witness is not *ipso facto*, ground for a new trial, where there is ample evidence to justify the decision independently of the evidence so admitted. *Wooma Kanto v Gunga Naram*, 20 W R 384. In civil cases in India there is no difficulty, on principle as regards the working of this section. In England in civil as well as criminal cases the Court is not a judge of facts. The jurors are judges of facts, and as such some difficulty may be felt by the Appellate Court to decide the effect of evidence improperly admitted in the minds of the jurors. So in India in civil cases "it is the duty of their Lordships who are Judges of the fact to consider whether throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decree." *Mohar Singh v Ghuriba*, 6 B L R 495 P C = 15 W R 8 P C. So under this section, the improper admission of evidence is not ground of itself for a reversal of any decision if it appears to the Court that independently of the evidence improperly admitted, there is sufficient evidence to justify the decision. A Court competent to deal with facts should ignore the evidence wrongly admitted and consider whether there still remains sufficient evidence to support the judgment. *Khul Sanhar v Emperor*, 82 Ind Cas 283. The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of that tribunal to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below has arrived. *Goshain Tata v Rickmune*, 13 M I A 77, see also *Baboo Bhodnarain v Omiao Singh*, 13 M I A 519 = 15 W R P C 1, *Lala Banshidhor v The Government of Bengal*, 9 B L R 371 = 14 M I A 86 P C, *Bommaran, v Rangaswami*, 6 M I A 23, *Maharaja Jagadindra v Bhaba Tarinee* 5 B L R Ap 54 = 14 W R 19, *Muhammad v Abdul*, 20 W R 458.

In *Nitrasin Singh v Nandlal*, 8 M I A 199 = 1 W R P C 51, their Lordships of the Privy Council observed "The learned counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remanding the cases for retrial. We have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the Principal Sadar Amin affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sadar Court was right in treating the cause as ripe for final decision. The appellant had, at all events from the date of the settlement of the issues, clear notices of what he had to prove. He had been called upon to adduce further evidence on those issues, if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular it is not for him to complain of an irregularity committed at his instance or with his consent. And the suspicion however probable of the Judge, that a party who has failed to prove his case, may be more successful on a second and fuller investigation is no sufficient ground for directing a new trial." The decision of a Court must rest upon legal grounds established by legal testimony and not upon mere suspicious circumstances. *Seth Manuklal v Bhoj Singh*, 25 C W N 409 = 62 Ind Cas 356 (P C).

**Objection in second appeal.** An erroneous omission to object to inadmissible evidence does not make it admissible. The omission to take objection to the admissibility of a document becomes fatal only in cases where if the objection is taken in time any defect in its admissibility could be cured and the document made admissible. In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower Courts. *Choonial v Nilmadhab* 41 C L J 374 = 86 Ind Cas 734 = A. I. R. 1925 Cal 1034, see also *Miller v Malho Das*, 19 A 76 P C, *Jagadis v Harihar*, 40 C L J 39, *Luchram v Radhacharan*, 34 C L J 107.

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Where the finding of the lower Court is based on unproved and consequently inadmissible document, the judgment is vitiated thereby and must be set aside, where an appellate Court has relied for its decision upon a document which is inadmissible in evidence a Court of second appeal will be justified in remanding the case for decision to the appellate Court with a direction to exclude that document from its consideration *Hem Raj v Aihal Singh*, 7 Lah L J 352=26 P L R 632=90 Ind Cas 678

The improper admission of evidence is not by itself a ground for a new trial if there is other independent evidence to justify the decision. But there is difficulty in applying this principle to cases which come before the High Court in second appeal because the Court has no power to deal with the sufficiency of the evidence. In such cases unless it is apparent from the judgment itself that the Judge decided the case on other evidence independently of the evidence in dispute the proper procedure for the High Court is to remand the case to the lower Court *Brojendra Kishore v Mohanachandra*, 31 C W N 32

Mere omission to object to a document which is not in itself admissible as evidence does not constitute such document so as to be available to either side at the trial. It is the duty of the Court apart from any objection by the parties or their pleader to exclude all irrelevant evidence. Where the lower Court has based its decision partly on irrelevant evidence the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at, s 167 is not a bar to such a case being remanded *Mussamat Sumitra v Ram Kuer Choubey*, 5 P L J 410=57 Ind Cas, 561

On second appeal, the High Court has generally speaking no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted, is sufficient to warrant the finding of the lower Court. The only cases which can be with propriety disposed of under such circumstances without a remand, are those, where, independently of the evidence admitted, the lower Court has apparently arrived at its conclusion upon other grounds *Woomesh Chunder v Chunder Charan*, 7 C 293

An objection as regards the modes of proving a document should be taken at the time when the document is tendered *Madhab v Gajenendra*, 9 C W N 11

When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which might have been accepted, the High Court has power to interfere in second appeal *Talewar v Bhagwan Das*, 8 C L J 147=12 C W N 312

Where no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal *Ram Prosad v Lala Sham*, 6 C L J 22, see also *Shahzadi Begam v The Secretary of State*, 6 C L J 678=34 C 1059 P C =9 Bom L R 1192, *Albar Bhैया Lal*, 6 C 666

Improper admission and rejection of evidence in criminal cases. The words "in any case" in s 167 of the Evidence Act, are wide enough and include criminal trials by jury. The English law with reference to the granting of new trials when evidence has been improperly admitted, does not apply to India. Where part of the evidence which has been allowed to go to the jury is held to be inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record, or to quash the verdict and order a new trial *Queen Empress v Ram Chandra*, 19 B 749. Where no objection was raised to the reception of improper evidence in the lower Court and the appellate Court finds, that there is sufficient evidence, disregarding the improper evidence admitted, to sustain a conviction, the appellate Court should not interfere with the conviction *Reg v Prabhu Das*, 11 B H C R 90. Though s 167 of the Evidence Act implies that the improper reception of evidence is not generally to be made a ground for the reversal of a judgment, unless it was objected to by the party prejudiced by such reception, yet, s 256 of the Criminal Procedure Code lays down that it is the duty of the Judge in his discretion to prevent the production of inadmissible evidence whether it is objected to by the

party or not. *Reg v Dayanand* 11 B H C 44 Where there is sufficient evidence to justify the conviction, independently of the evidence objected to, the decision of the lower Court should be affirmed *Emperor v Aloomiya*, 28 B 129 (152)

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When a case has been tried before a jury and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried by a jury, and, as a matter of procedure and in justice to the accused this course should be adopted. Acting on this principle the Court declined to exercise its powers under section 167 of the Evidence Act and sent back the case for retrial. *Sheikh Hayy v King Emperor*, 14 C W N 593=11 Cr L J 301=5 Ind Cas 315

At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination in chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The accused were convicted. *Held*, that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of s 537 of the Criminal Procedure Code and of s 167 of the Evidence Act (I of 1872), as it was not shown that there had been any failure of justice or that the accused had been substantially prejudiced, and as the matter elicited in cross examination was sufficient to sustain the conviction. *Queen Empress v Nand Ram*, 9 A 609. In *Emperor v Narayan* 9 Bom L R 789=32 B 111 F B, *Davar J* said "Then again under s 167 of the Evidence Act all that we have to do after rejecting the piece of evidence complained of as being improperly admitted is to see if there is 'sufficient evidence' to justify the decision. The confession is evidence recorded in the case. Its admissibility has been adjudicated upon. We are not a Court of appeal in the ordinary sense of the term. I do not think it is open to us under the present circumstances to go behind the record of the case, scrutinize every piece of evidence, and enter upon an elaborate investigation as to whether each particular piece of evidence recorded by the learned Judge and to which the accused's counsel now takes exception was or was not rightly recorded, such a course does not appear to be intended to be followed by s 26 of the Letters Patent and there is nothing in s 167 of the Evidence Act to justify such a procedure."

Where inadmissible evidence has been received the Court of appeal has to consider whether the reception of inadmissible evidence influenced the minds of the jury so seriously as to lead them to a conclusion which might have been different but for its reception and whether it has in fact occasioned a failure of justice. *Hendora v Emperor*, 81 Ind Cas 451=26 Cr L J 307. Under section 165 of the Evidence Act the improper admission of evidence is not ground of itself for reversal, if apart from it there is other evidence to support the decision. Ordinarily in such cases the case should be remanded to the trial Court to exclude the evidence and give a fresh finding with reference to the rest of the evidence. *Kumba Sankar v Kalli Marappa*, 82 Ind Cas 283=25 Cr L J 1275. Where the improper admission of evidence has not prejudiced the accused in any way being of little significance it is not a ground for a new trial. *Rajpal Dasadh v Emperor* 7 Pat. L T 673=95 Ind Cas 273=27 Cr L J 753=A I R 1926 Pat 211. Where independently of the police diary wrongly relied upon by the Court below, there was ample legal evidence to corroborate the prosecution case and to sustain the conviction, the High Court in revision will condone the irregularity and refuse to interfere. *Achhabat v Emperor*, 3 Pat L T 293=61 Ind Cas 230=22 Cr L J 374.

## SCHEDULE

## ENACTMENTS REPEALED

(See section 2)

Number and year	Title	Extent of repeal
Stat 26 Geo III, Chap, 57 *	For the further regulation of the trial of persons accused of certain offences committed in the East Indies, for repealing so much of an Act, made in the twenty fourth year of the reign of his present Majesty intituled '(An Act for the better regulation and management of the affairs of the East India Company and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies),' as requires the servants of the East India Company to deliver inventories of their estates and effects for rendering the laws more effectual against persons unlawfully resorting to the East Indies' and for the more easy proof, in certain cases of deeds and writings executed in Great Britain or India	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 & 15 Vict, Chap 99 †	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India ‡
§     *	*     *     *	*     *

\* The East India Company Act, 1786

† Short title, The Evidence Act, 1851—see the Short Titles Act, 1896 (59 &amp; 60 Vict. c. 111)

‡ Certain entries after this repealed by Act IV of 1927 have been omitted

§ The entry relating to ss 7 and 9 of the General Clauses Act, 1868 (1 of 1868), was repealed by the General Clauses Act, 1897 (10 of 1897)



## APPENDIX A\*

### (1) PLACES TO WHICH THE ACT HAS BEEN SPECIALLY APPLIED

Names of Places	Notification or other authority	Where published
1 Civil and Military Station of Bangalore	No 318 D dated the 16th Jan 1917	British Enactments in Force in Native States, 3rd Edition Supp to Vol I p 4
2 Administered Areas in the Hyderabad State, namely, the cantonments of Secundrabad and Auringabad, the Hyderabad Residency Bazar, and the lands in the Hyderabad State occupied by His Exalted Highness the Nizam's Guaranteed State Railway System, by the South East main line of the great Indian Peninsular Railway by the broad gauge North West line of the Madras and Southern Marbatha Railway and by the Secundrabad Gadwal section of the Secundrabad Gadag Railway	No 582 I B dated the 22nd March 1913, as amended by No 399 D dated the 18th January 1917	British Enactments in force in Native States, 3rd Ed Vol I p 227
3 Administered Areas in central India, namely the cantonments of Mhow, Nimach, Nowgong, Sehore, Agar and Guna, the Indore Residency Bazar, the Gwalior Residency Area the Sutna Agency and the Civil lines of Nowgong	No 2365 I B, dated the 14th November 1912	British Enactments in force in Native States 3rd Edition Vol I p 10
4 Mumpur [For purposes of cases in which British subjects are parties (except in cases in which no British subject other than a native of the Naga Hills Chin Hills, or Lushai Hills, districts is concerned) and in cases arising within the limits of the British Reserve]	No 535 I B, dated the 12th March 1909	British Enactments in force in Native States 3rd Edition Vol IV p 11
5 Jammu and Kashmir (Territories in which the Governor General in Council has jurisdiction)	No 260 I B, dated the 10th February, 1913	British Enactments in force in Native States 3rd Edition, Vol I p 372

\* In making the list up to date Macpherson's lists of British enactments in force in Native States and Mr Justice Woodroffe's Evidence Act as well as Mr Justice Field's Evidence Act have been consulted.

A

Names of places	Notification or other authority	When published
6 Abu District	No 2221 I B dated the 1st October, 1917	British Enactments in force in Native States, 3rd Ed Supplement to Vol I p 49
7 Baroda Cantonment (Baroda State)	No 162 I B dated the 28th January, 1913	British Enactments in force in Native States, 3rd Ed Vol I p 79
8 Territories included in the political Agency of Kathiawar	No 8944, dated 17th December 1912	British Enactments in force in Native States, 3rd Ed Vol IV p 178
9 Deesa cantonment	No 5287 dated the 30th July, 1906	British Enactments in force in Native States, 3rd Ed Vol IV p 389
10 Civil Station of Kolhapur	No 1803 I dated the 9th November, 1887	British Enactments in force in Native States, 3rd Ed Vol IV p 389
11 Berar	No 3510 I B, dated the 3rd November 1913	British Enactments in force in Berar, p 4
12 Lands occupied by the Rajputana Mitha Railway in the Nabha and Patiala States	No 517 I B dated the 17th March, 1913	British Enactments in force in Native States, 3rd Ed Vol V p 18
13 Lands occupied by the Jodhpur Bikaner Railway in the Patiala State	Ditto	Ditto
14 Lands occupied by the Kalka-Simla Railway in the Patiala Baghat and Keonthal States	Ditto	Ditto
15 Lands occupied by the Ludhiana Dhuri Jakkhal Railway in the Malerkotla Patiala, Nabha and Jhind States	Ditto	Ditto
16 Lands occupied by the Rajpur Bhatinda Railway in the Patiala, and Nabha States	Ditto	Ditto
17 Lands occupied by the Southern Punjab Railway in the Patiala, and Jhind States	Ditto	Ditto

Names of places	Notification or other authority	Where published
18 Lands occupied by the Jullundur Doab Railway in the Kapurthala State	No 1439 D, dated the 31st March, 1916	British Enactments in force in Native States, 3rd Ed, supplement to Vol V p 3
19 Lands occupied by the Phagwara Rahon Railway in the Kapurthala State	Ditto	British Enactments in force in Native States, 3rd Ed, supplement to Vol V p 3
20 Lands occupied by the Jind Panipat Railway in the Jhind State	No 833 I B, dated 16th May 1916	British Enactments in force in Native States, 3rd Ed, supplement to Vol V p 4
21 Lands occupied by the Bombay Borela and Central India Railway in the Bajana, Lakhitar Wadhwan, Wadhen District Thana and Patli States	No 781 I B dated the 9th April, 1913	British Enactments in force in Native States 3rd Ed, Vol V p 58
22 Lands occupied by the Bhavnagar Railway in the Bhoilka Thana, Songadh Thana, Palitana and Jasdan States.	Ditto	Ditto
23 Lands occupied by the Dhrangadhara Railway in Dhrangadhara and Wadwan States	Ditto	Ditto
24 Lands occupied by the Gondal Porbandar Railway in the Vithralgarh, Gondal and Nawanagar States	No 781 I B dated the 9th April 1913	British Enactments in force in Native States 3rd Ed Vol V p 58
25 Lands occupied by the Jamnagar Railway in the Dhrol, Jaha, Nawanagar, Pal and Rajkote States	Ditto	Ditto
26 Lands occupied by the Jitalsar Raj Kot Railway in the Gudhka Gondal, Kotla Sangani, Kotharia, Lodhika, Rajkot, Shapur, Virpur, Jetpur and Junagarh States	Ditto	Ditto
27 Lands occupied by the Junagarh Railway in the Bantva, Muvadar, Sardargarh and Jetpur Bilkha States	Ditto	Ditto
28 Lands occupied by the Khujadia Amreli Chhalala Railway in the Jatpur Luni State	Ditto	Ditto

## THE INDIAN EVIDENCE ACT

App A.

Names of places	Notification or other authority	Where published
29 Lands occupied by the Morvi Railway in the Dhol, Gavra, dad, Kotharia, Morvi, Rajkot, Wankaner, Dhringadhura, Lakhtar, Muli, Sayla and Wadhan States	No 781 I B dated the 9th April, 1930	British Enactments in force in Native States, 3rd Ed Vol V p 58
30 Lands occupied by the Godhra Ratlam Nagda Railway in the Jhabur, Indore, Sailana, Ratlam and Gwalior States	No 262 I B dated the 10th February 1913	British Enactments in force in Native States, 3rd Ed Vol V p 88
31 Lands occupied by the Nagda Ujjain Railway in the Gwalior State	Ditto	Ditto
32 Lands occupied by the Nagda Muttra Railway in the Gwalior Dewas(Senior), Dewas (Junior), Indore, Jhalawar Kotah, Bundi, Tonk, Jaipur, Karauli and Bharatpur States	Ditto	Ditto
33 Lands occupied by the Rajputana Malwa Railway in the Alwar, Jaipur, Jodhpur, Kishengarh, Sirohi, Bharatpur, Mewar, Tonk, Gwalior, Indore, Sailana, Jhona, Ratlam, and Dhar States	Ditto	Ditto
34 Lands occupied by the Bhopal Itarsi Railway in the Bhopal State	Ditto	Ditto
35 Lands occupied by the Bhopal Ujjain Railway in the Bhopal, Gwalior, Indore, Dewas (Senior), and Dewas (Junior) States	Ditto	Ditto
36 Lands occupied by the Baran Kotah Railway in the Kotah State	Ditto	Ditto
37 Lands occupied by the Baran Guna Baran Railway in the Kotah, Tonk and Gwalior States	No 262 I B dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed, Vol V p 88
38 Lands occupied by the G I P Ry in the Bhopal, Kurwai, Gwalior, Kaniadhar, Orchala, Datia, Dholepur, Santhar, Alipura, Garrauli, Pabra and Taron States	Ditto	Ditto

App A.

Names of places	Notification or other authority	Where published
39 Lands occupied by the Bhavnagar Ry in the Wadhwa, Limbdi, Chudā Bholā, Baridā and Bhāvanagar States	No 783 I B 9th Apr 1913	British Enactments in force in Native States, 3rd Vol V p 65
40 Lands occupied by the Junagarh Railway in the Gondal and Junagarh States	Ditto	Ditto
41 Lands occupied by the Khijadiā—Amreli Chaldā Railway in the Beroḍa State	Ditto	Ditto
42 Lands occupied by the Gondal Porbander Railway in the Bhāvanagar Beroḍa, Lūthi Banva, Jitpur, Kotdā Pittā Junagarh and Gondal Street	Ditto	Ditto

**2 PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION**

<i>Vide Extent and application of the Act at p 29 supra</i>		
1 The Political States of Serukelā and Kharsawin in Chotanagpur	No 205 I B dated the 28th January 1910	British Enactments in force in Native States 3rd Ed Vol IV p 35
2 Parganas of Todgarh, Diwar, Siroth, Chong and Kot Karanā	No 38 I dated 8th March 1872	Ditto Vol I p 572
3 Cantonment, Deolā	No 99J, dated the 18th June, 1875	Ditto Vol I p 593
4 Ramandurang (in respect to Criminal Jurisdiction over all persons not only subjects of the Rajah of Sinduri)	No 1019 I dated the 5th March, 1891	Gazette of India, 1891 Part I page 121
5 Feudatory States of Sirgiva Jaspur Udaipur, Korā and Chongbharā	No 1069 I B dated the 3rd April, 1919	British Enactments in force in Native States, 3rd Ed Vol IV p 101
6 Parts of the Naonwan Assigned Tract formerly administered by China	No 783 I B, dated the 2nd June 1899	Ditto Vol. IV p 409
7 Kasumpti, Simla (Konthal Hill State)	No 1516—I dated the 15th May, 1885	Ditto Vol IV p p 443

App A.

Names of places	Notification or other authority	Where published
29 Lands occupied by the Morvi Railway in the Dhol, Gavri dad, Kotharia, Morvi, Rajkot, Wankaner, Dhrangadhara, Lakhtar, Muli, Sayli and Wadhwa States	No 781 I B dated the 9th April, 1930	British Enactments in force in Native States, 3rd Ed Vol V p 68
30 Lands occupied by the Godhra Ratlam Nagda Railway in the Jhabua, Indore, Sailana, Ratlam and Gwalior States	No 262 I B dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed Vol V p 88
31 Lands occupied by the Nagda-Ujjain Railway in the Gwalior State	Ditto	Ditto
32 Lands occupied by the Nagda Muttra Railway in the Gwalior Dewas (Senior), Dewas (Junior) Indore, Jhalawar Kotah, Bundi, Tonk, Jaipur, Karauli and Bharatpur States	Ditto	Ditto
33 Lands occupied by the Rajputana Malwa Railway in the Alwar, Jaipur, Jodhpur, Kishengarh, Sirohi, Bharatpur, Mewar, Tonk, Gwalior, Indore, Sailana, Jhosa, Ratlam, and Dhar States	Ditto	Ditto
34 Lands occupied by the Bhopal Itarsi Railway in the Bhopal State	Ditto	Ditto
35 Lands occupied by the Bhopal Ujjain Railway in the Bhopal, Gwalior, Indore, Dewas (Senior), and Dewas (Junior) States	Ditto	Ditto
36 Lands occupied by the Baran Kotah Railway in the Kotah State	Ditto	Ditto
37 Lands occupied by the Bina Guna Baran Railway in the Kotah, Tonk and Gwalior States	No 262 I B dated the 10th February, 1913	British Enactments in force in Native States, 3rd Ed, Vol V p 88
38 Lands occupied by the G. I. P. Ry. in the Bhopal, Kurwai, Gwalior, Kaniadhar, Orchha, Datia, Dholepur, Santhar, Alipura, Garrauli, Pabra and Farson States	Ditto	Ditto

Names of places	Notification or other authority	Where published
39 Lands occupied by the Bhavnagar Ry in the Wadhwa, Lumbdi, Chudra Bholi, Baroda and Bhavnagar States	No 783I B 9th Apr 1913	British Enactments in force in Native States, 3rd Vol V p 65
40 Lands occupied by the Junagarh Railway in the Gondal and Junagarh States	Ditto	Ditto
41 Lands occupied by the Khiladi—Amreli Chulila Railway in the Baroda State	Ditto	Ditto
42 Lands occupied by the Gondal Porbander Railway in the Bhavnagar, Baroda, Lathi Banva, Jitpur, Kotda Pitta Junagarh and Gondal Street	Ditto	Ditto

**2 PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION**

<i>Vide Extent and application of the Act at p 29 supra</i>		
1 The Political States of Serukela and Kharsawan in Chotanagpur	No. 205 I B dated the 28th January 1910	British Enactments in force in Native States 3rd Ed Vol IV p 35
2 Parganas of Todgarh, Diwar, Siroth, Chong and Kot Karan.	No 33 I dated 8th March 1872	Ditto Vol I p 572
3 Cantonment, Deoli	No 99J, dated the 18th June, 1875	Ditto Vol I p 593
4 Ramandurang (in respect to Criminal Jurisdiction over all persons not only subjects of the Rajah of Sundari)	No 1018 L dated the 5th March, 1891	Gazette of India, 1891 Part I page 121
5 Feudatory States of Sirgiva Jaspur Udaipur, Korla and Chongbharkar	No 1069 I B, dated the 3rd April, 1919	British Enactments in force in Native States, 3rd Ed Vol IV p 101
6 Parts of the Naonwan Assigned Tract formerly administered by China	No 783 I B, dated the 2nd Jan, 1899	Ditto Vol IV p 409
7 Kasumpti, Simla (Koonthal Hill State)	No 1516—I dated the 15th May, 1885	Ditto Vol IV p p 443

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Names of places	Notification or other authority	Where published
8 Lands occupied by the Banalore Branch of the Madras and Southern Marhatta Railway	No 507 I dated the 6th February, 1896	British Enactments in force in Native States 3rd Ed Vol V p 121
9 The Mysore State Railway from and inclusive of the Bangalore Railway Station to the Hubli end of Thengbhadro Bridge at Harihar	Ditto	Ditto
10 The Mysore State Railway from and inclusive of the Yeswanthpur Junction Railway Station to the frontier of the State	Ditto	Ditto
11 Lands occupied by the Mysore Section of the Southern Marhatta Railway	No 3173 I dated the 10th September, 1889	British Enactments in force in Native States, S India (Madras & Mysore) (1890 Ed p 238 ) Ditto p 687
12 Lands in the Hyderabad State occupied by the Southern Marhatta Railway	No 4564 I dated the 18th November, 1891	Ditto p 688
13 Lands in the Hyderabad State occupied by the Barsi Light Railway	No 3244 I B dated the 26th August, 1897	Ditto p 688
14 Lands occupied by the Travancore Branch of the South Indian Railway in the Travancore Estate	No 1474 B dated 20th April, 1906	British Enactments in force in Native States 3rd Ed Vol V p 120
15 Lands occupied by the Shorapur Cochin Railway in the Travancore and Cochin States	No 5096 I B dated the 27th December, 1906	Ditto p 119
16 Lands occupied by Tipu valley Railway in the Sicheu and Buroda States	No 778 I B dated the 9th April 1913	British Enactments in force in Native States 3rd Ed Vol V p 35
17 Lands occupied by the Great Indian Peninsula Railway in the Kurandyad (Junior) and Hyderabad	Ditto	Ditto
18 Meywar and Mirwar Marwar.	No 38 I dated the 8th March, 1872	List of British Enactments Rajputana, Ed 1900, 56
19 Balaram Cantonment (in Hyderabad State)	No 3317 I dated the 3rd October, 1890	Gazette of India, 1890, Part I p 721
20 Hunoli Cantonment (Hyderabad State)	No 2007 I dated the 11th May, 1891	Gazette of India 1891, Part I p 201



Names of places	Notification or other authority	Where published
21 Raichore Cantonment (Hyderabad State)	No 3300-I dated the 8th August, 1891	Ditto p 475
22 Aurangabad and Jilna Cantonments (Hyderabad State)	No 4015 I dated the 2nd October, 1891	Ditto p 565
23 Mominabad Cantonment (Hyderabad State)	No 4607-I dated the 24th November, 1891	Ditto p 649
24 Lands occupied by the Bengal Nagpur Railway in the Rewa, Kharagarh, Nawgon, Sakti, Raigarh Gangpur, Busair, Kharwan, Seraikella, Mayurbhanj Patna, and Khandi States	754 I B dated the 28th March, 1912	British Enactments in force in Native States, 3rd Edition Vol. V p 7
25 Lands occupied by the Indian Midland Railway	Ditto	Ditto
26 Lands occupied by the Bengal Doon Railway in the Cooch Behar State	Ditto	Ditto
27 Land occupied by the Eastern Bengal Railway in the Cooch Behar State	Ditto	Ditto
28 Kumthi Simla (Keonmat Hill State)	No 1576 I dated the 15th May, 1885	List of British Enactments in force in Native States (Northern India) 1900 Ed p 94
29 Lands occupied by the Bengal and North Western Railway in the Benares State	No 1947 I B dated the 16th September 1912	British Enactments in force in Native States, 3rd Edition Vol V p 11
30 Lands occupied by the Rujputana Malwa Railway in the Bharatpur State	Ditto	Ditto
31 Lands occupied by the Agra Delhi Chord Railway in the Bharatpur State	Ditto	Ditto
32 Lands occupied by the Oudh and Rohilkhand Railway in the Benares and Rampur States	Ditto	Ditto
33 Lands occupied by Rohilkhand and Kumaon Railway in the Rampur State	Ditto	Ditto

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Names of places	Notification or other authority	Where published
34 Lands occupied by the Rajputana Malwa Railway in the Nabha, Pataudi, Dujana, Jind, Patuala, and Faridkot States	No 515 I B dated the 17th March, 1913	British Enactments in force in Native States 3rd Ed Vol V p 13
35 Lands occupied by the Delhi Ambala Kalka Railway in the Patuala States	Ditto	Ditto
36 Lands in the Nabha Patuala and Kapurthala Faridkot and Jammu States in the Punjab occupied by the North West ern Railway	Ditto	Ditto
37 Lands occupied by the Southern Punjab Railway in the Bha walpur and Bikaner States	Ditto	Ditto
38 Lands occupied by the Bombay Baroda and Central India Railway in the Baroda and Pandu Mewas States	No 778 I B dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed Vol V p 35
39 Lands occupied by the Barsi Light Railway in the Hyderabad and Miraj (Senior) States	Ditto	Ditto
40 Lands occupied by the Ahmedabad Poranji Railway in the Baroda, Bavisi Thana and Idar States	Ditto	Ditto
41 Lands occupied by the Godhra Ratlam Nagda Railway in the Baria State	Ditto	Ditto
42 Lands occupied by the Mehsana Railway in the Baroda, Katosan, and Jhura States	Ditto	Ditto
43 Lands occupied by the Billimora Kalamba Railway in the Baroda and Binsda States	Ditto	Ditto
44 Lands occupied by the Petlad Cambey Railway in the Baroda and Cambey States	Ditto	Ditto
45 Lands occupied by the Rajpipla Railway in the Rajpipla State	Ditto	Ditto
46 Lands occupied by the Godhra Junagadh Railway in the Junagadh State	No 778 I B dated the 9th April, 1913	British Enactments in force in Native States 3rd Ed Vol V p 37

Names of places	Notification or other authority	Where published
47 Lands occupied by the Chhinnar-Shivrajpur Light Railway in the Baria and Chhota Udepur States	Ditto	Ditto
48 Lands occupied by the Madras and Southern Marhatta Railway in the Hyderabad, Ramdrug, Sangli Akalkot Jamkhandi Miraj (Junior), Savanur, Kurandyad (Junior) Kurandyad (Senior) Kolhapur Miraj (Senior), Aundh and Phaltan States	Ditto	Ditto
49 Lands occupied by the North Western Railway in the Khurpur State	Ditto	Ditto
50 Lands occupied by the Tinnevely Quilon Railway in the Travancore State	No 316 D dated the 16th January, 1917	British Enactments in force in Native States 3rd Ed Supplement to Vol V p 8
51 Lands occupied by the Palanpur Decol Railway in Palanpur State	No 779 I, B dated the 9th April, 1913	British Enactments in force in Native States, 3rd Ed Vol V p 39
52 Lands occupied by the Ruyana Malwa Railway in the Palanpur and Beroda States	Ditto	Ditto
53 Lands occupied by the Kolhapur Railway in the Kolhapur and Miraj (Senior) States	Ditto	Ditto
54 Lands occupied by the Sangli Railway in the Sangli and Miraj (Senior) States	Ditto	Ditto

3 PLACES BEYOND INDIA TO WHICH THE ACT HAS BEEN MADE APPLICABLE BY HIS MAJESTY IN COUNCIL FOR PURPOSES OF CASES IN WHICH HIS MAJESTY HAS JURISDICTION

1 Zanzibar	Zanzibar order in Council, dated the 7th July, 1897 Art 11 (b) and Schedule 1	List of Enactments 1st 1900, pp 515 and 530
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Names of places	Notification or other authority	Where published
2 Persian Coast and Islands	Persian Court and Islands order in Council dated 7th May, 1907	Gazette of India 1907, Part I, p 469
3 Somaliland Protectorate	Somaliland order in Council dated the 7th October, 1899, Art 7 and Schedule	Statutory Rules and Orders Vol V p 173
4 East Africa Protectorate	The East Africa orders in Council, dated the 7th July, 1897 Art 11 (b) and Schedule	Statutory Rules and Orders, 1897, p 134
5 Bahrein	The Bahrein order in Council 1913	Gazette of India 1915 Part I p 231
6 Maskat and Oman	The Maskat order in Council 1915	Gazette of India 1917, Part I p 899

#### 4 A LIST OF SOME NATIVE STATES IN INDIA WHICH HAVE ADOPTED THE ACT AS THEIR LAW

1 Pudukkottai (Madras Presidency)	Pudukkottai Regulation II of 1882	See Note in Native States East Southern India (Madras and Mysore) Ed 1888 p 20
2 Sindur (Madras Presidency)	Introduced by the Raja	Ditto
3 Mysore	Schedule attached to the Instrument dated 1st March, 1881 transferring the Government to the Maharaja	British Enactments Native States, Southern India (Madras and Mysore) Ed 1899, p 57
4 Akalkot (Bombay Presidency)	Notification No 3413 dated the 19th July 1880	Bombay Government Gazette 1880, Part I p 638
5 Janjira (Bombay Presidency)	Notification by the Nizam of Janjira	Not known
6 Jath (Bombay Presidency)	Notification by the Chief of Jath dated 5th May 1888	Ditto

Name of places	Notification or other authority	Where published
7 Kolhapur State (Bombay Presidency)	Notification by the Council of Administration on behalf of the Minor Raja, dated the 25th Feb, 1888	Ditto
8 Miraj (Junior) (Bombay Presidency)	Notification by the Joint Administrators on behalf of the minor Chief, dated the 10th Aug, 1888	Ditto
9 Ramdurg (Bombay Presidency)	Ditto, dated the 17th December 1888	Ditto
10 Sachin (Bombay Presidency)	No 2983 dated the 7th May 1887 (on behalf of the Government of the Nawab of Sachin)	Bombay Government Gazette, 1887 Part I, p 377
11 Sawantwadi (Bombay Presidency)	Notification No 540 dated the 10th March, 1888 by the Political Superintendent of the State (on behalf of the Government of the chief)	Not known
12 Savanur	Notification dated the 21st May, 1897 by the Administrator of the State (on behalf of the minor Nawab of Savanur)	Published in the Savanur State on 25th July 1897
13 Imakhandi (Southern Marhatra Country)	Notification dated 1st February, 1901, by the Political agent	Not known *

\* In addition to the Native States that have adopted the Act it may be mentioned that in the Kathiawar Agency, rules based on the Indian Evidence Act (I of 1872) have been brought into force by Notification No 1, dated the 5th January, 1874, see Kathiawar Agency Gazette, 1874, supplement p 23

## APPENDIX B

### FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS TO THE QUEEN'S MOST EXCELLENT MAJESTY

We, your Majesty's Commissioners appointed to prepare a body of substantive law for India, now humbly submit to Your Majesty rules of law which we have prepared on the subject of evidence.

India does not at present possess an uniform law upon the subject. Within the Presidency towns the English law of evidence is in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important.

This Act contains many valuable provisions. It extends the range of judicial notice and facilitates the proof of documents, of foreign system of law and of matters of public history. It removes incompetency to testify by reason of interest or relationship, renders parties to suits liable to be called as witnesses, and makes husband and wife competent witnesses for or against each other in civil proceedings, renders dying declarations admissible though the declarant may have entertained hopes of recovery, provided that witnesses may be cross-examined by the party who called them, and that they shall not be excused from answering questions because they may thereby criminate themselves. Declarations which were against the pecuniary interest of the persons who made them and entries according to the usual course of business both of which kinds of evidence the English law admits only in cases of death are under this Act admissible if the person who made the declaration or the entry has become incapable of giving evidence or if his testimony cannot be procured. The Act also gives to books regularly kept, and to certain commercial documents, the character of corroborative, though not of independent evidence, and makes entries in such books independent evidence of certain formal matters, it extends the class of persons whose declarations are admissible in case of pedigree, and provides in effect that mistake committed in the rejection or reception of evidence shall not lead to a new trial or to the reversal of a decision unless a substantial failure of justice has been caused thereby. The Act, however, bears reference in many places to the existing law, and it appears to have been designed not as a complete body of rules, but as supplementary to, and corrective of, the English law, and also of the customary law of evidence prevailing in those parts of British India where the English law is not administered.

This customary law has not assumed any definite form, the Mahomedan law since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country Courts, even in criminal matters and those Courts have in fact no fixed rules of evidence except those contained in Act II of 1855. They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.

In laying down uniform rules for the guidance of the Indian Judges in general, as well in the Courts of just mentioned as in those in which the English law of evidence has hitherto prevailed we do not think that it would be advisable to adopt a system so artificial as that which has grown up in this country.

The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India. In England the aim has been to avoid presenting to the consideration of the jury whatever it was thought could not safely be presented to an unprofessional tribunal. In order to obtain this end various kinds of evidence which were deemed little worthy of credit, were pronounced inadmissible, and a great deal of evidence which, if duly weighed and dispassionately considered would tend to the elucidation of truth, is absolutely excluded. On the other hand, evidence is admitted which is at least as dangerous

as that which is shut out. Thus parent and child cannot refuse to bear testimony for or against each other in criminal cases, while a wife cannot be asked a question on the trial of her husband unless the trial be for an offence committed against herself. In matrimonial cases the inconsistencies of the law as to incompetency of the married persons to give evidence cause frequent embarrassment, and even occasional failure of justice.

In a country like India where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil, and in some criminal cases, to decide without a jury, there is a great danger of miscarriage from the mind of the Court being uninformed than from it being unduly influenced by the information laid before it. It seems, therefore, better to afford every facility for the admission of truth, although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted. It is, of course, impossible to admit all evidence that may be offered, for this would lead to excessive waste of time, but we have provided that all relevant evidence not expressly excluded by our rules shall be admissible, and that except in those few cases where the law itself attaches a special importance or effect to particular evidence, the Court shall decide for itself whether any weight, and what weight shall be assigned to each piece of evidence that is submitted to it. The Judge must, of course, form his own opinion regarding the relevancy of any evidence which the parties may desire to submit to him, but it is often difficult especially in the early stage of a trial, to show the exact bearing of each piece of evidence upon the issues. It is by no means our desire that our rules should be understood as imposing upon the Judges the use of excessive strictness in excluding evidence of which the applicability cannot be fully shown at the moment when the evidence is tendered. We have, however, inserted provisions intended to guard against the trial of collateral issues arising out of questions asked with a view to impugn the credit of witnesses.

It will be seen that we have discarded, for the most part, the rules which limit the discretion of the Court in drawing its conclusions from the whole of the evidence. While we do not interfere with those provisions of the Act for the registration of assurances or of the Code of Criminal Procedure which recognise certain things as *prima facie* evidence, that is to say, as conclusive unless met by counter evidence yet we do not by our own rules attach this character to evidence of any class nor, except where the testimony of a witness has been attacked,—do we recognise anything as corroborative though not independent evidence. We have provided that a Court may act upon the testimony of a single witness even in the case of the gravest offences against the State, or of perjury, or of criminal charges supported by the evidence of accomplices alone.

An attempt to define all the cases in which, and the purposes for which, particular evidence may be received would in our opinion impede instead of aid the investigation of truth. We hope that the course which we have adopted will render it easier for those who administer the law to avoid the error so often committed in practice where a strict standard of admissibility exists—that of supposing that whatever evidence is admissible comes in some degree accredited to the Court.

The exclusion of even of relevant evidence may be desirable, when the evidence is such that people are naturally inclined to attach undue importance to it, when it is such as cannot be admitted without the danger of encouraging, forgery, or when it is such as cannot be received, or at least cannot be extorted without injury to interests which are even more important than the judicial investigation of truth.

Although we have laid it down generally that all relevant evidence shall be admissible, we have thought it necessary to make certain exceptions from this rule. These exceptions relate chiefly to that kind of evidence which is described in the English law books under the title 'hearsay.' We have however abstained from making use of the word 'hearsay' from the uncertainty and vagueness of the meaning usually attributed to that word. What a witness says as to what some other person has said or written may be called 'hearsay.'

**B** in one sense of that word, and that the widest or popular sense, but the statements by a witness by what he has heard another person say may be, in fact (as in cases of slander) the very matter in issue, or in other case may be part of the circumstances which it is essential to ascertain. On the other hand, "hearsay" may be defined to be that which a witness does not say as of his knowledge, but says that another has said or signified to him. This is probably a more strict and accurate definition of the word "hearsay" as used in the English law, but it does not include all that is known in that law as hearsay.

After much considering this subject, we have thought that it would promote a more accurate apprehension of our meaning, and be of more practical utility in the Indian Courts, if we were to exclude the word altogether. We have, therefore, without attempting any definition of the word "hearsay", endeavoured to lay down rules for the exclusion of that class of evidence in the cases in which we think it ought to be excluded, and for the admission of it in the cases in which we think it ought to be admitted. We have accordingly gone through the various class of evidence in which arises the question of admissibility or exclusion what is called in the English law "hearsay" and have endeavoured to state the rule applicable to each class. Most of the rules for the admissibility of this kind of evidence are recognized by the English law, others are in accordance with the Indian Act II of 1835, above referred to, or are intended to relax the English rule still further than was done by that enactment.

We have, for instance, made admissible in evidence that which has been spoken, written, or otherwise intimated in the ordinary course of business by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured, and we have admitted entries in books kept in the ordinary course of business. We have also made admissible written acknowledgments of the receipts of money, goods, securities, or property of any kind, and documents used in commerce. Declarations which under the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth.

We have admitted statements as to matters of reputation and of pedigree made by persons since dead or incapacitated, or whose presence cannot be procured, adding in the case of pedigree a proviso that the person who made the statement shall have had special means of knowledge. We have discarded the condition of the English law which requires that the statement shall have been made before the controversy had arisen as we think that this circumstance affects rather the weight than the admissibility of the statement. We have allowed a limited effect, as evidence, to newspaper reports of public meetings.

The indulgence afforded to witnesses by the existing law in permitting them to refer to contemporaneous memoranda appears to us to be carried too far when copies of such memoranda are allowed to be used for the purpose, and our rules do not permit the use of copies.

Another clause of exclusion applies to documentary evidence unless some degree of caution were observed with regard to the authentication of writings, great facilities would be afforded for the fabrication of documents. We have, therefore, laid down rules for the evidence to be required of the proper execution of documents, and, retaining the distinction between primary and secondary evidence, have provided against the admission of the latter where the former is procurable. We hope that these rules will, in combination with the laws lately passed by the Indian Legislature for the registration of assurances tend to the improvement of Indian documentary evidence.

The third case in which we have excluded testimony is, where its admission would be dangerous to the public service or inconsistent with decency or morality, with the confidence of married life or with the freedom of intercourse between a client and his legal adviser.

We have provided that questions of a criminatory tendency shall not be asked merely in order to test the credit of a witness. We have adopted section 19 of Act XIX of 1833, which excuses witnesses from producing their own



revision which must, under an improved system of registration, be less suited to India. Judges will, no doubt, protect witnesses from the production of their title-deeds when they are not relevant and material to the cause. We have not adopted in all respects the doctrines of the English law on the subject of the effect of the previous decisions when adduced as evidence.

To those judgments which are admitted by the laws of all other countries as conclusive evidence not only between the parties but as against strangers, the same character in India, in all other cases we have provided we have affixed a stamp of a Court of competent jurisdiction upon a matter directly that the judgment is admissible as evidence between the same parties upon the same matter directly in issue in another cause, but that it shall not be conclusive as against strangers, we have provided that it shall be admissible as evidence that such a judgment was pronounced between the parties.

We have been brought to the Court will arrive at the truth more accurately if their inference from the evidence given than if fettered by rules left to draw their own conclusions. It may perhaps be made a question how far the subject of presumption is applicable under the head of substantive law and some of the sections universally applicable submitted certainly border closely on Procedure. Those of evidence fallow have not found a place in either of the Codes of Procedure of the draft now submitted (with some modifications), as it appears to us sections, however, evidence ought not to be left to be gleaned from many different enactments but that so much of it as it not to be found in the Codes of Procedure should be as far as possible comprised in the rules of law now submitted by us, and that the enactments which will thus be rendered unnecessary should be repealed.

We recommend the repeal of so much of Acts II of 1855 and XIX of 1853 as remain unrepealed, except section 26 of the latter enactment, which does not form part of the law of evidence.

## EVIDENCE

### MEANING OF WORDS

1 In the following rules the word "Court" shall be taken to comprise all Courts of justice, civil or criminal, and all persons having by law or consent of parties authority to take evidence, and the word "cause" shall be taken to comprise all judicial proceedings, civil or criminal.

#### Admissibility

2 Whenever any evidence is said to be admissible, it is not meant that it is conclusive, but only that the weight, if any, which the deciding authority may consider due shall be allowed to it. Any thing of which question is material to the decision of the cause, is admissible unless it is excluded by the rules contained in this chapter, or otherwise intimated by another person, and no statement spoken or written, or otherwise intimated by another person, and no statement contained in any document, is admissible in evidence, except in the cases specified in the rules hereafter contained.

#### Illustrations

1 A is charged with robbing C. A gives evidence that D told him that he saw B rob C. The evidence is inadmissible.  
(a) B is charged with robbing C. A gives evidence that D a deaf and dumb person intimated to him by signs that he saw B rob C. The evidence is inadmissible.  
(b) B is charged with robbing C. A gives evidence that D a deaf and dumb person intimated to him by signs that he saw B rob C. The evidence is inadmissible.

B

(c) A gives evidence that B robbed C. Being asked how he knows it, he says that he knows it only because L told him so. The evidence which has been admitted must be struck out.

(d) A says that B was alive on the 1st January 1860. It appears that A does not speak to this fact of his own knowledge, but that he learnt it from a letter written to him by C, or from a newspaper or from a printed book or a picture. In each of these cases A's statement is not admissible as evidence that B was alive on that day.

(e) A says that B was alive on the 1st January 1860. Being asked how he knows this, he produces a letter, dated that day, from B whose handwriting he verifies. The letter is admissible as evidence that B was alive on that day.

4 Such evidence is admissible —

(1) Where the fact that a thing was spoken, stated or otherwise intimated is a question in issue.

#### *Illustration*

A says that he has been told by B that he saw C pick D's pocket. This is admissible in an action against B for slandering C.

(2) Where the fact that a person by or to whom the thing was spoken, written, stated or otherwise intimated was acquainted with such thing is a question in issue.

#### *Illustration*

A writes to B "I have just heard that C has failed." The letter is received by B. The letter is not admissible as evidence that C had failed, but when it is proved that C had then failed, the letter is admissible as evidence that the failure was known to A at the place and time at which the letter was written and also that B was apprised of it.

(3) Where the thing spoken, written, stated, or otherwise tends to explain any act or conduct which is a question in issue.

#### *Illustrations*

(a) A says on a trial of C for robbing D's house that he heard B say to C "D's house has been robbed" and that thereupon C fled. This evidence is admissible.

(b) On a trial of B for robbing C's house it is proved that B fled immediately after the robbery. A witness is produced who says that he heard A tell B before B fled that a warrant had been issued for his arrest under a decree of Civil Court. This evidence is admissible.

(c) A is on his trial for shooting at B with intent to kill him. It is alleged on A's behalf that the shooting was accidental. Evidence of what A said at the time is admissible as evidence either for A or against him.

(d) A sues B for compensation for maliciously causing him to be apprehended on a charge of theft. Evidence that a theft had been committed in B's house and that C told B that he saw A running away immediately after is admissible.

(e) A says that he has heard B say to C "Pay me the 1,000 rupees which you owe me." This is no evidence that C owed B 1,000 rupees, but it is evidence that B claimed 1,000 rupees, and it is admissible in order to introduce evidence of what C said or did with respect to the claim.

(f) A is charged with sedition and is proved to have combined with B for seditious purposes. Evidence of words spoken by B, while taking part in a riot in furtherance of those purposes, is admissible against A.

(4) Where the thing was spoken, written or stated or otherwise intimated by a party to the suit, or some one whom he represents in interest, and it is sought to be used against him.

#### *Illustrations*

(a) A brings a suit against B to establish a right of way across B's field. Evidence that C from whom B derives his title to the land, had, while owner, admitted A's right of way, is admissible.

(b) A writes to B 'By the direction of C, I request you will ship for him 100 bales of cotton.' The letter is evidence against A that he had received such direction from C, but is not evidence against C that he had given the direction.

(c) In a deed to which A was not a party, but which was made between B and C stringers to A it is stated that A had become insolvent. This deed is admissible against B or C in evidence to show that A had become insolvent, but it is not admissible against A for that purpose.

(5) In the cases provided for by ss 368, 369, 370 and 371 of the Code of Criminal Procedure

(b) Where the evidence tendered consists in a statement which was received in evidence in a former judicial proceeding relating to the same subject and between the same parties, or those whom they represent in interest and where the person who made such statement has since died or become incapable of giving evidence, or where his presence cannot be procured, provided that if such person were present his evidence would be admissible.

(7) Where the thing spoken, written, stated, or otherwise intimated was spoken, written, stated or otherwise intimated in the ordinary course of business by a person who has died or become incapable of giving evidence, or whose presence cannot be procured.

#### *Illustrations*

(a) A, the shipping agent of the firm of B and Co states in a letter to B and Co that he has just seen a certain ship of theirs sail from the port of Calcutta. The letter is admissible as evidence of the sailing of the ship.

(b) A, an attorney, prepares the draft of an intended deed to which B was to be a party, and endorses upon it a memorandum that a copy had been sent to another attorney on a certain day. The draft contains a statement that B was in insolvent circumstances. The draft and endorsement are admissible as evidence to show that such a copy was sent to the other attorney, but are not admissible as evidence to show that B had become insolvent.

(c) A, a commercial traveller employed by the firm of B and Co, to obtain orders and information in the cotton trade only, writes to B and Co that the firm of C and Co have ordered of him as such traveller a certain quantity of cotton, and in the same letter he mentions the state of the silk market. A's letter is admissible as evidence of the order given to him, but not of the state of the silk market.

(8) Where the thing intimated consists in entries in books kept in the ordinary course of business or consists in written acknowledgments of the receipt of money, goods, securities of property of any kind, or in any document used in commerce.

#### *Illustrations*

(a) Entries made by a clerk of a firm of in the books of the firm to the effect that the firm has received a consignment of cotton from A, and has purchased 50 chests of indigo from B. These are admissible in evidence against all the partners in the firm.

(b) A one of two partners, makes an entry in the partnership-books that he has lent his partners B £ 100. The entry is not admissible in evidence against B that A had lent him the £ 100.

(c) A clerk whose business it is to make entries in the books of the firm of all monies paid by him makes an entry in the books that he had paid away £ 100 for the firm. The entry is admissible in evidence that he had so paid away the money.

(d) The firm of A and Co keeps a book in which the despatch and receipt of letters by the firm is regularly noted. An entry in this book of the despatch of a letter on the 1st January, 1860 to the firm of B and Co is admissible in evidence that a letter was despatched on that day by A and Co to B and Co.

(e) The letters written by the firm of A and Co are, according to the ordinary course of business copied in a book, and afterwards despatched A and Co, in order to show that a letter in stated terms was despatched by them.

B. on a certain day to B and Co. tendered in evidence an entry in their letter book purporting to be a copy of a letter addressed by them on that day to B and Co. and an entry of the fact that such letter was despatched. The entries are admissible.

(f) A guarantees the payment by C of a sum of money due from him to B. A pays the amount to B and sues C for repayment. A tenders in evidence a receipt given to himself by B for the amount due. The receipt is admissible in evidence.

(g) A sues B for the proceeds of a cargo of cotton consigned by A to B and sold through a broker. The account sales rendered by the broker are admissible in evidence.

(h) A, a wharfinger, gives to B an acknowledgment that 100 tons of copper have been deposited at A's wharf. This acknowledgment is admissible in evidence of the fact that the deposit has been made.

(i) A effects a policy on his ship against sea risks. The ship goes to sea and sustains injury. A institutes a suit to recover damages from the underwriters. The log book of the ship is admissible in evidence.

(9) Where the thing spoken, written, stated or otherwise intimated, relates to the usages or tenets of any body of men, the constitution or government of any religious or charitable foundation, or the meaning of any technical or conventional words or terms or of any words or terms used in particulars, districts, or to any matter of public or general interest and was spoken, written, stated or otherwise intimated by a person who has since died or become incapable of giving evidence or whose presence cannot be procured,

#### *Illustrations*

(a) A, in order to show the religious tenets of a certain sect, tenders in evidence a manuscript treatise proved to have been written by a deceased member of the sect. The treatise is admissible.

(b) It is a disputed fact in a suit whether a certain spot is or is not a public landing place. Statements made on the subject by A and B, now deceased who resided in the neighbourhood, are admissible in evidence.

10 Where the thing spoken, written, stated, or otherwise intimated has reference to the relationship of one person to another and is spoken, written, stated, or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured, provided that such person was a member of the family or had otherwise special means of knowledge.

#### *Illustrations*

(a) It is a disputed fact in a suit whether A is the son of B. A statement made on the subject by C, who was a nurse in B's family about the time of A's birth is admissible in evidence.

(b) A alleging that he is the son of B, deceased produces the following documents in which he is mentioned as the son of B.

1. An entry made by B in a memorandum book stating A's birth.
2. Letters which passed between two of B's brothers since deceased.
3. A deed executed by B.

A also produced witnesses who state that B told them that A was his son. The contents of the documents and the testimony of the witnesses are admissible in evidence.

(11) Where the thing intimated is a fact of a public nature and appears by a recital contained in any Act of the Governor General of India made before or after the passing of this Act or is notified by any official communication of the Government appearing in the *Gazette of India* or in any paper purporting to be the Government Gazette of any Presidency or Lieutenant Governorship of British India or any colony or possession of the British Crown.

(12) Where the thing intimated is, and there has been a public meeting or public proceeding, and such intimation is contained in a report thereof published in any newspaper or journal

*Explanation* Such report is not admissible in evidence of any fact reported to have occurred or of any statement reported to have been made at the meeting or proceeding

### EVIDENCE OF LAW OF FOREIGN COUNTRY

(13) Where the thing intimated purports to be the law of a foreign country, and appears to be contained in books or documents purporting to be printed on published under the authority of the Government of that country, or in reports of decisions of the Courts of such country

### MAPS

5 Maps made under the authority of Government shall be admissible

### RES JUDICATA

6 A grant of probate or of administration unrevoked shall have effect as provided by the Indian Succession Act, section 242

7 A decree declaring a marriage void is proof that the parties never were husband and wife. A decree declaring a marriage dissolved is proof that the parties have ceased to be husband and wife, if they ever were such

8 A decree declaring a ship to be the captors as prize of war is proof that the ship has become the property of the captors

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause, but not between any other parties, except as provided for in the next following section of this chapter

#### *Illustrations*

(a) A sues B for a horse alleging that it was stolen from himself and that B brought it, knowing it is to be stolen. Judgment is given in B's favour. B afterwards loses the horse, A finds it and B sues A for it. A in defence makes the same allegations as in the former suit. The judgment pronounced in the former suit is admissible as evidence in B's favour

(b) A gives B for rent in the Court of the Collector, which has cognizance of such suits. B sets up in defence a mortgage under which he is entitled to retain the rent in satisfaction of the interest of his mortgage. A disputes the genuineness of the mortgage, but the Court pronounces it genuine and dismisses A's suit. Afterwards B sues A in the Zillah Court to recover the amount due to him upon the mortgage. A disputes the genuineness of the mortgage. The judgment of the Collector is admissible in evidence

10 A decree of a Court of competent jurisdiction is admissible as evidence that such judgment was pronounced between the parties but is not, as against any person other than the parties thereto and those who represent them in interest, evidence, of any other fact thereby appearing

#### *Illustrations*

(a) A sues B for compensation for injury sustained through the negligence of C who is B's agent. A obtains judgment. In a suit brought by B against C for compensation for loss sustained, by B through C's negligence the judgment is admissible as evidence of the amount which A has been adjudged to pay, but not as evidence of B's negligence

(b) A sues B for compensation because B yielded up to C certain lands which B held as guardian of A, who was then a minor. A decree passed in a prior suit, whereby B was directed to yield up possession to C as owner, is admissible in evidence

(c) A is tried on the charge of, having forged a deed of gift from B. He is acquitted. Afterwards C alleging the deed of gift to be forgery institutes a suit against A for certain lands, of which A has obtained possession under it. The record of A's acquittal is not admissible in evidence

pp. B

(d) A, one of the three Hindu brothers, undivided in estate, dies, and his brothers, B and C alleging that they are his heirs, sell to D a portion of the land which they possessed jointly with A

E, claiming as the adopted son and heir of A, sues for A's share of the land sold to D and obtains a decree in his favour. He afterwards claiming as such adopted son of A, sues B and C for A's share of the land which remains in their possession. The decree in the former suit is not admissible in evidence

(e) A, alleging that he is the only brother and the heir of B, deceased sues C for possession of B's land. The Court declares A's title established and decrees that C shall yield up the land to him.

Afterwards B claims to be the son and heir of B, and sues A for possession of the lands. The decree in the former suit is admissible in evidence that A had obtained such a decree, but not admissible as evidence that he was entitled to the land as the only brother and heir of B.

(f) Two ships come into collision whereby A, a passenger in one of them, is maimed, and B's goods are destroyed. A obtains a decree for compensation from the owners of the other ship on the ground that the injuries were sustained by him through the negligence of their captain. B sues the owners of the same ship for compensation for the loss of his goods. The judgment is not admissible in B's suit as evidence of the captain's negligence.

(g) A sues B for maintenance of C, a minor, whom A alleges to be B's son. B denies that C is his son. The Court decides that C is B's son and decrees payment by B of A's claims.

B dies, C alleging that he is B's son, sues the executor of D for a legacy of A 10,000 rupees, D having by his will bequeathed that sum to every child of B. The judgment is not admissible in evidence that C is a son of B.

## PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE

11 A writing which is not required by law to be attested, but which is alleged to have been signed by a specified person or to have been written wholly or in part by a specified person, shall not, except in the cases provided for by sections 17, 18, 19, 20 and 21 of this chapter, be received as evidence, unless the signature attached thereto or so much of the same writing as is sought to verify, be proved to be in the handwriting of the person by whom it is alleged to have been written or signed.

12 A written instrument which is required by law to be attested shall not (except in the cases provided for by section 20 of this chapter), be received as evidence unless the following rules are complied with —

(1) That execution of such instrument shall be proved by one attesting witness at the least, if there be an attesting witness alive and subject to the process of the Court by which the case is tried, and capable of bearing testimony.

(2) If no attesting witness is alive and subject to such process as aforesaid, and capable of bearing testimony, it shall be proved that the attestation of one attesting witness at the least is in his handwriting and evidence must be adduced to show that the person who executed the instrument was the same person who is alleged to have done so.

13 In order to ascertain whether a signature, writing, or seal is genuine any signature, writing or seal, which has been admitted or proved to the satisfaction of the Judge to be genuine, may be compared with the disputed one.

14 Where a written instrument purports or is proved to be thirty years old and is produced from the proper custody, it shall be admissible in evidence without proof of its execution or attestation.

## PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

15 Evidence of the contents or purport of any written or printed document, or of letters, figure, or other mark not produced to the Court shall not be admissible except as provided by the rules next following —

(1) A copy of or extract from any proclamation, order, or regulation issued by Her Majesty or by the Privy Council or any department of Her

Majesty's Government shall be admissible in evidence provided that such copy of extract is contained in the London Gazette or in such other Gazette or paper as is mentioned in section 4 clause (11) of this chapter or provided it purports to be printed by the Government printer, or to be printed under the authority of the Legislature of any British colony or possession or to be certified to be true by the proper officer

(2) A copy of a record of any Court, or of an entry in any public book or register, which is proved to be a correct copy, or which purports to be under the seal of such Court, or to be certified by the proper officer, shall be admissible as evidence of the existence and the contents of any such record or entry

(3) Evidence shall be admissible of inscriptions or marks which are proved to have been destroyed or lost, or which cannot be produced by reason of their being engraved on or affixed to trees, buildings, or other things of an immovable character

(4) Evidence of the contents of a written or printed document shall be admissible, when it has been proved that the document had been destroyed or lost, or when the person in whose custody it is, is not subject to the proviso of the Court by which the cause is tried, or is not legally bound to produce the document, or refuses, after due notice, to produce it, or when its absence is otherwise satisfactorily accounted for

### EVIDENCE OF TERMS OF CONTRACT

16 Where a contract or grant or other disposition of property is in writing no evidence of the terms of such contract, grant, or disposition shall be received except the writing itself, or such evidence of its contents as may be admissible under the provisions of the last preceding section

*Explanation* The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of settling an issue or varying a document on the ground of a mistake in the writing thereof, evidence may be received for the purpose of proving such mistake

### PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No proof shall be required of the genuineness of any paper purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Presidency or Lieutenant Governorship of British India, or of any colony or possession of the British Crown, nor of any paper purporting to be a news paper or journal, or a copy of a private Act of Parliament printed by the King's printer

18 No proof shall be required of the genuineness of any paper purporting to be a certificate, certified copy, or other document which is by law made evidence of any particular fact, provided that such paper is substantially in the form and purports to be executed in the manner directed by the law in that behalf

19 No proof shall be required of the official position of any person certifying to the truth of any such paper as is mentioned in the last preceding rule

20 Any paper purporting to be a power of attorney and to have been executed before and authenticated by a notary public or any Court, Judge Magistrate, British consul or Vice-consul or representative of Her Majesty or of the Government of India shall be admissible in evidence

21 An impression of any document made by a copying machine, or a representation of anything made by means of photography or of any other process which affords a reasonable assurance or correctness shall be admissible in evidence, wherever under these rules the production of the original may be dispensed with

### PERSONS WHO MAY TESTIFY

22 Those persons only shall be incompetent to testify who from tender years or for unsoundness of mind or from any other cause appear to the Judge to be incapable of understanding the questions addressed to them

# THE INDIAN EVIDENCE ACT

## PRIVILEGE

23 A witness is not at liberty to disclose a communication—  
(1) When such communication relates to affairs of State and its disclosure has not been intimated by the proper officer

(2) Where the communication was made by one of a married couple to the other during their marriage and did not relate to a matter then in dispute in a suit pending between them, and where the consent of the person who made it or if such person be dead, of his or her representative in interest, has not been obtained for such disclosure

(3) Where the witness is a barrister, attorney, or valuer, or an interpreter or intermediate agent between the client and his legal adviser, and the communication was made by the client or principal to the witness in the course of his professional employment, or consists of any advice given or conveyed by the witness professionally to his client or principal, or of the contents of any document of his client or principal the knowledge of which the witness has acquired in the course of his professional employment, and where the client or principal or his representative in interest has not consented to the disclosure of such communication

(4) Where the disclosure demanded of the witness consisted in the production of documents belonging to another person who would not be bound to produce them if in his possession and who has not consented to their production

24 A witness is not compellable to disclose to the Court any confidential communication which may have taken place between him and his legal professional adviser

25 No communication made in furtherance of criminal purpose is protected from disclosure.

26 A witness summoned to produce a document shall, if the same be in his custody, possession or power, be bound to bring it into Court, notwithstanding any objection to the right of the party calling for it to compel its production or to its being read, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which such person may give respecting it, and it shall also be lawful for the Court unless the document relates to affairs of State to inspect it and if necessary, to employ any person to interpret it under the obligation of an oath, and not to disclose its contents except to the Court, unless the Court shall decide that the document is to be given in evidence

27 No question shall be put to a married person which substantially amounts to inquiring whether that person has had sexual intercourse forbidden him or her by the law to which he or she is subject.

28 No question regarding the occurrence of sexual intercourse between a husband and wife shall be put to either of them except in the case of Christians where the suit is for a decree of nullity of marriage on the ground of bodily incapacity, and except in the case of persons who are not Christians where the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which they are subject

## EXAMINATION OF WITNESSES

29 The party at whose instance a witness is examined may, with the permission of the Court, cross examine such witness to test his veracity, in the same manner as if the witness had not been called at his instance and may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness any former statement made by such witness relating to the same fact at or about the time when the fact took place, before any authority legally competent to investigate



the fact, shall be admissible, and for the purpose a copy duly certified of any deposition or statement taken before such authority shall be admissible in evidence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of the deposition or statement

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate or might tend directly or indirectly, to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture of any kind. But a witness shall not be excused from answering any question relevant to the matter in issue in any cause upon the ground that the answer to such question would or might criminate, or tend to criminate him, or that it would or might expose or tend to expose him to a penalty or forfeiture. Provided that no answer which a witness shall be compelled to give shall, except for the purpose of punishing him for wilfully giving false evidence in such cause, be used as evidence against him in any criminal proceeding.

32 No evidence is admissible to contradict the answers of a party or a witness as to matters affecting his character, but not otherwise bearing upon any question in issue in the cause. Evidence of statements or conduct of a witness inconsistent with his evidence as to a question directly in issue in a cause is not excluded by this rule.

### *Illustrations*

(a) A claim against an underwriter is resisted on the ground of fraud. The party claimant is asked whether in a former transaction he had not made a fraudulent claim. He denies it. Evidence is not admissible to show that he had made such fraudulent claim.

(b) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct. He denies it. Evidence is tendered to contradict the witness's statement as to such dismissal. The evidence is not admissible.

(c) In an action against A for goods sold to him by B, a witness for B deposes that he saw the goods sold and delivered. He is asked whether he had given a different account of the transaction. He denies it. Evidence is tendered to show that he had given such different account. This evidence is admissible. He is asked whether he had not, after the date of the alleged sale, dealt with B as the owner of the goods. He denies it. Evidence is tendered to show that he had so dealt with B. This evidence is admissible. He is asked whether he had not given a false account of another transaction not in issue in the cause. He denies it. Evidence is tendered to show that he had given such false account. This evidence is not admissible.

(d) The witness is asked whether he had not received money or a promise of some favour from B to induce him to give his evidence. He denies it. Evidence is tendered to show that he had received such money or promise. This evidence is admissible.

33 A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must before such contradicting proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. The Court may, however, at any time during the trial require the production of the writing for its inspection, and may thereupon make such use of it for the purpose of the trials as may seem fit.

34 A witness may while under examination refer to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that it may be reasonably presumed that the transaction was fresh in his memory, and he may for the like purpose refer to a writing made by any other person, and read by the witness at the time of such transaction or so soon afterwards that it may be reasonably presumed that the transaction was fresh in his memory. In such case the writing shall be produced and

# THE INDIAN EVIDENCE ACT

**App. B.** may be given by the adverse party, who may if he choose, cross examine the witness upon it

## NUMBER OF WITNESSES

35 A Court if satisfied by the evidence given may in any case act on such evidence although there may be only the testimony of one witness. This rule is not rendered inapplicable by the circumstances that the testimony is given in a trial for giving false evidence, or for any other offence against the State, or that it is the testimony of an accomplice.

## THINGS OF WHICH JUDICIAL NOTICE IS TO BE TAKEN

- 36 The Courts shall take judicial notice of—
- (1) All Acts, Regulations, and Ordinances having the force of law in any part of British India
  - (2) All public Acts of the Parliament of the United Kingdom of Great Britain and Ireland, and all local and personal Acts directed by Parliament to be judicially noticed
  - (3) The names, titles, and functions of the persons filling, for the time being any police office in any part of India,
  - (4) All divisions of time, the geographical divisions of the world, the territories under the dominion of the British Crown the commencement, continuation, and termination of hostilities between the British Crown and any other State and the existence title and national flag of every sovereign or State recognized by the British Crown
- 37 Every Court shall take judicial notice of the names of its own members and officers and of their deputies and subordinate officers or assistants, and also of all officers acting in execution of its process and of all Advocates, Attorneys, Proctors, Vakeels, Pleaders, and other persons authorized by law to act before it

## SOURCES OF INFORMATION TO WHICH COURTS MAY REFER

- 38 A Court may in order to inform itself in respect of any of the matters mentioned in sections 36 and 37 of these Rules and also on matters of Public History, Literature, Science, or Art refer for the purposes of evidence to such Books, Maps, Almanacks, or Charts as the Court shall consider to be of authority on the subject to which they relate.
- 39 The foregoing Rules are to take effect subject to the provisions of the law for the time being in force regarding the registration of any document.

We humbly submit this our Fifth Report to your Majesty's Royal consideration

(Sd) ROMILLY (Ls)  
 (Sd) EDWARD RYAN (Ls)  
 (Sd) ROBERT LOWE (Ls)  
 (Sd) ROBERT LUSH (Ls)  
 (Sd) JOHN M. MACLEOD (Ls)  
 (Sd) W. M. JAMES (Ls)

Dated this 2nd day of August 1865

INSTRUMENT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67

The Council met at Simla on Wednesday, the 28th October, 1865

PRESENT

His Excellency the Viceroy and Governor General of India presiding  
 The Hon ble G. N. Taylor  
 The Hon ble H. S. Maine  
 The Hon ble John Strachey  
 The Hon ble Sir George Couper, Bart. C. B.  
 The Hon ble Sir Richard Temple K. C. S. I.  
 The Hon ble Col. H. W. Norman C. B.  
 The Hon ble I. R. Cockerell.

App. B way restriction or extension with regard to the special circumstances, or India, this country

On the general expediency of obtaining a codified law of evidence, Mr. Maine did not suppose that there could be two opinions. He thought that the commissioners had, if anything rather understated the expediency on which such a law was desirable. They observed that India did not have any uniform law on the subject. After stating that within the Presidency towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature of which Act II of 1855 was the most important, they went on to say that a customary law of evidence prevailed in those parts of India where English-law was not administered. This customary law, since the added—

"Has not assumed any definite form, the Mahomedan Law is the only enactment of the new Code of Criminal Procedure has ceased to have validity in the country Courts even in criminal matters, and those Courts are not in fact no fixed rules of evidence except those contained in Act II of 1855. They are not required to follow the English law as such although they do seem to be deterred from following where they regard it as the most equitable."

On looking, however, at the two Indian Evidence Acts it would seem or that they implied that the English law of evidence except where they were in force it, was in force in the bulk of India the Mofussil. During the last fifteen years the doctrine that the English law of evidence was *in propria* doubt throughout the whole of the country had certainly gained strength, and the Courts of applying that law with increasing strictness was gaining ground. None to much evidence was received by the Mofussil Courts which the English would not regard as strictly admissible. But Mr. Maine would advise of members of Council who had more experience in the Mofussil than he had to honourable friends Sir George Couper and Mr. Cockerell, whether the Judges in those Courts did not as a matter of fact, believe that it was their duty to administer the English law of evidence as modified by the Evidence Act of 1855. In particular, Mr. Mune was informed that when a case was argued by a barrister before a Mofussil Judge, and when the English rules of evidence were presented to his attention, he did practically accept those rules and admit or reject evidence according to his construction of them.

Mr. Mune could not help regarding this state of things as eminently satisfactory. He entirely agreed with the commissioners that there were parts but the English law of evidence which were not suited to this country. They said much of the laxity with which evidence was admitted in the Mofussil Courts, that the truth was that this laxity was to a considerable extent justifiable. It appeared to Mr. Maine less in admitting evidence which under the rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything so capricious administration of the law of evidence was an evil, but it would be equal or perhaps even a greater evil, that such strict rules of evidence should be enforced as practically to leave the Court without the material for a decision. Mr. Mune would venture to state his impression that the fault of substance ordinarily committed by the Mofussil Courts consisted less in lax admission of evidence than in averting their attention from the evidence really before them and in conjecturing the facts of the case upon probabilities derived from a general deration of what the natives of this country would be likely to do under the circumstances. Another objection lay in the necessity which the Mofussil Judges were thus placed under of depending upon English text books. These were excellent text books of the English law of evidence, but their usefulness consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge. The commissioners would appear to have been right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice and superseding the use of text books by compactness and precision.

Another objection which Mr. Maine entertained to the present state of

The doctrine that the English law of evidence without authoritative enactment prevailed *vis propria* and of its own virtue, was calculated to encourage the notion that rules of evidence constituted a scientific machinery by which truth as to acts and to man's actions could be ascertained some what as physical truths could be ascertained by the processes in use among men of science. There were certain continental systems of evidence which did make a pretension to include a process of the kind. And perhaps some such theory did pervade the rules of the English law with regard to presumptions, which he was happy to see the Commissioners had discarded. But the English law of evidence as a whole made no claim to be such a system. It was justly regarded by English lawyers as a model of good sense, but it would probably have never come into existence but for one peculiarity of the English judicial administration,—the separation of the Judge of law from the Judge of fact, of the Judge from the Jury. It consisted mainly of rules of exclusion, that is of rules for keeping certain kinds of evidence out of sight of the Judge of fact. Such a system, Mr Maine apprehended could only be justified on two grounds. First of all, some evidence must be excluded. If all evidence were admitted nay, even if all relevant evidence were admitted, if everything were let in which tended to throw light on the matters in issue, the Courts would be overwhelmed. Even in England they would break down and it would be quite impossible for the Courts to discharge their functions in this country with the notorious habit of its Natives of attempting to heap on the proof by accumulating everything which has even the remotest bearing on it. It being, then, assumed that, under the actual conditions of judicial enquiry some sorts of evidence must necessarily be shut out, the English law excluded those descriptions of evidence which were found practically to affect the minds of all men, except those of the most sagacious judgment, out of all proportion to the real value of such evidence. This was the case of the great department known to English lawyers as "hearsay." It was not at all meant that hearsay evidence was not incidentally valuable, and Mr Maine could well imagine a great Indian statesman conducted in an emergency to a most important conclusion by evidence which a Court of Justice would reject as absolutely inadmissible. But taking men, as you found them, and taking the average of judicial ability, it was really true that some kinds of evidence did produce an impression on the mind far deeper than was consistent with their real weight. The good sense to which the English law laid claim was evidenced by the tests which it laid down for distinguishing those kinds of evidence from those which remained. It would be presumptuous in Mr Maine to praise the Commissioners proposals but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience but had wisely modified those results upon two considerations, which, they stated as follows:—

"The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure, and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India.

In a country like India where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it."

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice because as it involved a financial question the Select Committee would probably not like to deal with it without knowing the opinion of the Executive Government. The Commissioners draft and the Bill based upon it saved the Registration Act but it would be observed that they did not refer to the Stamp Act. The omission in the Bill was explained by its being doubtful whether the Stamp Bill now in hands of Mr Cockerell would or would not receive the assent of the Governor General before the present measure. If the Stamp Bill were passed last, it would control the present measure. But another reason

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be assigned for the omission in the Commissioners' Draft, which deliberate Mr Maine found that the last paragraph of their on the Law of Negotiable Instruments, was to the following

App B.

must probable appeared to be instruments have recently been subjected to a stamp duty Third Report that by an Act which, like the English Stamp Act, renders instru- effect — if its regulations are not observed This provision of the English

"Negotiable led to the establishment of several rules and distinctions not in British India with inconvenience, and we would suggest that a law which merely Stamp Act had in case of infringement would be more conducive to the unattended with For the present, we have thought it our best course to frame respectively of the stamp law"

imposed a penalty on the Commissioners' point of view, which was the purely judicial public interest, there was no doubt that simplicity would be attained by the our rules irregul But what would be the practical effect? His Hon'ble friend

Now from had had a vast mass of papers before him relating to the operation point of view Mr Maine appealed to him whether the following was not a course proposed from those papers If effect were given to the Commissioners' Mr Cockerell er there would be an enormous evasion of the law, 'or that evasion of the Stamp Act tented by recourse to the criminal Courts for the enforcement of fair inference extent which would itself be a greater evil than the sacrifice of suggestion ent of revenue Under these circumstances, the point has been consi- would be pre- executive Government and Mr Maine had to state that, having penalties to an fact that the stamp duties on commercial instruments were easily any branch and not press hardly on the people, the Government was not dered by the Es up that portion of the public receipts

regard to the En was put and agreed to being Select Committee was named —

prepared to give all to define and amend the Law of Evidence—The Hon'ble Mr

The motion Hon'ble Sir George Couper, and the Hon'ble Messrs Gordon

The following Stewart and the Mover

On the Bill al adjourned till the 11th December, 1863

Cockerell, the ra

Forbes, Shaw mber, 1868

The coun

WHITLEY STOKES

Asst Secy to the Govt of India  
Home Department (Legislature)

CIVIL

The 4th Dec, T of the Proceedings of the Council of the Governor-General of for the purposes of making Laws and Regulations under the Act of Parliament 24 & 25 Vict Cap 67

ABSTRACT met at Simla on Tuesday, the 6th September, 1870

India, assembled provisions of th

The council ellency the Viceroy and Governor General of India.

K P G C S I Presiding

excellency the Commander in Chief G C B G C S I

His Excellency Mr Strachey The Hon'ble B H Ellis

Richard Temple Major General the Hon'ble H W

His Excellency K, C S I Norman C B

Fitzjames Stephen, Q C The Hon'ble F R. Cockerell

The Hon'ble Mr the Hon'ble Suramade Rajpal Hindustan Raj R yendra Sri

The Hon'ble Mr Ja Dhiraj Siva Ram Singh Bahadur of Jaypur G C S I

His Highness Mahar

## EVIDENCE BILL

le Mr Stephen moved that the Hon'ble Mr Strachey be added committee on the Bill to define and amend the Law of Evidence motion afforded him an opportunity of saying a few words.

The Hon'ble to the Select Com He said that the

on a measure of the very highest importance. The Evidence Act was drafted by the Indian Law Commissioners, and sent out to this country two years ago. It was introduced by Mr Maune, referred to a Committee, several of the members of which had now ceased to belong to the Council and published in the Gazette for general information. Objections of great weight had been taken to it by many of the most distinguished lawyers in India, and, no doubt, the subject was one which required the most careful handling. I was impossible to exaggerate the practical importance of the Bill as it would regulate the most important part of the procedure of every Court of Justice throughout the Empire. Such a measure would, of course require the most careful consideration in each of its parts, and it appeared to him (the mover) that the great question which the Committee would have to consider was what was likely to be practically useful in the various Courts, and, in particular, in the Courts of the Mofussil. The English Law of Evidence had been gradually constructed by the decisions of successive generations of Judges and by Acts of Parliament, and it assumed throughout that the Court had the assistance of the English Law of a highly qualified Bar, that the facts in dispute were decided by a Jury, and that the Judge was to act as an umpire between two litigants, and not as an independent inquirer into facts. The result had been that the object of many of the rules of evidence was rather to bring the proceedings to a point thin to aid inquiry into truth. It was not so much a guide to the Judge as a set of conditions imposed upon the parties. He (the mover) felt doubts whether such a system could be advantageously introduced into this country without great modifications.

At the same time it was necessary to take some steps. The law was in a state of great uncertainty. No one could say precisely how far the English Law of Evidence did, and how far it did not, prevail in the Mofussil, and the consequence was that the subject caused great difficulty and uncertainty. As a proof of this he (the mover) might observe that in Messrs Cowell and Woodman's Indian Digest, which contained notes of cases decided in about eight years, the title Evidence filled no less than twenty three royal octavo pages in small print and double columns. There were probably from four to five hundred decisions noted upon the subject. This was the state of things for which the Committee would have if possible, to provide a remedy. It was one which in justice to exceedingly hard worked officials ought not to be permitted to continue.

The motion was put and agreed to.

The Council then adjourned to the 20th September 1870.

#### WHIFFLEY STOKES

SIR,

Secretary to the Council of the Governor General

The 6th September, 1870

for making Laws and Regulations

*ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67*

The Council met at Government House on Friday, the 18th November, 1870

#### PRESENT

His Excellency the Viceroy and Governor General of India, K. P. G. C. S. I., presiding	
The Hon'ble John Strachey	Major Genl the Hon'ble H. W.
The Hon'ble Sir Richard Temple	Norman C. I.
	K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.	The Hon'ble D. Cowie
The Hon'ble B. H. Ellis	The Hon'ble Francis Stuart Chapman
	The Hon'ble F. R. Colclerell

#### EVIDENCE AND INSOLVENCY BILLS

The Hon'ble Mr Stephen moved that the Hon'ble Mr Inglis be added to the Select Committees on the following Bills —

To define and amend the Law of Evidence.

# THE INDIAN EVIDENCE ACT

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To amend the Law of Insolvency  
The motion was put and agreed to

The Council adjourned to Friday, the 9th December, 1870

WHITLEY STOKES,

Secretary to the Government of India

CALCUTTA,

The 2nd December, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India,  
assembled for the purposes of making Laws and Regulations under the  
provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Government House on Friday, the 9th December, 1870

PRESIDENT

His Excellency the Viceroy and Governor General of India,  
K I G, C S I, presiding

The Hon'ble John Strache,  
The Hon'ble Sir Richard Temple, K C S I  
The Hon'ble J Fitzjames Stephen, Q C  
The Hon'ble B H Ellis  
Major Genl the Hon'ble W H Norman, C B

The Hon'ble Francis Stuart Chapman  
The Hon'ble J R Bullen Smith  
The Hon'ble F R Cockerell  
The Hon'ble J F D Inglis  
The Hon'ble D Cowie  
The Hon'ble W Robinson, C S I

## SUNDRY BILLS

The Hon'ble Mr Stephen moved that the Hon'ble Mr Robinson be added  
to the select committees on the following Bills —  
To define and amend the Law of Evidence  
To amend the Law of Insolvency  
For the Limitation of Suits  
The motion was put and agreed to  
The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES,  
Secretary to the Govt of India

CALCUTTA,

The 9th December, 1870

## APPENDIX C

App

### DRAFT REPORT OF THE SELECT COMMITTEE

*The Gazette of India, July 1, 1871, Part V, p 273*

The following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 31st March, 1871 —

From Officiating Under Secretary, Home Department, No 423 dated 23rd October 1868 and enclosures

From Assistant Secretary, Foreign Department, No 387 dated 12th December 1868, and enclosures

Remarks by the Hon'ble the Chief Justice of Bombay (no date)

Remarks by Hon'ble Justice Phera dated 8th December, 1868

From Secretary to Chief Commissioner British Burma No 525—1, dated 1st December, 1868

From Assistant Secretary to Government of Bengal Legislative Department No 37 dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army dated 26th January, 1869, and enclosures

From Officiating under Secretary Home Department No 258 dated 17th February 1869 forwarding memorial from Muk-tars and Revenue Agents, Howrah dated 4th February, 1869

From Secretary to Indian Law Commissioners dated 6th February 1869

From Chief Secretary to Government Fort St George, No 120, dated 18th March 1869 and enclosures

From Secretary to Government of Bombay No 2971, dated 7th September 1869 and enclosures

From Secretary to Government of Bombay, No 3188, dated 24th September 1869, and enclosures

Fifth Report of Her Majesty's Law Commissioners on the Bill

From Officiating Inspector General of Police, Punjab, No 2657, dated the 28th September 1870

From Secretary to Government of India Home Department, No 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, British Burma, No 61, dated 15th August 1870, and enclosures

We the members of the Select Committee to which the Evidence Bill has been referred have the honour to report that we have considered the Bill and the papers noted in the margin

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country

We have recorded in a separate report the grounds on which this conclusion is based. They are in a few words that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of England which can scarcely be expected from them. Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions. In general, it has been our object to reproduce the English Law of Evidence with certain modifications, most of which have been suggested by the Commissioners though with some this is not the case

The English Law of Evidence appears to us to be totally destitute of arrangement. This arises partly from the circumstance that its leading terms are continually used in different sense, and partly from the circumstance that the Law of Evidence was formed by degree out of various elements and in particular out of the English system of pleading and the habitual practice of the Courts of Common Law. For instance the rule that evidence must be confined to point in issue is founded on the system of pleading. The rule that hearsay is no evidence is part of the practice of the Courts but the two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished, and with the everyday practice of the Common Laws of Courts which can be acquired and understood only by those who habitually take part in it. This knowledge, moreover, must be qualified by study of text-books which are seldom systematically arranged



## App C

Many other circumstances to which we need not refer, have contributed largely to the general results, but we may illustrate the extreme intricacy of the law and the total absence of anything like a system which pervades every part of it, by a single instance. In Mr Pitt Taylor's will on evidence it is stated that 'ancient documents' when tendered in support of ancient possession, form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay admissible by special exception. Surely this is a unique language in a most un instructive manner.

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected together. The result is as follows—

Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal the object is to ascertain the liability to punishment of the person accused, if the proceeding is civil, the object is to ascertain some right of property or of status or the right of one party, and the liability of the other, to some form of relief.

All rights and liabilities are dependent upon and arise out of facts, and facts fall into two classes, those which can, and those which cannot be perceived by the senses. Of facts which can be perceived by the senses it is superfluous to give examples. Of facts which cannot be perceived by the sense intention, fraud, good faith, and knowledge may be given as examples. But each class of facts has in common one element which entitles them to the name of facts—they can be directly perceived either with or without the intervention of the senses. A man can testify to the fact that at a certain time, he had a certain intention on the same grounds as that on which he can testify that at a certain time and place, he saw a particular man. He has, in each case, a present recollection of a past direct perception. Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in most cases be ascertained in precisely the same way.

Facts may be related to rights and liabilities in one of two different ways.

1. They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B there arises of necessity the inference that A is by the law of England the heir at law of B and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances and with a certain intention or knowledge there arises of necessity the inference that A murdered B, and is liable to the punishment provided by the law for murder.

Facts thus related to a proceeding may be called facts in issue unless indeed, their existence is undisputed.

2. Facts which are not themselves in issue in the sense above explained may affect the probability of the existence of facts in issue, and these may be called collateral facts.

It appears to us that these two classes comprised all the facts with which it can in any event be necessary for Courts of justice to concern themselves so that this classification exhausts all facts considered in their relation to the proceeding in which they are to be proved.

This introduces the question of proof. It is obvious that whether an alleged fact is a fact in issue or a collateral fact the Court can draw no inference from its existence till it believes it to exist, and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of a crime, but whatever may be the relation of the

fact to the proceeding the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned by the same or similar means. If for instance, the Court required the production of the original when the writing of the letter is a crime there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.

The instrument by which the Court is convinced of a fact is evidence. It is often classified as being either direct or circumstantial. We have not adopted this classification.

If the distinction is that direct evidence establishes a fact in issue whereas circumstantial evidence establishes a collateral fact evidence is classified, not with reference to its essential qualities but with reference to the use to which it is put, is it paper were to be deprived not by reference to its component elements but as being used for writing or for printing. We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it. Evidence therefore should be defined not with reference to the nature of the fact which it is to prove but with reference to its own nature.

Sometimes the distinction is stated thus. Direct evidence is a statement of what a man has actually seen or heard. Circumstantial evidence is something from which facts in issue are to be inferred. If the phrase is thus used, the word 'evidence' in the two phrases (direct evidence and circumstantial 'evidence' opposed to each other) has two different meanings. In the first, it means testimony in the second it means a fact which is to serve as the foundation for an inference. It would indeed be quite correct if this view is taken to say circumstantial evidence must be proved by direct evidence. This would be a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence' which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only and so used it may be reduced to three heads—(1) oral evidence, (2), documentary evidence, (3) material evidence.

Finally, the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgment respecting them.

These general considerations appear to us to supply the ground work for a systematic and complete distribution of the subject as follows —

- I Preliminary
- II The relevancy of facts to the issue
- III The proof of facts according to their nature by oral, documentary or material evidence
- IV The production of evidence
- V Procedure

We have accordingly distributed the subject Under these heads, in the manner which we now proceed to describe somewhat more fully

### I—PRELIMINARY

Under this head we have defined "fact" 'facts in issue', 'collateral facts', 'a document', 'evidence', 'proof' and 'proved', 'necessary inference' and 'presume'. We have also laid down in general terms the duty of the Court.

Of our definitions of 'fact', 'facts in issue', 'collateral facts' and 'evidence' we need say no more than that they are framed in accordance with the principles already stated. We may however shortly illustrate the effect of the definition of evidence.

It will make perfectly clear several matters over which the ambiguity of the words as used in English law has thrown much confusion. The subject

**App. C.** of circumstantial evidence will be distributed into its elements, and will be dealt with thus. The question is whether A committed a crime. The facts are—that he had a motive displayed by statement of his own, for it, that the scene of the crime shows foot marks which correspond with his feet, that he was in possession of property which might have been procured by it, and that he wrote a letter indicating his guilt. On turning to Chapter II, it will be found that all these are relevant facts, either as motive, incident or facts in issue, effects of facts in issue, or conduct influenced by facts in issue. On turning to Chapter III, it will be seen how each of these facts must be proved, namely, the statements displaying motive by the direct oral evidence of some one who says he heard them, the foot marks by the direct oral evidence of some one who says he saw them, the possession of the property by the production of the property in Court, and by the direct oral evidence of some one who had seen it in the prisoner's possession and the letter by the production of the letter itself or secondary evidence of it if the case allows secondary evidence.

So the phrase 'hearsay evidence,' which as the commissioners observe is used by English writers in so vague and unsatisfactory a manner, finds no place in our draft, and we hope we have avoided the possibility of any confusion in connection with it. Chapter II provides specially, and in manner which corresponds on the whole (though with some modifications) with the English law in what cases the statements and opinions of third persons as to relevant facts shall, and in what cases they shall not be themselves relevant, and Chapter V on proof by oral evidence provides that oral evidence shall in all cases be direct, on whatever ground the fact which it is to establish may be relevant to the issue—that is to say, if the fact is one which could be seen, it must be established by a witness who says he saw it if it could be heard by a witness who says he heard it—whether it is a fact in issue, or a collateral fact. These provisions distribute the different things described by the phrase 'hearsay evidence' in the same way in which the different things described by the phrase 'circumstantial evidence' are distributed by the other provisions.

So our definition does away with a confusion which arises out of the double meaning of the word evidence in the phrases "primary" and "secondary" evidence. Primary evidence sometimes means a relevant fact, and at other times the proof of a document by its production as opposed to proof by a copy. In our draft 'primary' and 'secondary' are distinctly defined, and confined to an unambiguous meaning. "Evidence" in each case means words spoken or things (documents or not) shown to the Court.

Finally we have substituted for the words 'conclusive evidence' the phrase 'necessary inference'. The phrase 'conclusive evidence is not open to objection on the ground of obscurity or ambiguity' but the word 'evidence' in it means not what we understood by evidence but a fact established by evidence from which a particular inference necessarily follows. Our phrase therefore harmonises with the rest of our draft, whereas 'conclusive evidence' would not.

The definitions of 'proof' 'proved' and 'moral certainty' require some comment. The definition of 'proof' is subordinate to that of 'proved' which is that a fact is said to be proved in two cases, that is to say, when the Court after hearing the evidence respecting it—

- (1) believe in its existence, or
- (2) thinks its existence so probable that a reasonable man ought under the circumstances of the particular case to act upon the supposition that it exists.

This degree of probability we describe as "moral certainty" and we provide that no fact shall be regarded as morally certain unless the evidence is such as to render its non-existence improbable. This is as near in approach as we have been able to make to a distinct equivalent for the phrase reasonable doubt, which is usually employed by English Judges in hearing questions of fact to jury. The question 'when is doubt reasonable' is one which cannot be completely answered for at bottom it is a question, not of science but of prudence, and our definition of the word 'proved' is meant to make this plain. We have, however, attached to it the negative condition that a reasonable man ought

not to be morally certain of a conclusion, merely because it is probable, if other conclusions are also probable. It is easier to illustrate this principle than to state, without a prolonged abstract discussion which would be out of place on the present occasion the general grounds on which it rests. Our illustrations are meant to point out to judges that they are not to convict A of an offence which must have been committed either by him or by B, unless circumstances exist which make it improbable that the offence was committed by B. We have not attempted to carry the matter further. We believe that in all countries, and in this country more than in any other it is absolutely necessary to leave to judges a wide discretion as to the risk of error which they choose to incur in coming to a decision, and that this is a matter of prudence and practice, as to which rules ought to be laid down, rather with a view of guiding than with a view of fettering discretion.

The last provision, in the preliminary part, to which we would call attention, defines in very general terms the duty of the Court in deciding questions of fact. Its generality appeared to us to render the preliminary rather than the concluding chapter, the proper place for it. This section declares that the duty of the Court is to determine question of fact by drawing inferences—

- (1) from the evidence given to the facts alleged to exist,
- (2) from facts proved to facts not proved,
- (3) from the absence of evidence which might have been given
- (4) from the admissions and conduct of the parties, and generally from the circumstances of the case

We have said nothing of the principle on which these inferences are to be drawn as that is a matter of logic and does not belong *specifically* to the subject of judicial evidence, but we wish to point out and put distinctly upon record the fact that to infer, and not merely to accept or register evidence is in all cases the duty of the Court. One of the many fallacies which owe their origin to the ambiguity of the word "evidence," and the looseness with which it is used, is the common assertion that direct evidence leaves no room for inference, whereas indirect or circumstantial evidence does. In fact, all evidence whatever is useful only as to the ground work for inferences, of which the inference that the facts which the witness alleges to exist, do or did actually exist, is very often the most difficult to draw. The truth is that to infer in one or other of the different shapes which we have stated is the great duty of the Judge in every case whatever, and we have thought it desirable to point this out in the plainest and broadest way.

We have added two qualifications only to this general rule (1) that, when the law declares an inference to be necessary, the Court shall draw it, and shall not allow its truth to be contradicted, (2) that, when the law directs the Court to presume a fact it shall infer its existence till the contrary appears. We have treated in detail of necessary inference and presumptions in other parts of the Bill.

## II THE RELEVANCY OF FACTS

We have already pointed out the place which in our opinion belongs to this subject in the law of evidence. The questions what facts may you prove obviously lies at the root of the whole matter, and unless a plain and full answer is given to the question it is impossible to state the law systematically. The answer to the question is, we think, to be found in several of the wide exceptions which are made by English text writers to the wide exclusive rule—that evidence must be confined to the point in issue, that hearsay is no evidence and that the best evidence must be given, though other parts of the same exceptions are to be found in different branches of the law. We think, however, that by a comparison and collection of these exceptions we have succeeded in forming a collection of positive rules as to the relevancy of facts to the issue, which will admit every fact which a rational man could wish to have before him in investigating any question of fact.

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These rules declare to be relevant—

- (1) all facts in issue
  - (2) all collateral facts which
    - (a) form part of the same transaction,
    - (b) are the immediate occasion, cause or effect of fact in issue,
    - (c) show motive preparation or conduct affected by a fact in issue,
    - (d) are necessary to be known in order to introduce or explain relevant facts,
    - (e) are done or said by a conspirator in furtherance of a common design,
    - (f) are either inconsistent with any fact in issue or inconsistent with it, except upon a supposition which should be proved by the other side, or render its existence or non existence morally certain, according to the definition of moral certainty given above
    - (g) affect the amount of damages in cases where damages are claimed,
    - (h) show the origin or existence of a disputed right or custom,
    - (i) show the existence of a relevant fact forming a part or
    - (j) show the existence of a series of which a given course of business
    - (k) show (in certain cases) the existence of a relevant fact forming a part or
- The remainder of the chapter throws into a positive shape what in English law forms the exceptions of the rule, excluding the various matters described as hearsay. They relate to—
- the conduct of the parties on previous occasions
  - the statement of the parties on previous occasions,
  - previous judgments,
  - statements of third persons,
  - opinions of third persons

1 In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications. We include under the word "character" both reputation and disposition and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence, if it is true.

2 Under the head of the statement of the parties on other occasions we deal with the question of admissions, as to which we have not materially altered the existing law.

We have not thought it necessary to transfer from their present position in the Code of Criminal Procedure the rules as to confession made to the Police. This appears to us to be a special matter relating rather to the discipline of the Police than to the principles of evidence.

3 Previous judgments appear to follow naturally upon previous statements. Under this head we deal with the question of *res judicata*. We have not attempted to deal with the question of the bar of suits by previous judgments between the same parties. This is a question of procedure rather than of evidence and will be properly dealt with whenever the Code of Civil and Criminal Procedure are re-enacted. We have on the other hand dealt in substantial accordance with the principles of the law of England with the question of the relevancy of judgment between strangers. For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgments *in rem* we have adopted the statement of the law of *Su Barnes Peacock* in *Kunya Lal v. Hadha Chaitan* 7 Suth W R 339.

4 As to statements by third persons. We have made one considerable alteration in the existing law by admitting generally statements made by third persons about relevant facts if attended by conduct which confirms their truth or if they refer to facts independently proved. This confirms the making them appears to the Court to have special means of knowledge. We have given several illustrations of this the strongest of which is suggested by Mr Pitt Taylor. A Captain about to sail on a voyage carefully examines the ship and declares his belief that she is a worthy and embarks on her with his family and property uninsured. Statements of this sort are surely most unlikely to be

false Evidence of such statements will be admissible under this section, whether the person who makes them is living or dead, producible or not. Some of them would probably be admissible under the English rule which admits statements explanatory of conduct, but as the conduct explained must be relevant, and as no clear definition of relevancy is given by the law of England, it is very difficult to say how far his rule extends.

The next exception refers to statements made by a person who is dead or cannot be found or produced without unreasonable delay or expense. We declare such statements to be relevant if they relate to the cause of the person's death, or are made in the ordinary course of business, or express an opinion as to the existence of the public right, or state the existence of any relationship to which the party had special means of knowledge, or when they are made in family pedigrees, titles, deeds, etc. We have omitted the restrictions placed by the law of England on the admission of dying declarations and statements about relationship and as to the necessity that statements should be opposed to the pecuniary interest of the party making them, on the ground that they ought to affect the weight rather than the admissibility of what is at best to use Bentham's expression, "make shift evidence."

We also provide for the admissibility of statements in public or official book (and in certain cases) of evidences given in previous judicial proceedings.

5 The cases in which the opinion of third persons are relevant are dealt with in sections forty four to fifty.

They declare to be relevant, the opinions of experts, opinion as to handwriting, opinion as to usages, and opinions as to relationship and the grounds of such opinions.

This completes that part of the Bill which relates to the relevancy of facts. In the particulars stated and in some others of minor importance, which for the sake of brevity we have not noticed, it modifies the law of England, but we believe that, substantially, it represents that part of the law which is contained in (amongst others) the rules, together with the exceptions to the rules that evidence must be confined to points in issue, that the best evidence must be given, and that hearsay is no evidence though these rules include other matters which we treat of under other heads.

### III—PROOF

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved.

In the first place, the fact to be proved may be one of so much notoriety that the Courts will take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III which relates to judicial notice disposes of this subject. It is taken in part from Act II of 1855, in part from the commissioners' draft bill and in part from the law of England.

If evidence has to be given of any fact that evidence must be either oral documentary or material, and we proceed in the following chapters to deal with the peculiarities of each of these three kinds of evidence. There is, however, one topic which applies to all of them, of which we treat in Chapter IV. This is the distinction between primary and secondary evidence. As we have already shown, the phrase is ambiguous. We regard it as a legal way of recognizing the obvious principle that the best way of finding out the contents of a document is to read it yourself and we have accordingly defined primary and secondary evidence thus: in the case of documents or other material things the document or thing itself is primary evidence. A copy, model, or oral description is secondary evidence. In all other cases, oral evidence is primary.

We next proceed (Chapters V, VI, VII and VIII) to the question of proof by the various kinds of evidence successively, namely oral documentary and material. With regard to oral evidence we provide, that it must in all cases whatever, whether it is primary or secondary, and whether the fact to be proved is a fact in issue or collateral be direct. That is to say if the fact to be proved is one that could be seen, it must be proved by some one who

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**App. C.** says he saw it. If it could be heard, by some one who says he heard it, and so with the other senses. We also provide that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds.

We have, however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise it may be proved by the production of the treatise.

This provision taken in connection with the provisions or relevancy contained, in Chapter II, will we hope, set the whole doctrine of relevancy in a perfectly plain light, for their joint effect is this—

- (1) the sayings and doings of third persons are as a rule irrelevant so that no proof of them can be admitted
- (2) in some excepted cases they are relevant,
- (3) every act done or words spoken which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears

With regard to the Chapters which relate to the proof of facts by document ary evidence, and in cases in which secondary evidence may be admitted we have followed, with few alterations the existing law. We may observe that Chapter VII contains most of the presumptions which we have thought it right to introduce into the Bill. They are presumptions which in almost every instance will be true—as to the genuineness of certified copies, gazettes, books purporting to be published at particular places, copies of depositions, etc.

We have inserted a few provisions in Chapter VIII as to material evidence. They reproduce the practice and as we believe the law of England upon this subject though no distinct provisions about it and few judicial decisions upon it are so far as we are aware, to be found in English law books.

On the subject of the exclusion of oral evidence of a contract, etc. reduced to writing we have (in Chapter IX) simply followed the law of England and the commissioners draft.

## IV THE PRODUCTION OF PROOF

From the question of proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following head—

The burden of proof (Chapter X)

Witness (Chapter XI)

The administration of oaths (Chapter XII)

Examination of witnesses (Chapter XIII)

With regard to the burden of proof, we lay down the broad rules that the general burden of proof is on the party who if no evidence at all were given, would fail and that the burden of proving any particular fact is on the party who affirms it. These are the well established English rules and appear to us reasonable in themselves. We have not followed the precedent of the New York Code in laying down a long list of presumptions agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges. We have however admitted one or two such presumptions to a place in the code as in the absence of an express rule, the Judges might feel embarrassed. These are—the presumption of death from seven years disappearance and the presumption of partnership from the fact of acting as partners.

We may observe that we have disposed, in an illustration, of a matter in which the laws of several countries contain elaborate and we think somewhat arbitrary provisions to be made in the case of the death of several persons in a

common catastrophe. We treat it as an instance of the rule as to the burden of proof. The person who affirms that A died before B must prove it. This is the principle adopted by the English Courts.

We follow the English law as to legitimacy being a necessary inference from marriage and cohabitation and we adopt one or two of the rules of English law as to estoppel.

In this chapter as to the examination of witnesses we have been careful to interfere as little as possible with the existing practice of the Courts which in the Mofussil Courts and under the Code of Civil Procedure, is of necessity very loose and much guided by circumstances, but we have put into propositions the rules of English law as to the examination and cross examination of witnesses.

We have also considered it necessary, having regard to the peculiar circumstances of this country to put into the hands of the Judge an amount of discretion as to the admission of evidence which, if it exists by law is at all events rarely or never exercised in England. We expressly empower him to ask any questions upon any facts relevant or irrelevant at any period of the trial and we expressly declare that it is his duty in criminal cases if he thinks that the public interest requires it, not merely to receive and adjudicate upon the evidence submitted to him by the parties but also to enquire to the utmost into the truth of the matter before him. The object of these provisions is to define simply and clearly the duties and the position of the Judges and those who practice before them. The English system under which the Bench and the Bar act together and play their respective parts independently and the professional organisation on which it rests, have no doubt great advantages, but in this country such a system does not as yet exist, and will not for a very long course of time be introduced. In the mofussil, generally speaking the great mass of cases are conducted without the assistance of a Bar, and when advocates are employed there they are usually brought from a distance and have to appear before Judges who have not had the same professional training as English Judges and are liable to be intimidated by advocates whose technical knowledge of law is greater than their own, and to whom the extremely intricate system of appeal which prevails in his country gives a power over the Judges unlike anything which exists in England. For this reason we have thought it necessary to strengthen the hands of the Judges and to enable them to act efficiently and promptly as the representatives of the public interest.

In connection with this subject we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross examination to credit. We believe the existence of that power to be essential to the administration of justice and we believe it to be liable to great abuses. The need for the power and danger of its abuse are proved by English experience, but in this country litigation of various kinds and criminal prosecutions in particular are the great engines of malignity and it is accordingly even more necessary here than in England both to permit the exposure of corrupt motives and to prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows.

Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case we think that the witness ought to be compellable to answer, but that his answer should not afterwards be used against him.

If they relate to matters not relevant to the case except in so far as they affect the credit of the witness we think that the witness ought not to be compelled to answer. His refusal to do so would in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true.

In order to protect witnesses against needless questions of this kind we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be guilty of a contempt of Court, and the Court may record any such question, if asked by a party to the proceedings. The records of the question of the written instructions are to be admissible as evidence of the



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publication of an imputation intended to harm the reputation of the person affected, and such imputations are not to be regarded as privileged communications, or as falling under any of the exceptions to section four hundred and ninety nine of the India Penal Code merely because they were made in the manner stated. Upon a trial for defamation it would of course be open to the person accused to show, either that the imputation was true or that it was for the public good that imputation should be made (Pt I, section 449, I P C), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Pt 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness.

In the same spirit we have empowered the Court, in general terms, to forbid indecent and scandalous inquiries unless they relate to facts in issue as defined above or to matters absolutely necessary to be known in order to determine whether the facts in issue existed, and also to forbid questions intended to insult or annoy.

We prefer this general power to the sections drawn by the Commissioners, which forbid questions to married persons "which substantially amount to inquiring whether that person has had sexual intercourse forbidden to him or her by the law to which he or she is subject, and questions regarding the occurrence of sexual intercourse between a husband and wife except in the case of Christians, where the suit is for a decree of nullity of marriage on the ground of bodily incapacity." We should regard these rules as dangerous. It is possible to imagine numerous cases in which it might be highly important to show that a married person was living with some one who was not her husband or his wife. A woman brings a false accusation against her servant. The motive is revenge for the discovery by the servant of an intrigue by the mistress. A married man comes to prove an *alibi* on behalf of his mistress. A woman sues a married man on a bond. He pleads that consideration was adultery. In all these cases and so in many others which might be suggested it appears to us that it would be absolutely necessary to admit such evidence as is referred to. As to questions relating to sexual intercourse between husband and wife we think it better to forbid indecent and scandalous inquiries in general terms than to lay down a positive rule which in possible cases might produce hardship.

Finally we deal (Chapter XV) with the question of the improper admission or rejection of evidence.

We provide in substance that in regular appeals each Court successively shall decide for itself to what evidence it will have regard. As for special appeals we provide that if evidence is said to be improperly admitted, the objection must be taken before the inferior Appellate Court, and the Court called upon to say what its decisions would be if the evidence objected to were rejected. If evidence is improperly rejected we would permit the High Court either to look into the facts and deliver final judgment or to remind the case.

Finally, we recommend that the Draft Bill together with the report should be circulated for the opinion of the Local Governments.

J F STEPHEN

J STRACHY

F S CHAPMAN

F R COCKRELL

J F D INGLIS

W ROBINSON

The 31st March, 1871

*ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67* **App**

The Council met at Government House on Friday the 31st March, 1871

### PRESENT

His Excellency the Viceroy and Governor General of India *K P G M S I* *presiding*

His Honour the Lieutenant-Governor of Bengal

His Excellency the Commander-in-chief *C. I. , C. S. I*

The Hon'ble John Strachey

The Hon'ble Sir Richard Temple,

*K C S I*

The Hon'ble J Fitzjames Stephen *Q C*

The Hon'ble B H Ellis

Major General The Hon'ble H W

Norman *C B*

Colonel the Hon'ble R Strachey, *C S*

The Hon'ble F S Chapman

The Hon'ble J R Bullen Smith

The Hon'ble F R Cockerell

The Hon'ble J F D Inglis

The Hon'ble W Robinson, *C S I*

### INDIAN EVIDENCE BILL

The Hon'ble Mr Stephen in presenting the Report of the Select Committee on the Bill to define and amend the Law of Evidence said —

"My Lord—I feel that I owe an apology to Your Lordship and the Council for requesting their attention to a second speech upon a purely legal subject after the one which I delivered a week ago, upon the Limitation Act. On this occasion, however, I have to explain the position of a measure perhaps as important as any that have been passed of late years by the Indian Legislature, in as much as, if it becomes law, it will affect the daily administration of both Civil and Criminal Procedure throughout the whole country. Moreover the subject matter to which the Bill refers is one of deep and wide general interest, for a law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law, to the problem of enquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

"This is the object which has been kept in view in framing the Bill which the committee append to their report, and which I am now to describe in a general way to your Lordship and the Council.

"I will state in the first place, the history of the measures down to the present time. So far back as the year 1868, the Indian Law Commissioners drew a draft Evidence Act which was sent out to his country, and introduced and reposed to a Select Committee, by my friend and predecessor Mr Maine. The Bill was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted, to be unsuitable to the wants of this country. In this view the committee concur for reasons which I need not state in detail on the present occasion as they are fully stated in the report which I present to day. I may observe in general however that the principal reasons were, that the bill was not sufficiently elementary, that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in his country are at present placed, of acquainting themselves by means of English Law books with the English Law upon this subject.

"The Commissioners' Draft, indeed would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English Law. Under these circumstances, a new draft was framed which we now propose to print and circulate and on which I hope to receive the opinions of the Local Governments and High Courts, in the course of the summer lay by next September so that their criticisms may be deliberately weighed, and the measure may be finally disposed of, by this time next year.

"The report of the committee explains very fully the scheme of the Bill, which of course is of considerable, though not I hope unwieldy length, and enters fully into the reasons which have led us to adopt its leading provisions,

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App C I will not worry the council by going into all these questions on the present occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will by studying the report which has been drawn up with great care and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear comprehensive and distinct knowledge of the subject, without unnecessary labour but not of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the committee in general and I in particular as the member in charge of the Bill desire that it may be tried.

With this reference to the Bill and the report of the committee, I proceed to discuss the general questions connected with the subject and to mention a few of the leading features of the measure.

I suppose that I may assume as generally admitted the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what at the present moment the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the thing it both is and will continue to be so in practice for if the English Law of Evidence has not been introduced into this country English lawyers and quasi lawyers have, and they have been directed to decide according to the law of justice equity and good conscience. Practically speaking these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of the English text books. It is difficult to imagine anything much less satisfactory than such a state of law as this. A good deal may be said for an elaborate legal system well understood and strictly administered. A good deal may be said for unaided mother wit and natural shrewdness, but a half and half system in which a vast body of half understood law, totally destitute of arrangement and of uncertain authority maintains a dead alive existence is a state of things which it is by no means easy to praise.

Legislation being thus necessary in what direction is legislation to proceed? A gentleman for whose opinion upon all subjects connected with Indian Law and Legislation I in common with most other people have a profound respect said to me the other day in discussing this subject—“My Evidence Bill would be very short one. It would consist of one rule to this effect—All rules of evidence are hereby abolished. I believe that the opinion thus vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is in short in the lay world including in the expression the majority of Indian Civilians an impression that rules of evidence are technicalities invented by lawyers principally for what Bentham called fee gathering purposes and of no real value in the investigation of fact. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all enquiries into matters of fact, and in particular in enquiries for judicial purposes and that it is practically impossible to investigate difficult subjects without regard to them.

“It is worth while to illustrate this point a little because the necessity for rules of evidence rests upon it, but strong proof of it is to be found in the fact that in all ages and countries there have been rules of evidence. In rude times and amongst primitive people the task of arriving at the truth as to matters of fact was regarded as so helpless and difficult, that rude arbitrary substitutes for any sort of rational procedure were provided in the shape of ordeals and judicial combats. When people began to obtain glimpses of the true methods of investigation they seem to have considered as almost supernatural skill what in our days fall within the scope of average police officers or attorneys. The delighted wonder which was displayed by the Jews according to the apocryphal story of Susannah and the wonders at what a friend of mine used to call that very feeble cross-examination of Daniels about the trees is a good instance of this. At a later period arbitrary rules of evidence began to be formed. Such a fact must be proved by two eye-witnesses, such another by

four, such another by seven. To say nothing of European systems, in which such rules were in force the Hedaya is full of them. These rules were never introduced in their full force into England, but the system which was adopted or rather which grew up by degrees was of a very mixed and exceedingly singular character. Part of it consisted of rules declaring large classes of witnesses to be incompetent. Part was intimately connected with the English system of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed or were as the phrase goes, at issue. Parts were the result of the practical experience of the Courts, and these were by far the most valuable portion, in my opinion of the English law of evidence. Most of the other rules have indeed been cut away by legislation and the rules which still remain may fairly be taken to be the net result of English judicial experience in modern times. In the most general terms these rules are —

- (1) that evidence must be confined to the issue
- (2) that hearsay is no evidence
- (3) that the best evidence must be given,
- (4) rules as to confessions and admissions
- (5) rules as to documentary evidence

"I have two general remarks to make upon them. The first is that they are sound in substance and eminently useful in practice, and that when properly understood they are calculated to afford invaluable assistance to all who have to take part in the administration of justice.

"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

"It is necessary to prove the first of these propositions in order to justify the recommendations of the committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system. First, then as to the proposition that the rules in question are substantially sound and do far more good than harm even in their recent confused condition. The proof of this, I think, is to be found, in a comparison between the proceedings of English Courts of Justice and those of countries which have no such rules and between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts, than from theoretical study. Most English lawyers know by habit, almost instinctively whether this or that (to use the common phrase) is or is not evidence, although they have hardly given the theory of the matter a thought. Practice therefore and not theory, affords the true test of the value of these rules. In fact the clumsy, intricate, ambiguous and in many instances absurd theory by which the rules of evidence are connected together came after the eminently sagacious practice which they were intended to justify and explain. What then is the practical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence, and I think that any one who would take the trouble to compare those trials together carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence in those cases was to shorten the proceedings enormously, and at the same time to consolidate and strengthen them. Keeping out nothing that a reasonable person would have wished to have before him as material for his judgment. The French system, on the other hand, which dispenses with all rules of evidence, not, at least in those cases, no other result from the want of them, than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head. Again compare the proceedings of an ordinary Court of Criminal Justice with the proceedings of a Court martial in which the rules of

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evidence are far less strictly enforced, and less clearly understood. An ordinary criminal Court never gets very far from the point but a Court martial continually wanders into questions far remote from those which it was assembled to try. Nothing for instance is more common than to see the prosecutor change places, as it were with the prisoner, or to find collateral issues pursued till the Court finds itself engaged in determining, not whether A was guilty of a military offence, but whether I told a false hood on some perfectly irrelevant subject. In a case which I well recollect I testified against A B, being cross-examined to his credit, stated a fact not otherwise relevant to the inquiry / denied the fact, which B affirmed and made further statements which were contradicted by intermediate letters of the alphabet. No Judge e in possibly be expected by the mere light of nature, to know how to set limits to the inquiries in which he is engaged, yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous Advocates who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might, or often would in such hands, be made the excuse for tearing open old quarrels and reviving questions laid at rest and giving fresh animus to scandals long since exploded and the main question would frequently be lost sight of, in a cloud of irritating and useless collateral issues. I may be excused for referring to my own experience at the English Bar in illustration of this. Apperils against perjury which I should think it would be difficult to exceed in any country. In certain parts of the country it was a point of honour for the friends of the putative father and of the mother respectively, to go to session to swear for him or her, as they used to say. No one who did not take part in such cases could imagine the strange ramifications of falsehood and contradiction, into which a hotly contested case of this kind would spread or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female. If it had not been for the rules of evidence the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil, but the parties, the witnesses and the attorneys, all appeared to me to be one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman and child, whose name was in any way brought into the discussion. The French Courts display this evil, in an aggravated form. In the work to which I have already referred will be found an account of the trial of a monk named Leotade for murder. If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the French Court it lasted witness in particular, was discovered, to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. One naturally wished to give his own account of the transactions, but was stopped on the ground that a line must be drawn some where, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character, and the point at which he been permitted to do so he might have given an equally irrelevant explanation.

"It is not, however, merely for the purpose of confining judicial proceedings within reasonable limits, that rules of evidence are useful. They are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty. There is a sense in which it may be said with perfect truth that even legislative power is unequal to the task of abolishing rules of evidence. No doubt it is competent to the Legislature to provide that no rules of evidence shall have the force of law, but unless they expressly forbid all Courts and Judges to act upon any rules at all or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss) the Judges infallibly will hear and will be guided by arguments upon the subject, and these arguments will be drawn from the practice of English Courts.

Moreover, the Courts

of appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic, and inconvenient of all conceivable shapes. The plain truth is, that there is only one possible way of getting rid of the law of evidence and that is by getting rid of the administration of justice by lawyers, and returning to the system of mere personal discretion.

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

"So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges. I must now say a few words on their value, as furnishing the Judge with solid tests of truth. I fully admit that their value in this respect is often exaggerated and misconceived, but I think that, when the matter is fairly stated, it will be found that they have a real, though it may be described as a negative, value for this purpose. There are two great problems on which the rules of evidence throw no light at all, and on which they are not intended to throw any light, and it must be admitted that those problems are by far the most important of any, which a Judge has to solve. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether, and how far, he ought to believe what the witnesses say? Again, rules of evidence are not, and do not profess to be rules of logic. They throw no light at all, on a further question of equal importance to the one just stated. What inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever these two questions—Is this true, and if it is true, what then,—ought to be constantly present to the mind of the Judge, and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them, and that persons who are absolutely ignorant of those rules, may give a much better answer to each of these questions, than men to whom every rule of evidence is perfectly familiar. I think, that a more or less distinct perception of this coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike, with which they are at times regarded. This dislike, I think, is merely a particular instance of the vulgar error, which in so many instances leads people to deprecate art in comparison with nature, as if there were an opposition between the two and as if art in all cases did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glass make him see, and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste for, and training in logic, but it no more follows that rules of evidence are useless as guides to truth than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence is ascertaining the truth consists in the fact that they supply tests warranted by very long and varied experience as to two great facts, the relevancy of facts to the question to be decided by the Court, and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus—'If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims—'First if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from the other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had, that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes, if it was a thing said have before you some one who heard it said with his own ears, if it was a written paper, have the paper before you and read it for yourself.

"This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these

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App C. rules are in themselves eminently wise, or that they are by no means so obvious and self evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice with no assistance from an express law. I do not wish to exaggerate but I must add that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters which will be of vast importance. I ought to add that the good which they are calculated to effect, can be obtained only by erecting them into laws and rigorously enforcing them. When this is done I feel confident that experience will be continually adding to the proper proof of their value.

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity. I pass now to the next proposition which is that these rules are expressed in a form so confused intricate and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice in an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, on the subject they form a mass of confusion to the English text books which is disputed. I can only refer in general to which no one can understand until by the aid of long practice, he learns the intention of the different rules of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished authors of these compilations. They like all other hand books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings, generally relating to some very minute point. It was necessary, therefore that they should be arranged rather with reference to vague catch words than which the ears of lawyers are familiar, than with reference to theoretical principles, which it has never been worth any lawyer's while to investigate.

"The condition of the law of evidence as well as the condition of many other branches of the law of England affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or what is still worse, with the presence of unsound theory. No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it and is not true. I will give one or two illustrations of my meaning. The expression 'hearsay' is no evidence early obtained is clear enough and what is more true is that when considered as the scientific expression of a general truth from which rules can be deduced in particular cases it is inaccurate faulty and obscure to the last degree. The objections to it are that both 'hearsay' and evidence are words of the most uncertain kind, each of which may mean several different things. For instance 'hearsay' may mean what you have heard a man say and this is its most obvious meaning, but it is difficult to imagine a grosser absurdity than the ascription that no one is ever to prove in a judicial proceeding anything said by any other person. 'Hearsay' again, may be taken to mean that which a person did not perceive with his own organs of perception but this is not the natural sense of the word and it is almost impossible in practice to direct a word of its natural meaning.

"The word evidence is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean, the fact to which he testifies, regarded as a ground for further inference. Notwithstanding this the phrase 'hearsay' is no evidence, being emphatic and easy to recollect stuck in the ears and in the minds of lawyers and has been taken by many text writers as the principle on which their statement of the most

important branch of the law of evidence is to be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short, they turned 'hearsay is no evidence' into, that which is not evidence is hearsay. They did not however, do this expressly. They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was admitted of anything, which would have been excluded, but for such exceptions. This is so intricate a statement that I can hardly expect the counsel to follow me but I will give one of what I mean. The question is whether a piece of land belongs to A or B. A says that it belongs to him, because his father C bought it from D, who bought it from E and he produces the deeds by which E conveyed the law to D and D conveyed it to C. Now as D and E are not parties to the suit between A and B and as A cannot of his own knowledge know anything of the transaction between them, English text writers call the deed between D and E 'hearsay' and according to Mr Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay', and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms. I think, however, that it is hard to expect people to understand, bear in mind, and follow out in all its ramifications a system, which employs language in such a peculiar manner as to call an ancient deed 'written hearsay'. To talk of hearing a document, is like talking of seeing a sound.

'I now turn to the ambiguity of the word evidence', to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say, — 'Recent possession of stolen goods is evidence of theft,' that is the fact of such possession suggests the inference of theft. At other times and I think more frequently 'evidence' means what a witness actually says in Court, or that which he produces. For instance, we say 'the evidence which he gave was true' I might occupy, I will not say the attention, but the time of Your Lordship and the Council for hours, if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence', is introduced 'circumstantial evidence', 'hearsay evidence', 'direct evidence', 'primary evidence', 'best evidence' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or to see how its various parts are related to each other, without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence, which few people are in a position to bestow upon the subject.

"I may appear to be detaining the Council unduly upon merely verbal questions but I think that it is a common fault to under rate the importance of accurate language, particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it, is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid, if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels and perpendiculars? Such a defect would render geometry impossible, and the defect which makes large parts of the law almost unintelligible and beyond all measures cumbrous and unwieldy, is precisely analogous to it in principle. I believe that if its fundamental terms were defined as clearly as the term 'law' was defined by the late Mr Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake, that its bulk might be diminished to a degree of which people in general have hardly any conception, that the expense of its administration might be greatly diminished and that comparative certainty might do away with a very large amount of needless and harassing litigation.



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I shall now proceed to describe, shortly, the principles on which the draft Bill of the committee has been framed. In the first place, we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood, and for that purpose we define, 'fact,' 'evidence,' 'proof,' 'proved' and some other words as to which I will content myself with a reference to the report. It seemed to us that the remainder of the subject would fall under the following general heads—

- 1 The relevancy of fact to the issues to be proved
- 2 The proof of facts, according to their nature by oral, documentary, or material evidence
- 3 The production of evidence in Court
- 4 The duties of the Court, and the effect of the mistaken admission or rejection of evidence

These heads would, we think be found to embrace, and to arrange in their natural order, all the subjects treated of by English text writers and Judges, under the general head of Evidence. I will say a few words on their relation to each other, and on each of them in turn.

The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts, and the mode of proving relevant facts. The neglect of this distinction by English text writers and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically. I will shortly illustrate my meaning. A says 'Z committed murder.' First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances. If the question is whether A was guilty of murdering Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murdering the object is to show that, when A charged him with it, he behaved as if he were guilty and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is whether Z actually did commit murder, the fact that A thought so or said so generally speaking is not relevant. Supposing, however that the fact is relevant on some one of the grounds just mentioned or on any other ground what ever be the ground on which the words themselves ought to be satisfactorily proved, it is obvious that the words are relevant to the writer under inquiry, and the rule of English law—and we think it a wise rule—is that they must be proved by the assertion of some witness that he heard them say that they under the head of Hearsay. They lay down the general rule that they are no evidence meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions and it is necessary to look through a long list of exceptions to that rule, in order to see whether in a particular case, a statement may or may not be proved? and you find that it can be proved the question is how can it be proved? If you propose to prove it by a witness who says that B told him that he heard A say so. Again, you are told hearsay is no evidence, but this expression means not that the fact is irrelevant but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is, that the most intricate and inconvenient of all possible forms that of a very wide negative of most uncertain meaning qualified by a long string of intricate exceptions.

No one who has not gone through the process of learning the law by mere rule of thumb practice can imagine the degree of needless obscurity and difficulty upon this point of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text writer you tell me an enormous length what is not evidence but you nowhere tell me what is evidence, except indeed in large compilations, which point out

what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference.

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant, as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non-existence. I will not weary the Council by specifying those rules, and I will content myself by referring to the Bill and their report. But I may shortly illustrate them by reference to a passage from a modern historian which will relieve the dullness of a technical speech. The passage to which I refer is a short summary, by Mr Froude, of the grounds on which he believes that Mary Queen of Scots murdered her husband.

"As Mr Froude was not a lawyer he certainly wrote, what I am about to read, without reference to the rules of evidence. I think the fact that he did, in fact, unconsciously observe them, illustrate very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr Froude's opinions or asserting the truth of his facts. I am concerned merely with relevance.

'She (Mary) was known to have been weary of her husband, and anxious to get rid of him.

'(By our draft, facts which show motives are relevant)

'The difficulty and the means of disposing of him had been discussed in her presence and she had herself suggested to Sir James Balfour to kill him.

'(Facts which show preparation for a fact in issue, are relevant)

"She brought him to the house where he was destroyed, she was with him two hours before the death.

"(Facts so connected with the facts in issue as to form part of the same transaction, are relevant)

"And afterwards threw every difficulty in the way of my examination into the circumstances of his end."

"(Subsequent conduct, influenced by any fact in issue, is relevant)"

"The Earl of Bothwell was publicly accused of the murder.

'(Facts necessary to be known in order to introduce relevant facts, are relevant)

"She kept him close at her side, she would not allow him to be arrested, she went openly to Setton with him, before her widowhood was a fortnight old. When at last unwillingly, she consented to his trial, Edinburgh was occupied by his retainers. He represented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute, and the Earl of Lennox had been prevented from appearing."

'(Subsequent conduct influenced by any fact in issue is relevant)

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him."

'(Subsequent conduct Motive)

"A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr Froude, in passages which I need not read, alleges facts which go to show that she tried to prevent the production, and to secure the destruction of these letters. An illustration as to the subsequent conduct meets the case of a person who destroys or conceals evidence."

"Finally Mr Froude observes 'In her own correspondence, though she denies the crime, there is no where the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.

"The letters would be evidence under the section relating to admissions, and Mr Froude's remark is in the nature of a criticism on them by a prosecuting counsel.

## App. C

"In English text books, so far as my experience goes, these rules and others of the same sort, are nowhere presented in a compact substantive form. They come for the most part, as exceptions to the rule that evidence must be confined to the point in issue. In fact, they can be learned only by the practice of the Courts though they are as natural and lax as any rules need be, if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions to public documents, and the like—these rules may be said to be three in number though of course, numerous introductory rules are required to adopt for practice. They are these:

"1. If a fact is proved by oral evidence, the oral evidence must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. Things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for, before any other evidence can be given of their contents.

"3. When the conflict has been reduced to writing, it must not be varied by oral evidence.

These rules, as I have said, are subjected to certain exceptions, and require certain practical adjustments, but I do not think that any one who has had practical experience of the working of Courts of Justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

"Passing over certain matters which are explained at length in the Bill and report, I come to two points to which the committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refer to the part taken by the Judge in the examination of witnesses, the second to the effect of the improper admission or rejection of evidence upon the proceeding in case of appeal.

"That part of the English law of evidence which relates to the manner in which witnesses are to be examined, assumes the existence of a well educated, but co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that the state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant, and it is most unlikely that he should ever wish to push an enquiry needlessly or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespective of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration, that it is the duty of the Judges especially in criminal cases not merely to listen to the evidence put before him, but to enquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of any better than carelessness and apathy in England.

"With respect to the question of appeals we have drawn a series of provisions the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the various cases in which, as appears to us, the questions of the improper admission or rejection or omission of evidence can arise, and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either

strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly

I have addressed Your Lordship and the Council at great length, but not, I think at greater length than the importance of the matter requires. I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticism of the Local Governments upon the measure.

The council adjourned to Thursday, the 6th April 1871

CALCUTTA,

WHITELEY STOKES

The 31st March, 1871

Secy to the Govt of India

*ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict, Cap 67*

#### PRESIDENT

His Excellency the Viceroy and Governor General of India *K R C M S I presiding*

The Hon'ble John Strachey	The Hon'ble J F D English
The Hon'ble J Fitzjames Stephen, Q C	The Hon'ble W Robinson Esq
The Hon'ble B H Ellis	The Hon'ble F S Chapman
The Hon'ble F R Cockerell	The Hon'ble R Stewart
The Hon'ble J R Bullen Smith	

#### SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman, Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill. He need not say anything more about it than that it was under the consideration of the Committee. He however wished to make one or two remarks. In the first place although the Bill have been sent for the opinion of the Local Governments some time in June last, with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject. He earnestly hoped that their opinions might be received in order that they might be fully considered. Some memorial had been received on the subject from individuals, specially from certain members of the Bar. He did not wish to discuss them. But he wished to say that he thought that the opinion of some persons, that the Council in General, and Mr Stephen in particular, were animated by some feelings of hostility against the Bar was perfectly unfounded, and was almost as unnatural and absurd as that His Lordship, the President should be accused of a strong prejudice and dislike against the Civil Service. He was the last person in British India who had any right or any wish to make an attack upon the members of the Bar. Everything that had been said upon the subject of this Bill would receive most earnest and careful attention in a perfectly fair and friendly spirit without the slightest notion of making any attack upon the independence or position generally of the honourable profession in question.

The Council adjourned to Friday, the 15th December, 1871,

CALCUTTA,

H S CUNNINGHAM,

The 5th December, 1871

Offy Secretary to the Council of the  
Governor General for making  
Law and Regulation

App. C

## SECOND REPORT OF THE SELECT COMMITTEE

*The Gazette of India, 1 February 17th, 1912, Part V P 91*

The following Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 30th January, 1872 —

Petition from certain Barristers and Advocates of Bombay, dated the 8th August, 1871

From Officiating Secretary to Chief Commissioner of Coorg No 386

4, dated 4th October 1871, and enclosures

From certain pleaders of the High Court, Bombay, dated 4th October 1871

From Officiating Secretary to Chief Commissioner of Coorg, No 400

6, dated 9th October 1871, and enclosures

From the Chief Secretary to Government of Fort Saint George No 166 dated 21st November 1871 and enclosures

From F I Fergusson Esq Barrister High Court Calcutta dated 8th December, 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta

From Secretary to Chief Commissioner, Central Provinces, No 2640

299, dated 6th December 1871 and enclosures

From Officiating Secretary to Government of Bengal, No 6326 J dated 13th December 1871, and enclosures

Memorial from certain members of the Madras Bar, dated 16th December 1871

We the undersigned, the Members of the select committee of the Council of the Governor Genl of India for the purpose of making Laws and Regulations, to which the Indian Evidence Bill was referred, have the honour to report that we have considered the Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof" and "moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

4 We have provided that the Act shall apply to all judicial proceedings but not to affidavits presented to any Court or officer, nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an offence we have omitted sections 120 and 121 of the original Bill. Instead of these we have provided that when two or more persons are on their trial for the same offence at the same time, and an admission is proved against one of them which affects others of the accused besides himself, it may be taken into consideration by the Court against all the persons whom it affects

6 We have redrawn chapter VI, as to the exclusion of oral by documentary evidence, so as to make the sections more distinct and complete. We believe that they now represent the English law on the subject freed from certain refinements which would not be suitable for this country

7 Exception was taken to the Bill in several quarters on the ground that it did not sufficiently dispose of the matter of presumptions. We have reconsidered this subject with attention, and have provided for it as follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases. These we have dealt with in sections 103 to 111 of the new Bill

A conclusive presumption is a direction by law that the existence of one fact shall in all cases, be inferred from proof of another. This we have provided for in sections 112 and 113

We have substituted the term 'conclusive proof' in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill

Other presumptions are in substance mere maxims by which the Court ought to be guided in the interpretation of facts. Theoretically they are regarded in English law in a different light that is to say, as artificial rules which the Court is bound to follow as to the inferences to be drawn from facts. Practically, however, so many exceptions are made that the difference between a

presumption of law and a presumption of fact is hardly traceable. The distinction appears to us altogether unsuitable for this country and likely to produce great inconvenience if it were introduced. We have accordingly, by section 114 put all such presumptions in the position of mere presumptions of fact with which the Court can deal at its discretion.

We have provided in the Chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native State shall be conclusive proof a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which as we are informed, have arisen on this subject.

The subject of presumptions as to documents is a very special matter, and appears to us to belong to the subject of documentary evidence, under which head we have placed it in chapter V.

Lastly many subjects are treated by English writers under the head of presumptions which appear to us to belong rather to different branches of the substantial law, e.g., the presumption that every one knows law is in reality a branch of substantive criminal law. We have omitted such presumptions as these from the law of evidence, because they do not belong to the subject and because many of them are fictitious.

8 The chapter on oaths has been omitted as they form the subject of a separate Bill now under discussion.

9 We also recommend the omission of sections 141 to 145 of the old draft as to questions to credit asked by barristers or pleaders and the substitution of provisions showing the principles by which the asking of such questions, should be regulated, and empowering the Court, if any such question is improperly asked to report the circumstance to the authority to which the person asking it is subject.

10 We have amended the wording of section 166 as to the Judge's power to ask questions. The section as originally drawn might have been taken to authorize him to found his judgment upon irrelevant matter, such as loose rumours. The intention of the section was to give him the fullest possible power of inquiry for the discovering of relevant matter. Section 164 as now drawn makes this clear.

11 We have omitted the chapter as to the duties of Judges, and Juries, which will we think, be more properly placed in the Code of Criminal Procedure. We have also omitted the provisions as to appeal in the first draft, and have substituted for them section 57 of Act II of 1855 which provides for the cases in which the improper admission or rejection of evidence shall be ground for a new trial or a reversal of a decision.

12 Subject to these amendments we recommend that the Bill be passed but we also recommend that the amended Bill be published in the Gazette and that this report be not taken into consideration for a month from the date of its publication.

J F STEPHEN

J STRACHLY

J T D INGLIS

W ROBINSON

F S CHAPMAN

R STEWART

J R BULLEN SMITH

F R COCKERELL

*The 30th January, 1872*

App C

*Abstract of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67*

The Council met at Government House on Tuesday, the 12th March, 1872

## PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

His Honour the Lieutenant Governor of Bengal

His Excellency the Commander in Chief, G C B, G C S, I

The Hon'ble John Strachey

The Hon'ble J Fitzjames Stephen Q C

The Hon'ble B H Ellis

Major Genl the Hon'ble W H Norman,

The Hon'ble J F D Inglis

The Hon'ble W Robinson, C S I

The Hon'ble F S Chapman

The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

The Hon'ble F R Cockerell

The Hon'ble Mr Stephen in moving that the Report of the Select Committee on the Bill to define and amend the Law of Evidence be taken into consideration, said "My Lord—Just a year ago, in submitting the Report of the Committee to the Council I explained at very considerable length the general design and scope of the Bill which they proposed and which is now before the Council for its final decision. I need not revert to what I then said upon the general principles of the subject. My best course I think will be to inform the Council of what has taken place in relation to the Bill since I last addressed them on the subject.

'After a very full and careful reconsideration of its various details, the Bill was published in the Gazette and forwarded to the Local Governments for opinion. It was carefully reconsidered in Committee after the return of the Government to Calcutta. It was published in the Gazette upwards of a month ago, with a report giving an account of the various alterations which had been made in it, and it is now finally submitted for the consideration of the Council. The Committee has fully considered all the papers with which it was favoured, but with one or two exceptions I cannot say that it has received any very considerable help from its critics. The Bengal Government made some important observations, and so did the Madras Government which favoured us with two peculiarly valuable papers, one by the then Advocate General Mr Norton, and the other in form of a letter by the Government itself which had obviously been prepared with the advice and assistance of a very able professional lawyer. We have received no public expression of opinion from any one of the High Courts, except the High Court of Bombay which approved, generally of the Bill but took exception to two of its provisions on minor points. The High Court of Calcutta announced its intention to say nothing at all on the matter. The High Courts of Madras and Allahabad have as a fact, said nothing, and as the Bill has been before them for many months I presume that they do not intend to do so. I have, however the satisfaction of being able to say that most of the Barrister Judges of the High Courts, and three out of the four Chief Justices, have informed me that they approve generally of the Bill and regard it as an important improvement on the existing state of thing. The Local Governments, I think, are unanimous in regarding the measure as one which is much needed, and which is so far suited to its purpose as to be both intelligible to persons not legally trained and complete in essential respects.

'Upon this point, I would specially refer to the valuable papers already referred to which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault they can with it sometimes coming to very minute criticism. I do not in the least complain of this. I only wish the Bill had been criticized more fully in the same spirit, and I readily admit that the critics in question have pointed out many defects which have been, I think, removed. I am entitled to say that such other defects as may still be latent in it have escaped the detection of at

least two highly competent, and by no means favourable critics, who have given the matter careful consideration. Upon some of these criticisms I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

'The letter of the Madras Government says —

'It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes,' and it then adds — 'The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code' but it is observed that the Bill 'in its present state is far from complete.'

'Mr Norton expresses the same opinion at greater length, and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a greater number of judicial decisions.

'Mr Norton criticises the Bill, section by section, and in order to show how fully, he has done so, he observes —

'I have, however, compared it, section by section, with Taylor, Ro-coe, Best and other text writers, with Civil and Criminal Procedure Codes so far as they apply to the subject of evidence, with some of the existing Acts which regulate judicial evidence and such judicial decisions as I have access to illustrating the principles which at present are generally supposed by the profession to obtain in the Courts of India.'

'He would hardly, I think, have submitted it to a more searching test. Further on he observes —

'The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr Pitt Taylor's works on evidence, and arbitrarily selecting certain sections or portions of sections.'

'He then criticises the Bill in detail, and conclude by saying —

'Such are the observations that have occurred to me in the most careful study I can give the Bill, and I think that with some omissions, a little rearrangement here and there and considerable extension and enlargement it promises to prove a great step in advance and improvement in the present uncoded Law of Evidence, and likely to afford very valuable aid and facilities to the Mofussil Judges, and all concerned in the practice of the law in the Mofussil.

'The general result of these criticisms is, that the Bill is good so far as it goes, but it is very incomplete and is composed of scraps of Taylor, on Evidence 'arbitrarily' and much too sparingly selected. I think I owe to the Council and to the public some observations on this matter. I assert that they do the Bill an injustice, that it is very much more complete than its critics allow it to be and that their own writings prove it. I will not do Mr Norton the injustice of supposing that he has intentionally kept back anything of importance which has occurred to him on the Bill. I am therefore entitled to assume that his paper which contains 33 paragraphs and extends over 14 folio pages, refer to all the defects and omissions which his careful study of the subject has brought to his notice. Passing over criticisms of details many of which are no doubt just and have been adopted I find that the only sins of omission with which he charges the Bill are the following—

'1 —Its provisions as to the effect of judgments are 'meagre'

'2 —It does not deal fully enough with the subject of presumptions

He also suggests slight additions to or enlargements upon four sections of very subordinate importance which I will not trouble the council by referring to.

'The letter from the Madras Government which describes the Bill as 'far from complete specifies no omission whatever except in reference to the subject of presumptions more of which it affirms, should be included in a Code aiming at completeness.'



## App. C

"The charge of incompleteness, then comes to this that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter, but I wish first with Your Lordship's permission, say a few words on the positive grounds on which I assert that the Bill does form a complete Code, and does deal with every subject which has been dealt by English text writers on Evidence or by English Legislation. This leads me, in the first place to notice the remark that it consists of bits of Taylor on Evidence 'arbitrarily chosen.' There is a certain amount of truth in this charge, about as much truth, and truth of the same kind as there would be by saying that the speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law book in common use which is, or even pretends to be much more than a large index, made up of extracts from cases strung together with little regard as to any other than a very superficial functionary arrangement of the subject matter. There is always some one book which is in possession of the field at a given moment because it is more complete than its rivals, and has the latest cases and statutes entered up in it. This position at present is occupied by Mr Taylor's book, as it was occupied before his time by Gilbert Phillips, Starkie and others, and as analogous positions are occupied, in relation to other subjects, by Russell on Crimes, Bullen on Pleading and other works known to all lawyers. To say, however, that the Bill now before the Council consists of bits taken from Taylor, and especially of bits taken 'arbitrarily' is altogether incorrect. In the first place, the arrangement of the Bill, and the general conception of the subject on which that arrangement is based are altogether unlike anything in Taylor or in any other text book on the subject with which I am acquainted. Nowhere in Taylor, nor in Mr Norton's own book on the subject will be found any recognition of the distinction between the relevancy of facts and the proof of facts, or any, even the faintest perception of the extreme ambiguity and uncertainty which as I showed in the observations which I addressed to the Council a year ago have been thrown over the whole subject by the absence of anything like an attempt to define with precision the fundamental terms of the subject, and specially the words 'fact' and 'evidence.' As to the notion that bits of Taylor have been 'arbitrarily put together in the Bill, I will only say that, at a proper time and place, I would undertake to assign the reason why every section stands where it does. Upon the question of completeness, however, I will make this remark. I assert that every principle applicable to the circumstances of British India which is contained in the 1593 royal octavo pages of Taylor on Evidence, is contained in the 167 sections of this Bill, I also assert that the Bill has been carefully compared, section by section with the last edition of Mr Norton's work upon evidence, and that it disposes fully of every subject which Mr Norton treats."

"As to the specific instances of incompleteness which are alleged against the Bill two only are of any importance upon each of them I will say a few words."

The first is, that the Chapter on judgments is meagre. My answer is, that it may appear meagre to those who take their notions of the law of Evidence from works like Mr Taylor's, but that it contains every thing which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England, and one of the strongest instances of it is to be found in the way in which provisions of an essentially different character are frequently comprised under the same head. I might give many illustrations of this, but the law of evidence I think, supplies more glaring illustrations than any other department of law. Many English writers have treated the subject in such a manner as to make it comprise the whole body of the law. Thus for instance Starkie's Law of Evidence deals with the whole range of the criminal law and of actions for contracts and damages. His book contains not merely rules about hearsay and secondary evidence and the like, but a specification of the sort of facts which it is permissible to prove on a charge of murder or in an action for libel in order to show malice or under the plea of not guilty in such an action. It is obvious that the law of evidence thus conceived would

include nearly the whole of the substantive law, and it follows, I think that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form and that certain topics connected with judgments which are often dealt with by writers on evidence, are omitted from the Bill. The subject is very technical, but I will endeavour to explain it in a few words.

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"The second section of the Code of Civil Procedure enacts that—

"The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim."

"The Code of Criminal Procedure enacts that a man shall not be tried again after he has once been acquitted or convicted. It is a matter of great difficulty and intricacy to describe the precise effect of these provisions and to show how they apply to a variety of cases which may arise. Mr Broughton's edition of the Code of Civil Procedure contains ten large pages in very small print, of notes of the cases which have been decided on the second section of the Code of Civil Procedure, and a certain number of decisions have been given on the corresponding sections of the Code of Criminal Procedure, and it is because this Bill does not codify those decisions that it is described as meagre. My answer to the criticism is, that the authors of the two Codes in question were quite right in considering the matter as essentially a matter of procedure. It no more belongs to the law of evidence than a thousand other questions which are sometimes connected with it. There are, for instance cases in which insanity excuses an act which, but for its existence would be a crime. If a man defend himself on the ground of insanity, he must give evidence of it, just as he must prove the existence of a judgment barring his antagonist's right to sue if he relies on the rights being so barred, but it appears to me that it would be as reasonable to treat the question of the effect of insanity on responsibility as a part of the Law of Evidence, because in particular cases it may be necessary to give evidence of insanity, and to treat the law as to the effect of a previous judgment on a right to sue as part of the law of evidence because in certain cases, it may be necessary to give evidence of the existence of a previous judgment.

The only questions connected with judgments which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration and some additions to it have accordingly been introduced though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable. *Praesumptiones juris et de jure*, *Praesumptiones juris* and *Praesumptiones facti*. There were also an infinite variety of rules for weighing evidence, so much in the way of presumption and so much evidence was full proof, a little less was half full and so on. Scraps of this theory have found their way into English law where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions

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"The charge of incompleteness, then comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter, but I wish first with Your Lordship's permission, to say a few words on the positive grounds on which I assert that the Bill does form a complete Code, and does deal with every subject which has been dealt by English text writers on Evidence or by English Legislation. This leads me, in the first place to notice the remark that it consists of bits of Taylor on Evidence 'arbitrarily chosen'. There is a certain amount of truth in this charge, about as much truth, and truth of the same kind as there would be by saying that the speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law book in common use which is, or even pretends to be, much more than a large index, made up of extracts from cases strung together with little regard as to any other than a very superficial functional arrangement of the subject matter. There is always some one book which is in possession of the field at a given moment because it is complete than its rivals and has the latest cases and statutes entered up in it before his time by Gilbert Phillips, Starkie and others and as analogous positions are occupied, in relation to other subjects, by Russell on Crimes, Bullen on Pleading and other works known to all lawyers. To say, however, that the Bill is 'arbitrarily' is altogether incorrect. In the first place, the arrangement now before the Council consists of bits taken from Taylor or in any other text book on the subject with which I am acquainted. Nowhere in Taylor, nor in Mr Norton's own book on the subject will be found any recognition of the distinction between the relevancy of facts and the proof of facts, or any, even the faintest perception of the extreme ambiguity and uncertainty which, as I showed in the observations which I addressed to the Council a year ago have been thrown over the whole subject by the absence of the subject, and specially the words 'fact and evidence'. As to the notion that bits of Taylor have been 'arbitrarily' put together to assign the reason why every section stands where it place, I would undertake to show the circumstances of British India does. Upon the question of completeness, however, I will make this remark I assert that every principle applicable to the circumstances of British India which is contained in the 138 royal octavo pages of Taylor on Evidence is contained in the 167 sections of this Bill. I also assert that the Bill has been carefully compared, section by section with the last edition of Mr Norton's work upon evidence, and that it disposes fully of every subject which Mr Norton treats.

As to the specific instances of incompleteness which are alleged against the Bill two only are of any importance, upon each of them I will say a few words. The first is, that the Chapter on judgments is merged. My answer is, that it may appear merged to those who take their notions of the law of Evidence from works like Mr Taylor's but that it contains every thing which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England, and one of the strongest instances of it is to be found in the way in which provisions of an essentially different character are frequently comprised under the same head. I might give many illustrations of this, but the law of evidence, I think, supplies more glaring illustrations than any other department of law. Many English writers have treated the subject in such a manner as to make it comprise the whole range of the criminal law and of actions for contracts and torts. His book contains not merely rules about hearsay and secondary evidence and the like but a specification of the sort of facts which it is permitted to prove on a charge of murder or in an action for libel in order to show malice or under the plea of not guilty in such an action. It is obvious that the law of evidence thus conceived would

include nearly the whole of the substantive law, and it follows, I think that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form and that certain topics connected with judgments, which are often dealt with by writers on evidence, are omitted from the Bill. The subject is very technical, but I will endeavour to explain it in a few words.

"The second section of the Code of Civil Procedure enacts that—

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The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of presumptions my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable. *Presumptions juris et de jure*, *Presumptions juris* and *Presumptions facte*. There were also an infinite variety of rules for weighing evidence, so much the way of presumption and so much evidence was full proof, a little less than half full and so on. Scraps of this theory have found their way into English law where they produce a very incongruous and unfortunate effect, and a good deal of needless intricacy. Another use to which presump-

**App C** been put is that of engrafting upon the Law of Evidence many subjects which in no way belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to indicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it dispense with the presumptions and hands the subject over from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs.

I will not weary the Council by going into all the details of the subject, though I could with perfect ease if it would not take too long, answer specifically the remarks of the Malras Government on this matter. That Government says—

“Sections 192-4 contain three instances of presumptions, selected from a chapter of the Law of Evidence which in Taylor's fills 111 sections. It is difficult to see why any should be inserted when so few are chosen.”

In general terms the answer is this, large parts of Mr Taylor's chapter relate to topics which have nothing to do with the Law of Evidence. Those which are of practical importance are all included in the Bill as it stands (a few were no doubt omitted in the first draft) and they fall under these heads:—1st. There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance. 2ndly—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for for instance may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose obviously, six or eight would do equally well, but it is also obvious that to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them. A new section (114) has been added to this chapter, which deserves special notice. Its substance was I think, implied in the original draft of the Bill, but it has been inserted in order to put the matter beyond all possibility of doubt. It is in the following words—

114. The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

#### *Illustrations*

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession,

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration

(d) that a thing or state of things has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence,

(e) that judicial and official acts have been regularly performed,

(f) that the common course of business has been followed in particular cases,

(g) that evidence which could be and is not, produced, would, if produced, be unfavourable to the person who withholds it

(h) that if a man refuses to answer a question which he is not compelled to answer by law the answer, if given, would be unfavourable to him,

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged

But the Courts shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them —

*As to illustration (a)*—A shop keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business

*As to illustration (b)*—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement describes precisely what was done and admits and explains the common carelessness of A and himself

*As to illustration (b)*—A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable

*As to illustration (c)*—A, the drawer of a bill of exchange was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence

*As to illustration (d)*—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course

*As to illustration (e)*—A judicial act the regularity of which is in question, was performed under exceptional circumstances

*As to illustration (f)*—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances

*As to illustration (g)*—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family

*As to illustration (h)*—A man refuses to answer a question which he is not compelled by law to answer but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked,

*As to illustrations (i)*—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it

"The effect of this provision coupled with the general repealing clause at the beginning of the Bill is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law, artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. I am not quite sure, whether, in strictness of speech the rule that an accomplice is unworthy of credit unless he is confirmed, can be called a presumption of law though, according to a very elaborate judgment of Sir Barnes Peacock it has at all events some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failure of justice. On the one hand it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice, on the other hand it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence though they can if they choose. How a sensible Judge on (setting without a jury) is to give how a discretion to that effect and how a High Court is to deal with a case in which he has convicted although he told himself that he ought not to convict, I do not quite understand. At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course the fact that a man is an accomplice forms a strong objection in most cases, to his evidence, but every one I think, must have



in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichborne case one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted then however trifling the matter might have been, the party whose objection had been wrongly overruled would have been by law entitled to a new trial and the whole enormous expense of the first trial would have been thrown away. This never was the law in India nor will it be so now. The result is that the provisions about relevancy will be useful principally as guides to the Judges and the parties and, in particular as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question I think that it is possible to give the true theory of the relevancy of facts and if I thought it desirable to enter upon a very abstract matter in this place, I think I could show what this theory is, and how this bill is founded upon it. Be this, however as it may, and taking a view not indeed less practical but more immediately and obviously practical, I would make the following observations— I am quite aware that relevancy is as His Honour observes, a matter of degree and for that reason the Bill gives definitions of it so wide and various, that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant and most facts which have any real connection with the matter to be proved would fulfil several of them. Take for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is therefore relevant under section 6, (2) it is the effect of a fact in issue, and is therefore relevant under section 7, (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8, (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negating the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue nor forms part of the same transaction, nor is its occasion cause or effect, immediate or otherwise, that it shows no motion or preparation for it, that it is no fact of the previous or subsequent conduct of any person connected with the matter in question, that it does not explain or introduce any fact which is so connected with the matter in question or rebut or support any inference suggested thereby or establish the identity of any person or thing connected with it, or fix the time of any event the time of which is important, that it is not inconsistent with any relevant fact or facts in issue, and that neither by itself, nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

1. "I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel. The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character as to matters irrelevant to the case before the Court without written instructions—that if the Court considered the question improper it might require the production of the instructions, and that the giving of such instruction should be an act of defamation subject, of course to the various rules about defamation laid down in the Penal Code. For a such question without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

"This proposal caused a great deal of criticism and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of



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met with instances in which it is practically impossible to doubt the truth of such evidence although it may not be corroborated or although the evidence by which it is corroborated is itself suspicious.

"As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill, at all events, is not incomplete.

"I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests, and the manner in which an Act of this kind should be used in practice. I think, however, that it would not be proper to do so on the present occasion. I have therefore put into writing what I have to say on these subjects and I propose to publish what I have written by way of a commentary upon, or introduction to the Act itself. I hope that this may be of some use to the Civil Servants who are preparing for their Indian career, and to the law students in Indian Universities. The subject is one which reaches far beyond law, for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated.

"I now turn to criticism made on the Bill by His Honour the Lieutenant Governor of Bengal who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree.

"The Lieutenant Governor has no doubt that the law clearing up the obscurity now prevailing as to rules of evidence, protecting our Courts from the intrusion of a foreign law of evidence in no way applicable and rendering the Judges in some degree masters in their own Courts will be highly beneficial. His principal doubt is whether it is possible to define by law what evidence is relevant and what is not. He is inclined to think that relevancy is a question of degree, that relevant shades off into the irrelevant by imperceptible degree. It may be that it is easier to decide, in each case, what is substantially material to the issue, or so remote in its relevancy that the time of the Court should not be occupied than to lay down by rule of law what is to be considered relevant and what not. Such rules must not necessarily be somewhat refined and as it were metaphysical. If it were allowed to argue the question whether any piece of evidence is, or is not admissible under such rules, the Lieutenant Governor would fear that the Court might be lost in disputation. If, however, the rules regarding relevancy be treated as merely an authoritative treatise on evidence for the guidance of Judges, which they are to study and follow as well as they can, but that they are not bound to hear objections and arguments based upon it the Lieutenant Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful. It does not seem to him very clear in the draft whether or no counsel are to be entitled to take objection to evidence at every turn and to argue the question is to whether it is or it is not admissible under the evidence rules. It seems of great importance that this should be made clear, for if counsel may object and argue, the Lieutenant Governor certainly has great fear that the arguments regarding relevancy will be endless."

"I cannot altogether agree with these remarks. As to arguments of counsel I do not feel that horror of them which His Honour appears to feel. It is I think, abundantly clear that counsel will be permitted to argue as to the relevancy of evidence and as to the propriety of proof, and I do not see how a law can be laid down at all upon which counsel are never to argue. No one I think, will seriously assert that lawyers as a class are an impediment to the administration of justice or otherwise than an all but indispensable assistance to it, but if they are to exist at all, they must argue as well on evidence as on other subjects. I must, however, observe that every precaution has been taken to prevent useless and trifling arguments. In the first place if the Judge wishes to know about any fact, the relevancy of which is under debate, he can cut the matter short by asking about it himself under section 165. In the second place the mere admission or rejection of improper evidence is not to be a ground for a new trial or the reversal of a decision. The fact that the opposite is the rule

in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the *Richborne* case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been, the party whose objection had been wrongly overruled would have been by law entitled to a new trial and the whole enormous expense of the first trial would have been thrown away. This never was the law in India nor will it be so now. The result is that the provisions about relevancy will be useful principally as guides to the Judges and the parties, and, in particular as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question I think that it is possible to give the true theory of the relevancy of facts and if I thought it desirable to enter upon a very abstract matter in this place I think I could show what this theory is, and how this bill is founded upon it. Be this, however, as it may and taking a view, not indeed less practical, but more immediately and obviously practical, I would make the following observations — I am quite aware that relevancy is as His Honour observes, a matter of degree and for that reason the Bill gives definitions of it so wide and various that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant and most facts which have any real connection with the matter to be proved would fulfil several of them. Take for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with fact in issue as to form part of the same transaction, and is therefore relevant under section 6, (2) it is the effect of a fact in issue, and is therefore relevant under section 7, (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8, (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negating the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue nor forms part of the same transaction, nor is its occasion, cause or effect immediate or otherwise, that it shows no motion or preparation for it, that it is no fact of the previous or subsequent conduct of any person connected with the matter in question that it does not explain or introduce any fact which is so connected with the matter in question or rebut or support any inference suggested thereby or establish the identity of any person or thing connected with it, or fix the time of any event the time of which is important, that it is not inconsistent with any relevant fact or facts in issue, and that neither by itself, nor in connection with other facts does it make any such fact highly probable—if all these negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

1. "I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel. The Bill as originally drawn provided, in substance that no person should be asked a question which reflected on his character as to matters irrelevant to the case before the Court without written instructions that if the Court considered the question improper it might require the production of the instructions and that the giving of such instruction should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such question without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

"This proposal caused a great deal of criticism and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of

**App. C.** the objections made to the proposal, were I thought well founded. It was pointed out, in the first place that the difficulty of obtaining the written instructions would be practically insuperable, in the next place, that the Native Bar throughout the country were already subject of forms of discipline which were practically sufficient, and, in the third place—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties and is so frequently thwarted to purposes of the worst kind that it is of the greatest importance that the characters of witnesses should be open to full inquiry. These reasons satisfied the committee and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. The substituted sections are as follows —

Questions lawful in cross examination 146 When a witness is cross examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend —

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

When witness to be compelled to answer 147 If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto

148 If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations —

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies
- (2) such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character, that the truth of the imputation would not affect or would affect in a slight degree the opinion of the Court as to the credibility of the witness on the matter to which he testifies
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence
- (4) the Court may, if it sees fit draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable

Question not to be asked without reasonable grounds 149 No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded

#### Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakan. This is a reasonable ground for asking the witness whether he is a dakan.

(b) A pleader is informed by a person in Court that an important witness is a dakan, the informant, on being questioned by the pleader gives satisfactory

reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakt.

(c) A witness, of whom nothing whatever is known, is asked a question whether he is a dakt. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakt.

150 If the Court is of opinion that any such question was asked without reasonable grounds, it may if it was asked by any barrister or pleader, or by an attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, or attorney is subject in the exercise of his profession.

151 The Court may forbid any questions or inquiries which it regards as indecent or scandalous. Although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152 The Court shall forbid any question which appears to it to be intended to insult or annoy, or which although proper in itself appears to the Court needlessly offensive in form.

The object of these sections is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections so far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. I can not leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill since it appeared in the Gazette in its amended form, about a month ago I suppose that the alterations made in the Bill have removed the objection which they felt to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all memorials. The one sent in by the Cileutta Bar was for the most part proper though it contained passages which I think might well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice.

'I may observe in the first place in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar. Indeed, the Bombay memorial says, in so many words that remarks made by one member (meaning I suppose, me) in Council appear to contemplate the extinction of the profession of a Barrister at law in India. In support of this surprising statement they quote, as being open to no other construction, the following words from the report of the Select Committee—

"The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, do not as yet exist in this country and will not for a very long course of time be introduced."

'Before I made the remarks which this suggests, let me ask your friendship and the Council whether I charge that I, of all people, wish for the ex-

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tion of the profession of Barristers at law in India, is not upon the face of it absurd? I am myself a Barrister of eighteen years' standing and a Queen's counsel of four years standing. I believe, that there is no Barrister in British India of whom I should not be entitled to take precedence professionally, if I chose to practise here, and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold, for the purpose of returning to the ordinary routine of professional practice. How is it possible to imagine that a man so situated should be hostile to the profession? When this Bill was introduced I was—as I still am—anxious to do whatever lies in my power to preserve the honour and dignity of my profession and to prevent its good name from being disgraced. For this reason, I devoted what I regarded as an appropriate remedy for a great and crying evil—one with which I have been much impressed by my own observations in England and which is likely to extend in India as the habit of cross examination becomes more general, and when the rights which a cross examining advocate has are explicitly defined. The remedy, I will admit was to some extent inappropriate but for merely proposing it for merely recognizing the existence of the evil against which it was directed I am charged with wishing to extinguish my own profession.

The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said 'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests do not as yet exist in this country and will not for a very long course of time be introduced.'

"Yes," say the memorialist, it does exist to wit, in the Presidency towns. This is as much as if the water works of Calcutta were referred to to contradict a statement that India is wretchedly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts and three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements. The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated. It would, indeed, have been matter of great indifference to me personally, whether the Bill extended to the High Courts sitting on the original side or not. It is a mistake to make exceptions without a necessity of them but the question, what rules of evidence should apply in the Presidency towns is one of very little real importance. The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large. It is framed in order to meet the wants and lighten the labours, of district officers by giving them a short and clear view of a subject which has been converted into a sort of professional mystery the knowledge of which was confined to a not of persons specially initiated in it. Now as regards the Mofussil I repeat the expression complained of. I assert that they are absolutely true and state a fact notorious to every one. I say that throughout India generally, nothing like the English system under which the Bench and Bar act together and play their respective parts independently does now exist or can for a length of time be expected to exist. Let me just recall for a moment the nature of that system. In the first place the Bench and the Bar in England form substantially one body. The Judges have all been Barristers and the great prize to which the Barristers look forward is to become Judges.

That is not the case in India nor anything like it. The great mass of Indian Judges are not and never have been, lawyers at all, the great mass of Indian lawyers have no chance or expectation of becoming Judges and many of them have no wish to do so. Even in the Presidency towns, the whole organization of the profession differs from that of England in ways which I do not think it necessary to refer to, but which are of great importance. I

may, however, observe that the position of an English Barrister who practices in the Mofussil whether he is habitually resident in the Presidency town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister in circuit, and even at the Quarters Sessions, is subject to the whole series of professional restraints and professional rules which do not, and can not apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon him. He practices in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer. No one of these remarks applies to Barristers from a presidency practising in the Mofussil. The results of this state of things must be matter of opinion. It is impossible to discuss the subject in detail. The Bombay and Calcutta memorialists consider it eminently satisfactory, let us hope they are right. My opinion, of course, is formed upon grounds which it is not very easy to assign and, as it can be of little importance I shall not express it. In any case this Bill can do no harm.

Passing, however, from the case of English Barristers to the case of pleaders and vakils and the Courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon it there—the provision which empowers the Court to ask what questions it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India in an enormous mass of cases this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by other but that he should ascertain by his own inquiries how the facts actually stand. In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm the Judges with express authority to do this that section 165 which has been so much objected to, has been framed.

“I have now referred to the main points in the Bill which have been attacked, and as I fully explain the principles on which it was founded more than a year ago, I have only to move that it may be taken into consideration.”

The motion was put to and agreed to

## II S CUNNINGHAM

*Offg Secy to the Council of the Governor General  
for making Laws and Regulations*

CALCUTTA

For 12th March 1872

## APPENDIX D

### Act II of 1855

An Act for the further improvement of the Law of Evidence

Enacted

Whereas it is expedient further to improve the Law of Evidence, It is enacted as follows —

Act repealed

I Act No X of 1835 is hereby repealed

II Within the territories in the possession and under the Government of the East India Company, all Courts of Justice and all persons having by law or consent of parties authority to take evidence shall take judicial notice of all Regulations and Ordinances, made before or on the 2nd day of April 1834 by the Governor General in Council of the Presidency of Fort William in Bengal, by the Governor in Council of the Presidency of Fort St George or by the Governor in Council of the Presidency of Bombay, and having the force of law in any part of the said territories, and of all laws and regulations heretofore made by the Governor General of India in Council and of this Act and of all Acts and Regulations heretofore made, or hereafter to be made by the Governor General of India in Council constituted for the purpose of making Laws and Regulations whether the same be of a public or of a private nature

III All Courts and persons aforesaid shall take judicial notice of all public Acts of Parliament and of all local and personal Acts declared by Parliament to be public and to be judicially noticed and shall admit as prima facie evidence of any private Act of Parliament any copy thereof purporting to be printed by the King's Printer

IV Every Court shall take judicial notice of its own members and officers respectively, and of their deputies and subordinate officers or Assistants and also of all officers acting in execution of its process and of all Advocates Attorneys Proctors Vakeels Pleaders and other persons authorized by Law to act before it

V All Courts and persons aforesaid shall take judicial notice of the names, titles, and authorities of the persons filling for the time being any one of the following offices in any part of the said territories — Governor General Governor, Lieutenant Governor or Deputy Governor Secretary or under Secretary to Government Commander in Chief, Bishop Member of Council Legislative Councillor Judge of any of Her Majesty's Courts or of any Sadler Court or of any Court of Judicature hereafter to be constituted in the said territories to or in which the powers of any of Her Majesty's Supreme Courts may be transferred or vested

VI Any such Courts and persons aforesaid shall take judicial notices of all divisions of time of the geographical division of the world of the territories under the dominions of the British Crown of the commencement continuation and termination of hostilities between the British Crown, any other state, and also of the existence title and national flag of every sovereign or state recognised by the British Crown In all the above cases, such Court or person may resort for its aid to appropriate books or documents or reference

VII Any Government Gazette of any country colony or dependency under the domain of the British Crown, may be proved by the bare productions thereof before any of the Courts or persons aforesaid

Proof of Government Gazette

VIII All proclamations, acts of state whether Legislative or Executive nominations, appointments, and other official communications of the Government appearing in any such Gazette, may be proved by the production of such Gazette and shall be *prima facie* proof of any fact of a public nature which they were intended to notify

Proof of Proclamations, Acts, state, etc Proclamations, etc when to be *prima facie* proof of fact

IX Any recital contained in any Act of the Governor General of India in council constituted for the purpose of making Laws and Regulations, hereafter to be passed of any fact of a public nature shall be deemed, before all such Courts and persons to be *prima facie* evidence of the truth of the fact recited

Recital in Act of a public nature to be *prima facie* proof

X The Gazette of Newspaper containing any advertisement purporting to be published by virtue of any public statute Act, Regulation, or Ordinance or of any Rule or order of a Court of Justice or of any Board or Office of Revenue, may be received by any such Courts or persons as aforesaid as *prima facie* evidence that such advertisement was published duly under the authority from which it purports to proceed

Gazette, etc, containing advertisement purporting to be published by authority to be *prima facie* evidence of such authority

XI All Courts and persons aforesaid may, on matters of public history, literature, science or art refer for the purposes of evidence, to such published books maps or charts as such Courts or persons shall consider to be of authority on the subject to which they relate

Books, maps etc, to be evidence in matters of public history, etc

XII Books printed or published under the authority of the Government of a foreign country, and purporting to contain the Statutes, Code, or other written Law of such country, and also printed and published books of reports of decisions of the Courts of such country and books proved to be commonly admitted in such Courts as evidence of the law of such country, shall be admissible before any such Courts or persons as aforesaid as evidence of the law of such foreign country

What books, etc, shall be evidence of Foreign Law

XIII All maps made under the authority of Government or of any public municipal body and not made for the purpose of any litigated question shall *prima facie* be deemed to be correct and shall be admitted in evidence without further proof

Government or public maps when to be *prima facie* proof

XIV The following persons only shall be incompetent to testify

1 Children under seven years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly

2 Persons of unsound mind, who at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly and no person who is known to be of unsound mind shall be liable to be summoned as a witness without the consent, previously obtained of the Court or person before whom his attendance is required

XV Any person who, by reason of immature age or want of religious belief, or who by reason of defect of religious belief ought not, in the opinion of such Court or person to be admitted to give evidence on oath or solemn affirmation shall be admitted to give evidence on a simple affirmation declaring that he will speak the truth the whole truth, and nothing but the truth

Children and persons of defective religious belief to testify on simple affirmation



p. D

Provisions as to witness to apply to affidavits etc.,

XVI The provisions in the last preceding section as to witnesses shall apply to testimony given by affidavit or otherwise in writing as well as to testimony orally delivered

XVII Any such witness wilfully giving false evidence shall be subject to be proceeded against in like manner, and to suffer if convicted, the same punishment as if he had been sworn and had committed wilful and corrupt perjury. The indictment or charge shall be varied so as to meet the case.

XVIII No person shall, by reason of any interest in the result of any suit or of any interest connected therewith, or by reason of relationship to any of the parties thereto, be incompetent to give evidence in such suit.

XIX Any party to a civil suit or other proceeding of a civil nature shall be competent, and may be compelled, to give evidence as a witness therein either on his own behalf or on behalf of any other party to the suit or proceeding and also to produce any document in his possession or power, in the same manner as if he were not a party to the suit or proceeding. Provided that no Court or person as aforesaid other than Her Majesty's Supreme Courts of Judicature, shall compel the attendance of any party to such suit or proceeding, for the purpose of giving evidence therein except under and subject to the rules prescribed in that behalf in Act XIX of 1853.

PROVISO  
A husband or wife shall in every civil proceeding be competent to give evidence for or against each other. Provided that any communication made by husband or wife to the other during their marriage shall be deemed a privileged communication and shall not be disclosed without the consent of the person making the same, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife.

XIV A witness whether a party or not shall not be bound to produce any document relating to affairs of state, the production of which would be contrary to good policy, nor any document held by him for any other person who would not be bound to produce it if in his own possession.

XXII A witness being a party to the suit shall not be bound to produce any document in his possession or power which is not relevant or material to the case of the party requiring its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser. If any party, however, offer himself as a witness, he shall be bound to produce any such writing or correspondence in his custody, possession, or power if relevant or material to the case of the party requiring its production.

XXIII Every witness summoned to produce a document shall if the same be in his custody, possession or power be bound to bring it or cause it to be brought into Court although there be a valid objection to the right of the party calling for it to compel its production, or to the reading or putting it in as evidence, or to the disclosure. The validity of any such objection made by the person producing the document shall be determined by the Court, and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it.

and it shall also be lawful for the Court except in the case of any document relating to the affairs of state, to inspect the document, and if necessary to call to its assistance any person whom it may appoint to interpret the same. Such person, however shall be previously sworn truly to interpret the same to the Court alone and not to disclose the contents thereof except to the Court unless the Court shall order the document to be given in evidence.

**XXIV** A Barrister, Attorney, or Vakeel shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment nor any advice given by him professionally to his client nor the contents of any document of his client, the knowledge of which he shall have acquired in the course of his professional employment. The privilege, however, is that of the client and if any party to a suit shall give evidence therein at his own instance, he shall be deemed thereby to have waived his privilege and to have consulted to the disclosure by such Barrister, Attorney, or Vakeel of any matter aforesaid which may be relevant, and which the Barrister, Attorney, or Vakeel would have been bound to disclose but for the privilege of his client and the Barrister, Attorney or Vakeel shall be bound upon examination to disclose any such matter.

**XXV** Any person present in Court whether a party or not, may be called upon and compelled by the Court to give evidence and produce any document then and there in his actual possession, or in his power in the same manner and subject to the same rules as if he had been summoned to attend and give evidence, or to produce such document and may be punished in like manner for any refusal to obey the order of the Court.

**XXVI** Any person whether a party to the suit or not, may be summoned to produce a document without being summoned to give evidence and any person summoned merely to produce a document, shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

**XXVII** The rules of evidence in Her Majesty's supreme Courts as to matters of Ecclesiastical or Admiralty civil jurisdiction, shall be the same as they are on the Plea side of the Courts.

**XXVIII** Except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule of practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury.

**XXIX** Where dying declarations are evidence they shall be received if it be proved that the decedent was at the time of making the declaration and then thought himself to be, in danger of approaching death though he entertained at the time of making it hope of recovery.

**XXX** The party at whose instance a witness is examined may with the permission of such Court or person cross-examine such witness to test his veracity in the same manner as if he had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him.

## App D

**XXXI** In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority lawfully competent to investigate the fact, shall be admissible, and for that purpose a copy of any deposition or statement taken before any Court, Judge, Justice of the Peace, Magistrate or person lawfully exercising the powers of a Magistrate, or before a Commissioner or Superintendent for the suppression of Thuggee or Dacoity, in the discharge of his duty, shall if certified by such Court, Judge, or other officer above mentioned, under his hand or the official seal of the Court, or under the hand or official Seal of such Judge to be a true copy of such deposition or statement without further proof, be received as *prima facie* evidence that such deposition or statement was made and that it was made at the time and place, and under the circumstances if any which shall be stated in the certificate or on the face of the deposition or statement.

**XXXII** A witness shall not be excused from answering any question relevant to the matter at issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly, to criminate, such witness or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind. Provided that no such answer which a witness shall be compelled to give, shall except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution or be used as evidence against such witness in any Criminal proceeding.

**XXXIII** A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

**XXXIV** A witness may be cross-examined as to previous statement made by him in writing or reduced into writing relative to the subject matter of the cause, without such being shown to him; but if it is intended to contradict such witness by the writing his attention must before such contradictory proof can be given be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always, that it shall be competent for the Judge at any time during the trial to require the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

**XXXV** An impression of a document made by a copying machine shall be taken without further proof to be a correct copy.

**XXXVI** When an original document is out of the reach of the process of the Court it shall be lawful for the Court on application to it in any civil suit or proceeding, and on notice to the opposite party at a reasonable time before the hearing to make an order for the reception of secondary evidence of its execution and contents.

**XXXVII** An attested document may be proved as if unattested unless it be a document to the validity of which attestation is required.

**XXXVIII** The admission of a party to unattested instrument of its execution by him self shall be as against him sufficient *prima facie* proof of such execution of it, though it be an instrument which is required by law to be attested.

**XXXIX** An entry or statement which would be admissible in evidence after the death of the person who made it, on the ground of its having been made against the interest of the person making it or on the ground of its having been made in the ordinary course of business shall be admissible though the person who made it be not dead if he is incapable of giving evidence by reason of his subsequent loss of understanding or is at the time of the trial or hearing *bona fide* and permanently beyond the reach of the process of the Court, and cannot after diligent search be found

**XL** Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name description number or otherwise any bank note or other securities for the payment of money or other property and the giver in or receiver of them, shall, in any case where such identification is necessary to be proved be admissible in evidence for that limited purpose if it shall appear to have been made at or about the time of the transaction to which it relates, though the person who made it or he on whose information it was made, is alive and capable of being produced as a witness

**XLI** Any receipt in writing acknowledging the receipt of any money, valuable securities or goods shall, on proof of the execution thereof, be admissible in evidence before such Court or person aforesaid, not only against the party giving it but also against any person in whose favour such receipt would operate as a discharge or to whom it would render the person giving it, liable for the money, security, or goods acknowledged to have been received

**XLII** Whenever a receipt would be admissible under the preceding section, if given by a principal or receipt given by an agent or servant of such principal shall in like manner be evidence upon proof of the authority to give such receipt

**XLIII** Books proved to have been regularly kept in the course of business or in any public office shall be admissible as corroborative but not as independent proof of the facts stated therein

**XLIV** The following documents may be admitted as corroborative evidence — Certificates of shares and of registration thereof bills of lading invoices account sales receipts usually given on the payment deposit or delivery of money goods securities or other things provided they be proved to have been given in the ordinary course of business

**XLV** A witness shall be allowed before any such Court or person aforesaid to refresh his memory by any writing made by himself or by any other person at the time when the fact occurred or immediately afterward or at any time when the fact was fresh in his memory, and he shall new that the same was correctly stated in the writing. In such case the writing shall be produced and may be given by the adverse party, who may if he choose, cross-examine the witness upon it

**XLVI** Whenever a witness may refresh his memory by reference to any document he may with the permission of the Court refer to a copy of such document provided the Court or person under the circumstances, be satisfied that there is sufficient reason for the non production of the original

Court may permit a copy of document to be used to refresh memory

App D

**XXXI** In order to corroborate the testimony of a witness any form of deposition or statement made by such witness relating to the facts at or about the time when the fact took place or before any authority lawfully competent to investigate the fact shall be admissible and for that purpose a copy of any deposition or statement taken before any Court Judge, Justice of the Peace, Magistrate or person lawfully exercising the powers of a Magistrate or before a Commissioner or Superintendent for the suppression of Thugs or Dacoits, in the discharge of his duty shall if certified by such Court Judge or other officer in writing, and countersigned by the official seal of the Court or under the hand or official seal of such Judge to be a true copy of such deposition or statement, without further proof be receivable *prima facie* evidence that such deposition or statement was made and that it was made at the time and place and under the circumstances if any which shall be stated in the certificate or on the face of the deposition or statement.

**XXXII** A witness shall not be excused from answering any question relevant to the matter at issue in any suit or in any civil or criminal proceeding upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind. Provided that no such witness which a witness shall be compelled to give, shall except for the purpose of punishing such person for wilfully giving false evidence upon such examination subject him to any arrest or prosecution or be used as evidence against such witness in any criminal proceeding.

**XXXIII** A witness in any case may be questioned as to whether he has been convicted of any felony or misdemeanor and upon being so questioned if he either denies the fact or refuses to answer it shall be lawful for the opposite party to prove such conviction.

**XXXIV** A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the case, without such being shown to him, but if it is intended to contradict such witness by the writing his attention must be called to such contradictory proof can be given, he called to the opposite party of the writ which he to be used for the purpose of so contradicting him. Provided always that it shall be competent for the Judge at any time during the trial to require the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

**XXXV** An impression of a document made by a copying machine shall be taken without proof to be a correct copy.

**XXXVI** When an original document is out of the reach of the Court it shall be lawful for the Court on application to it, in any civil suit or proceeding, and to the opposite party at a reasonable time thereafter, to make an order for the reception of evidence of its execution and contents.

**XXXVII** An attested document may be proved as if unattested unless it be a document to the validity of which attestation is required.

**XXXVIII** The admission of a party to unattested instrument executed by him self shall be as against him a *prima facie* proof of such execution although it be an instrument which is required to be attested.

LVI Whenever, by any Statute or Act Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, any certificate, certified copy or other document, shall be receivable in evidence of any particular in any Court of Justice the same if it is substantially in the form and purports to be executed in the manner directed by the Statute, Act Regulation or Ordinance which makes it evidence, shall be *prima facie* evidence, when it is rendered admissible without proof of any stamp signature character or authority, which it is directed to have, or from which it is directed to proceed

LVII The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision or that, if the rejected evidence had been received, it ought not to have varied the decision

LVIII Nothing in this Act contained shall be construed as to render inadmissible in any Court any evidence which but for the passing of the Act, would have been admissible in such Court

## APPENDIX E

### LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE

The following section appears like in Act XIX of 1853, applying to Bengal and in Act X of 1853 applying to Madras and Bombay

#### Act XIX of 1853 Section 26

26 Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document, shall be personally delivered and who shall without lawful excuse, neglect or refuse to obey such summons or who shall be proved to have absconded, or kept out of the way to avoid being served with such summons and any person who being in Court and upon being required by the Court to give evidence or produce a document in his possession, shall, without lawful excuse refuse to give evidence or sign his deposition or to produce a document in his possession shall in addition to any proceedings under this Act, be liable to the party at whose request the summons shall have been issued or at whose instance he shall be required to give evidence or produce the document for all damages which he may sustain in consequence of such neglect or refusal or of such absconding, or keeping out of the way as aforesaid, to be recovered in a Civil action

## APPENDIX I

### AMENDING ACTS

#### Act XVIII of 1872

#### OBJECTIONS AND REVISIONS

The primary object of this bill is to continue certain rules which it is believed have been inadvertently repealed by the Indian Evidence Act, 1872. At the same time opportunity is taken to correct some clerical and other accidental errors to which attention has been drawn

# PHL INDIAN EVIDENCE ACT

**XLVII** In case of persons the declarations of ill-faminate members of the family, and also of persons who, though not related by blood or marriage to the family, were intimately acquainted with its members and still, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of declared members of the family.

**XLVIII** On an enquiry whether a signature, writing, or seal is genuine or not, any undisputed signature, writing, or seal of the party whose signature, writing, or seal is under dispute may be compared with the disputed one though such signature, writing, or seal be in instrument which is not evidence in the case.

**XLIX** Any power of attorney which has been executed at a place distant from the place where it is to be executed, and the production of which is necessary for the purpose of the action, suit, or proceeding, may be proved by the production of it without further proof where it is proved to have been executed before and authenticated by a Notary Public or any Court, Judge, Consul or Magistrate.

**L** Whenever it is proved that a Letter Book is kept, and that according to the usual course of business letters are copied into such book and despatched, and the letter book is produced and it is proved that the letter was despatched according to the usual practice to the belief and belief of the witness, having reasonable ground for forming that belief, the Court may presume the despatch of that letter according to the usual course of business.

**LI** Any book proved to have been kept for making the despatch and receipt of letters containing an entry of the despatch of a letter and in the knowledge of the receipt of such letter shall on proof that such entry was made in the usual course of business, be prima facie evidence of the receipt of such letter.

**LII** So much of Section VI of Act XV of 1912 as provides that any such application as therein mentioned shall be made before a judge or in any such action or twenty-one days before the trial or hearing of any other legal proceeding as therein mentioned is hereby repealed.

**LIII** The provision contained in the 16th Section of Act VI of 1854 that the provisions of section 17 of Act V of 1854 shall be extended to all civil actions, suits and proceedings on all sides of the Courts is hereby repealed.

**LIV** So much of the 17th section of the said Act as provides that the provisions of section 17 of Act V of 1854 shall be extended to all civil actions, suits and proceedings on all sides of the Courts is hereby repealed.

**LIV** The 33rd section of Act No VI of 1854 which applies only to the proof of accounts on the Equity side of the said Supreme Courts shall extend to and embrace all accounts directed to be taken on any side of the said Courts.

**LVI** Whenever, by any Statute or Act Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, my certificate, certified copy or other document, shall be receivable in evidence of any particular in any Court of Justice the same if it is substantially in the form and purports to be executed in the manner directed by the Statute Act Regulation or Ordinance which makes it evidence shall be *prima facie* evidence, where it is rendered admissible without proof of any stamp, signature, character or authority which it is directed to have, or from which it is directed to proceed

**LVII** The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision

**LVIII** Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which but for the passing of the Act, would have been admissible in such Court

## APPENDIX E

### LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE

The following section appears alike in Act XIX of 1853, applying to Bengal and in Act V of 1853, applying to Madras and Bombay

#### Act XIX of 1853, Section 26

**26** Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document shall be personally delivered and who shall without lawful excuse neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid being served with such summons and any person who being in Court and upon being required by the Court to give evidence, or produce a document in his possession, shall, without lawful excuse, refuse to give evidence or sign his deposition, or to produce a document in his possession shall, in addition to any proceedings under this Act liable to the party at whose request the summons shall have been issued or at whose instance he shall be required to give evidence or produce the document for all damages which he may sustain in consequence of such neglect or refusal or of such absconding or keeping out of the way as aforesaid, to be recovered in a Civil action

## APPENDIX F

### AMENDING ACTS

#### Act XVIII of 1872

#### OBJECTS AND REASONS

The primary object of this Bill is to continue certain rules which it is believed have been inadvertently repealed by the Indian Evidence Act, 1872. At the same time opportunity is taken to correct some clerical and other accidental errors to which attention has been drawn



## THE INDIAN EVIDENCE ACT

Section 32 clause (1) renders admissible certain statements as to the existence of relationship. As there are many relations other than those intended by the Act the Bill makes the clause precise by adding the words 'in blood marriage or adoption'.

In sections 41 and 45, some words which should have been repeated have been accidentally omitted. The Bill applies these omissions. The same thing is done in sections 126 and 128 and slight alterations are made in s. 92 to clear up some ambiguity of language and to correct a typographical error.

Section 27 Cl. (13) declares that the Court shall take judicial notice of the rules of the road. It must have been intended to include the rules of navigation. The Bill therefore adds the words 'on land or at sea'.

Section 66 contains rules as to notice to produce documents. It only mentions notice to the party in whose possession or power a document is, to prevent a doubt which might arise in the mofussil the Bill inserts the words 'or to his attorney or pleader'.

Section 91 (exception (2)) provides that Wills under the Indian Succession Act may be proved by the probate. But other Wills are admitted to probate and the same mode of proof is made applicable to all such, as doubtless was intended.

Of sections 107 and 108 the latter was clearly intended to be a qualification of the former. The language is altered to produce this effect.

Section 126 relates to professional communications and provides that when made in furtherance of any criminal purpose they shall not be protected from disclosure. As every fraud though illegal is not criminal the Bill intends the provision by substituting the former word for the latter, thus expressing the present rule of law and establishing the same principle for the first and second provisions of this section.

Section 135 para (2) provides that the credit of a witness may be impeached by proof that he has had the offer of a bribe. The Bill for obvious reasons for 'had' substitutes 'accepted'. In India, still more than in England, the mere offer of a bribe if unaccepted, should not prejudice the character of the person to whom it is made.

Act XX of 1852 section 12 provides that Her Majesty's Courts and Justices and all officers, Commissioners, Arbitrators, etc. authorised to receive evidence with respect to proceedings in such Courts may administer oath to witnesses. The Evidence Act repeals this section and puts nothing in its place. Nor is the matter sufficiently provided for by the Oaths Act (VI of 1872) or any other enactment. The Charter of the High Supreme Courts (empower these Courts to administer oaths. But nothing is said as to commissioners to examine witnesses. The Bill accordingly gives Act XX of 1852 section 12

12th August 1872.

## REPORT OF THE SELECT COMMITTEE

The Honble Mr. Hobhouse presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act 1872. He said that in considering the Bill the committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle but only to effect such alterations as they believed the Legislature would have made if his attention had been called to them. The principal reason for passing the present Bill into law before the 1st September was this —

Act I of 1872 repealed in effect a prior Act XX of 1852 in one of the sections of that Act which follows —

XX. All Her Majesty's Courts within the British territories under the administration of the East India Company and every Judge and Justice of such Court and every officer Commissioner Arbitrator or other person now or hereafter lawfully empowered by law or by consent of Justices to hear and examine evidence with respect to or concerning any suit action or other process in any of such Courts shall be lawfully called before the more particularly

Now, that was a positive enactment in the clearest possible terms purporting to confer upon certain tribunals and officers power to administer oath. *Prima facie* if that power were removed from the Statute Book and nothing put in its place it would cease to exist. The question then was, whether the power could be derived from any other quarter. For the purpose of determining this question it had been necessary to read five Acts of Parliament and ten charters, and to read some of these documents very carefully, since they were framed on the most perplexing of all principles the principle of declaring void all previous inconsistent provisions. So that you had to read through the whole document to see what was and what was not inconsistent. The result was that the power of administering an oath would remain with the High Courts but would not remain with the Commissioners and Arbitrators therein mentioned. It was therefore important to leave upon the Statute Book as clear and extensive an authority as that which was taken out of it and the simplest way of doing that in the present emergency was by continuing the existence of this section. When the time came for dealing with the matter finally the proper place for it would be found in an Act relating to the subject of oaths and affirmations, rather than in one relating to the general subject of evidence.

"Previously to this year the incapacity to administer an oath would have vitiated many legal proceedings. But in the present year an Act (No VI of 1872) was passed, which had two objects—one was to respect and bind the conscience of witnesses, and the other to prevent the entire vitiation of legal proceedings by omissions and irregularities in the administration of oaths. The first object had nothing to do with the present question. An oath was in oath whatever might be the form of it, and the person who administered it must be duly qualified to do so. The second object was important, because it diminished the mischief which might arise from the incapacity of the Judge to administer an oath. But it did not prevent administration of an oath by such incapable person from being an irregularity. Nor was it easy to say how a Judge, upon being pressed with such irregularity, would deal with the case. Certainly, many a Commissioner and Arbitrator would say 'in as much as no objection is made by the witness, and as an oath is the regular form of proceeding and as I have by express legislation been made incapable to administer one, I decline to go on with the case.' Besides this the Act in question did not affect the penalties of perjury to the giving of false testimony under such circumstance. On this point Sections 178 and 179 of the Penal Code showed the importance attached to the legal administration of an oath by duly authorized persons. For the foregoing reasons we should be running some appreciable risk of disturbance of judicial proceedings if we did not pass this Bill into law by the first September on which day Act I of 1872 was to come into force, where is no possible injury would be done by continuing the section in question the only suggestion is, must it being that it was useless.

With regard to the other amendments, they would not be remarked upon in detail. They would all speak for themselves, and were intended to cover obvious defects and slips either of writing, or of printing, or of drafting. We had now received several criticisms on Act I of 1872 and there was little doubt that after it had been tested in actual practice it would like most laws of great magnitude and difficulty, and especially those passed on subjects new to legislation require amendment in several particulars.

20th August, 1872

### Act III of 1887

#### OBJECT AND REASONS

"The object of this Bill is to prevent officers of any department concerned with any branch of the public revenue from being compelled to disclose to any person any information as to the commission of any offence. In India had not only as it is the case that witnesses may not be compelled to disclose but they are even permitted to be asked the names of the persons from whom they receive information as to crimes on the revenue (See *Practical Crime* Vol III, p 50.)



there is one case, *Reg v Francis*, (43 L J M C 97) in which evidence was admitted on a charge of obtaining money on false pretences. In that case Lord Coleridge C J said 'It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible.' This case probably goes further than any other case, and the amendment which has been proposed of section 15 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test."

"As regards the admission of evidence of other similar acts to prove guilty knowledge, it is thought that such evidence might be admitted in cases in which an accused person is charged, under section 231 Cr Pro Code, with and tried for three offences of the same kind at one trial. That is to say it is proposed to allow the evidence brought forward to prove one of the three offences to be relevant to prove guilty knowledge or intention in the case of the other offences as the accused is charged with and is being tried for all three offences he has an opportunity of disproving the evidence brought against him. Issues are not raised which are foreign to the charge."

Briefly stated the amendments proposed to be made by the Bill are as follows—

(1) the provision allowing a previous conviction to be proved in all cases will be repealed,

(2) a previous conviction will be relevant under section 43 when it is a fact in issue, or otherwise relevant under the Act,

(3) a previous conviction will be relevant as evidence of bad character when such evidence is relevant,

(4) a previous conviction will be relevant to prove guilty knowledge or intention,

(5) the fact that an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, will be relevant to prove guilty knowledge or intention."

11th July the 1890

## REPORT OF THE SELECT COMMITTEE

"We, the undersigned Members of the Select Committee to which the Bill was referred, have considered the Bill, and have now the honour to submit this our report with the Bill as revised by us annexed hereto.

We generally approve the Bill as introduced, but we consider that the object can be attained by adding to section 14 an Explanation suggested by the High Court.

We consider it desirable to indicate more particularly the classes of persons exercising magisterial functions who are not to be held to be magistrates for the purpose of section 26.

We have added a clause to remove a difficulty which has been experienced in the construction of the words 'for the same offence' in section 30 of the same Act.

6th February, 1891

## Act V of 1899

### OBJECTS AND REASONS

"It has been held by the Calcutta High Court in the case of *Queen Empress v Fahir Mamhomed Shet*, which was decided on the 16th July, 1896 that the opinion of an expert as to the identity of finger impression is not admissible under s 45 of the Indian Evidence Act 1872. The system of identification by means of such impressions is gaining ground and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert evidence in connection with it should be admitted and with that object it is proposed expressly to amend the law on the subject."

## THE INDIAN EVIDENCE ACT

The law on the subject is further stated in Bills of Exchange and follows — It is a rule of evidence applicable to criminal cases and the same rule has always been held to apply to penal informations at the suit of the Crown that a witness is not permitted to disclose privileged communication brought to his knowledge for the furtherance of justice. This is not the privilege of the witness but may be justly called a public privilege and is observed on a principle of public policy and from regard to public interest (1 *Phil Ec* 272). Hence those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice are not permitted to be asked (*see v Hardy* 21 How St Tr 703—*per Buller J*). If the name of the informer were to be disclosed no man would make a discovery and public justice would be defeated (Id p 814—*per Buller J*). In the case of *Attorney General v Bryant* it was held that a witness for the Crown could not be asked—Did you give the information? (15 M & W 169). It cannot be ascertained from the records why the English law was not incorporated in the Indian Evidence Act. The omission has caused much inconvenience.

11th August, 1886

## REPORT OF THE SELECT COMMITTEE

We the undersigned members of the Select Committee to which the Bill to amend the Indian Evidence Act 1872 was referred have considered the Bill and have the honour to submit this our Report.

We have so altered the section which it was proposed to substitute for section 125 as to limit its operation to the purpose stated in the preamble and following the plan of the Act we have made the definition of Revenue officer an explanation to the section instead of a subsection thereof.

4th January 1887

## Act III of 1891

## OBJECTS AND REASONS

The principal object of this Bill is to amend section 51 of the Indian Evidence Act, 1872 so as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged. The fact that a person has been previously convicted of an offence has of itself little prohibitive force to establish the fact that he has committed another offence, and it is not expedient to admit evidence which can only prejudice the accused. It is proposed to repeal so much of section 51 as provides that in criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant. The result of this amendment of the law will be that the rule as to the relevancy of a previous conviction will be contained in section 4 of the Act. The existence of the judgment convicting the accused will be relevant only if the fact of the conviction is a fact in issue or is relevant under some provision of the Act.

It seems necessary also to amend the Act so as to show, first that in criminal cases where evidence of character is relevant a previous conviction is relevant to prove bad character and secondly that a previous conviction may be relevant to prove a relevant state of mind, for instance guilty intention or knowledge. It is proposed to effect the first of these amendments by adding an Explanation to section 51. The second it is proposed to effect by amending the Explanation to section 14 so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention.

In English law for the purpose of proving guilty knowledge evidence of other acts of a nature similar to that charged may be given in cases of uttering false coin or disposing of forged bank notes (1 Russ 1, 233). On the whole evidence of this nature has been confined to cases of coming and forging, but

there is one case, *Reg v Francis*, (43 L J M C 97) in which evidence was admitted on a charge of obtaining money on false pretences. In that case Lord Coleridge C J said 'It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible.' This case probably goes further than any other case, and the amendment which has been proposed of section 15 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test."

"As regards the admission of evidence of other similar acts to prove guilty knowledge, it is thought that such evidence might be admitted in cases in which an accused person is charged, under section 234 Cr Pro Code, with and tried for three offences of the same kind at one trial. That is to say, it is proposed to allow the evidence brought forward to prove one of the three offences to be relevant to prove guilty knowledge or intention in the case of the other offences, as the accused is charged with and is being tried for all three offences he has an opportunity of disproving the evidence brought against him. Issues are not raised which are foreign to the charge."

"Briefly stated the amendments proposed to be made by the Bill are as follows—

(1) the provision allowing a previous conviction to be proved in all cases will be repealed,

(2) a previous conviction will be relevant under section 43 when it is a fact in issue, or otherwise relevant under the Act,

(3) a previous conviction will be relevant as evidence of bad character when such evidence is relevant,

(4) a previous conviction will be relevant to prove guilty knowledge or intention,

(5) the fact that an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, will be relevant to prove guilty knowledge or intention."

4th July the 1890

## REPORT OF THE SELECT COMMITTEE

"We, the undersigned Members of the Select Committee to which the Bill was referred, have considered the Bill, and have now the honour to submit this our report with the Bill as revised by us annexed hereto.

We generally approve the Bill as introduced, but we consider that the object can be attained by adding to section 14 an Explanation suggested by the High Court.

We consider it desirable to indicate more particularly the classes of persons exercising magisterial functions who are not to be held to be magistrates for the purpose of section 26.

We have added a clause to remove a difficulty which has been experienced in the construction of the words 'for the same offence' in section 30 of the same Act."

6th February, 1891

## Act V of 1899

### OBJECTS AND REASONS

"It has been held by the Calcutta High Court in the case of *Queen Empress v Fakir Mamhomed Shet*, which was decided on the 16th July, 1896 that the opinion of an expert as to the identity of finger impression is not admissible under s 45 of the Indian Evidence Act 1872. The system of identification by means of such impressions is gaining ground, and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert evidence in connection with it should be admitted and with that object it is proposed expressly to amend the law on the subject."

App. G.

## THE INDIAN EVIDENCE ACT

The opportunity has been taken to suggest the amendment of two other sections. Section 37 fails to render relevant statements as to the facts of a public nature made in the Acts of certain legislatures. Cl 2 will remove what is now an obvious lacuna. The remaining amendment is of a purely formal character.

5th October, 1898

## REPORT OF THE SELECT COMMITTEE

"We, the undersigned Members of the Select Committee to which the Bill to further amend the Indian Evidence Act 1872 was referred, have considered the Bill and have now the honour to submit this our Report with the Bill as amended by us annexed hereto.

We have added a sub-section making a consequential amendment in section 73 of the Act."

1st February 1899

## APPENDIX G

THE BANKERS' BOOKS, EVIDENCE ACT  
Act XVIII of 1891

*Received the assent of the Governor General on the 1st October 1891*

An Act further to amend the Law of Evidence with respect to Bankers' Books.

Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books, It is hereby enacted as follows,—

Title extent and commencement

- 1 (1) This Act may be called the Bankers' Books Evidence Act, 1891
- (2) It extends to be whole of British India
- (3) [*Repealed by Act X of 1914, Schedule II*]

Notes This Act is primarily intended for the convenience of bankers and to facilitate proof of their transactions.—*R v Bono* 29 L R 635, *Arnott v Hayes* 36 Ch D 731, *Kissan v Lml* (1896) 1 Q B 574 *Pollock v Earle*, (1898) 1 Ch 1

2 In this Act, unless there is something repugnant in the subject or context,—

(1) "Company" means a company registered under any of the enactments relating to companies for the time being in force in the United Kingdom or in any of the Colonies or Dependencies thereof or in British India or incorporated by an Act of Parliament or of the Governor General in Council, or by Royal Charter or Letters Patent

(2) "bank" and "banker" mean—

(a) any company carrying on the business of bankers

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided

(c) any post office savings bank or money order office,

(3) "bankers' books" include ledgers, day books, cash-books, account books, and all other books used in the ordinary business of a bank,

(4) "legal proceeding" means any proceeding or inquiry in which evidence is, or may be given and includes an arbitration

(5) "The Court" means the person or persons before whom legal proceeding is held or taken,

(6) "Judge" means a Judge of a High Court

(7) "trial" means any hearing before the Court at which evidence is taken, and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the book with his name and official title

**Origin** This Act is based on the English Bankers Books Evidence Act, 1879 (42 & 43 Vict C 11)

**Company** Copies of entries in the books of a Bank which does not come within the definition of a "Company" as given in sub section (1) though certified in accordance with the form prescribed by that Act are not admissible in evidence under the provisions of this Act *Empress v Patel*, 4 C W N 433 (F B)

**Bank** According to s 9 of the English Act, bank and 'banker' mean any person, persons partnership or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to Savings Banks, and also any post office Savings Banks. The word bank connotes the business of utilising money received for purposes of profit. The mere fact that a Government Treasury receives money from a District Board and respects orders issued to it for payment does not constitute the Treasury a Bank. *Rangaswami v Sankaralingam*, 43 M 816=39 M L J 327=58 Ind Cas 893, *Folsen v Hill*, 2 H L C 28, (43) per Lord Brougham

**Banker** In *Halifax Union v Wheelwright* 10 Ex 183=44 L J Ex 121, *Brown Cleasby* said "First it is said that taking that statute together with several other statutes on the same subject the word banker was not to be restricted to persons regularly engaged in the business of banking but that any person who receives the money of another into his charge and according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within the meaning of that enactment. We cannot accede to that argument. 'A banker is one who, in the ordinary course of his business, honours cheques drawn upon him by persons from and for whom he receives money' *Hart's Law of Banking*



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3 The Local Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers with the territories under its administration, and keeping a set of not less than three ordinary account-books, namely, a cash book, a day book, a journal, and a ledger, and may in like manner rescind any such notification.

4 Subject to the provisions of this Act, the provisions of the Mode of proof of entries in the books of any partnership or individual carrying on the business of bankers with the territories under its administration, and keeping a set of not less than three ordinary account-books, namely, a cash book, a day book, a journal, and a ledger, and may in like manner rescind any such notification.

4 Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

**Origin** This section is based on Section 3 of the English Bankers' Books Evidence Act, 1879, which runs as follows: "Subject to the provisions of this Act, a copy of any entry in a bankers book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded."

Principle "Then if they are not removable on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule." *Per Alderson B in Mortimer v. McCallan*, 6 M & W 58 67.

Per Alderson B in *Vortimer* & McCullan,

Scope and object of the section  
of bankers to avoid the serious  
to produce

Scope and object of the section  
 relief of bankers to avoid the serious inconvenience occasioned to them by their  
 having to produce books which were in constant use in their business' *Parnell*  
 Wood, (1892) P 137 'Banks are subject to the performance of duties to  
 the public which might be seriously interfered with if they were compelled  
 to carry the books needed in their business into every Court or tribunal where  
 testimony is to be introduced concerning them Books belonging to public  
 offices cannot be removed from their legal custody without some strong necessity  
 for their production While bank books are not public to the same extent yet  
 the business which the corporations are required to transact cannot be done  
 unless the books are usually preserved where they belong' *Per Campbell C J*  
*in People v Hurst*, 41 Mich 323 (Am) This Act makes copies of such entries  
 in evidence against any one thus the entries in a defendant's bankers books are  
 in evidence against the plaintiff *Harding*  
*in London & W Bank v Bullen* 51  
 books kept by the bank although the entries  
 successors of a bank 773 The  
*Handyside* (1906) [Arnott] 62 L J  
 evidence to be procured by bankers  
*Immut v Star Ac* (1913) 29 T L R 63  
 and produce their  
*New page*  
 party of  
 bankers  
 obtain a  
 Ch D 16  
 The Act was passed mainly for the  
 use of the books being removed  
 in *Vortimer v McCallan*  
 The Act applies to all  
 use and applies to the  
*Asylum for Idiots*  
 of this Act is to enable  
 36 Ch D at 737  
 v Bono and others  
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5 No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded unless by order of the Court or a Judge made for a special cause.

**Scope** This section corresponds to section 6 of the English Bankers' Books Evidence Act, 1879 (42 & 43 Vict 11). By this section a banker is not compellable to produce any bankers book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded unless by order of the Court or a Judge made for a special cause. See also *Emmott v Star News paper Co* 62 L J B, 77.

6 (1) On the application of any party to a legal proceeding, the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may, at any time before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial, or give notice of their intention to show cause against such orders and thereupon the same shall not be enforced without further order.

**Scope** This section corresponds to section 7 of the English Act. A magistrate before whom criminal proceedings are pending is a Court within the meaning of the Act and can therefore make an order under this section. *R. Kiplinghorn*, (1903) 2 K B 949 under the English Act any Judge in any division of the United Kingdom has jurisdiction in any other. *Kissam v Lint*, (1896) 1 Q B 574 = 65 L J Q B 433 C A. Such an order can be made *ex parte*, but the Judge ought to be careful about so doing. *Arnott v Hayes*, 36 Ch D 731 C A, *L. Anne v Wilson*, (1907) 2 Ir 103, *Emmott v Star News paper Co*, 62 L J Q B 77, *South Staffordshire v Ebbs Smith*, (1895) 2 Q B 674, per Lord Esher. But as a rule it should be made by a summons or a notice under the summons for direction. *Arnott v Hayes* 36 Ch D 731. *Davies v White* 53 L J Q B 275. The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted. *Yearly Practice*, (1921) 458. No evidence is absolutely necessary, but the Judge must be satisfied that the entries in question are admissible in evidence in the action, and for this purpose evidence may be

## HIL INDIAN EVIDENCE ACT

3 The Local Government may, from time to time, by notification to extend the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers with the territories under its administration, and keeping a set of not less than three ordinary account-books, namely, a cash book, a day book, a journal, and a ledger, and may in like manner rescind any such notification.

4 Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of the matter, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

Origin This section is based on Section 3 of the English Bankers Books Evidence Act 1879 which runs as follows "Subject to the provisions of this Act a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded."

Principle "Then if they are not removable on the ground of public inconvenience that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule." *Per Alderson B in Mortimer v McCullan*, 6 M & W 58 67.

Scope and object of the section "The Act was passed mainly for the relief of bankers to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business." *Parnell v Wood*, (1892) P 137. "Bankers are subject to the performance of duties to the public which might be seriously interfered with if they were compelled to carry the books needed in their business into every Court or tribunal where testimony is to be introduced concerning them. Books belonging to public offices cannot be removed from their legal custody without some strong necessity for their production. While bank books are not public to the same extent yet the business which the corporations are required to transact cannot be done unless the books are usually preserved where they belong." *Per Campbell C J in People v Hunt*, 41 Mich 328 (Am). This Act makes copies of such entries evidence against any one thus the entries in a defendant's bankers books are made evidence against the plaintiff. *Harding v Williams* 14 Ch D 197, see also *London & W Bank v Bulton* 51 Sol Jo 466. The Act applies to all books kept by the bank even although not in daily use and applies to the successors of a bank by whom the entries were made. *Asylum for Idiots v Handysides*, (1906) 22 T L R 573. The main object of this Act is to enable evidence to be procured and given. *Emmott v Hayes* (1887) 36 Ch D at 737. *Emmott v Star News paper Co* 62 L J Q B 77 R v Bono and another (1913) 29 T L R 635 and to relieve bankers from the necessity of attending and producing their books. *Parnell v Earle* (1893) 1 Ch 1 at p 4. *Emmott v Star newspaper Co supra*, *Pollock v Earle* (1893) 1 Ch 1 at p 4. It enables a party who formerly had the right to issue a subpoena duces tecum to compel bankers to produce their books and to attend and to be examined on them to obtain an order for leave to inspect and take copies of them. *R Marshallfield*, 32 Ch D 499.

5 No officer of a bank shall in any legal proceeding

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to which the bank is not a party be com-  
pellable to produce any bankers book,  
the contents of which can be proved under  
this Act, or to appear as a witness to

prove the matters, transactions, and accounts therein record-  
ed unless by order of the Court or a Judge made for a special  
cause

Scope This section corresponds to section 6 of the English Bankers'  
Book Evidence Act, 1879 (12 & 13 Vict 11) By this section a banker is  
excluded from personal attendance in Court See also *Emmott v Star News  
paper Co* 62 L J B, 77

6 (1) On the application of any party to a legal pro-

I inspection of books  
by order of Court or  
Judge

ceeding, the Court or a Judge may order  
that such party be at liberty to inspect  
and take copies of any entries in a

banker's book for any of the purposes of such proceeding, or  
may order the bank to prepare and produce, within a time  
to be specified in the order, certified copies of all such entries,  
accompanied by a further certificate that no other entries are  
to be found in the books of the bank relevant to the matters  
in issue in such proceeding and such further certificate shall  
be dated and subscribed in manner hereinbefore directed in  
reference to certified copies

(2) An order under this or the preceding section may be  
made either with or without summoning the bank, and shall  
be served on the bank three clear days (exclusive of bank  
holidays) before the same is to be obeyed, unless the Court or  
Judge shall otherwise direct

(3) The bank may, at any time before the time limited  
for obedience to any such order as aforesaid, either offer  
to produce their books at the trial, or give notice of their  
intention to show cause against such orders and thereupon  
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magistrate before whom criminal proceedings are pending is a Court within the  
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Kingshorn* (1908) 2 K B 949 under the English Act any Judge in any division  
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but the Judge ought to be careful about so doing *Innot v Hayes*, 36 Ch D 731  
C A *L'Amie v Wilson*, (1907) 2 Ir 103 *Emmott v Star News paper Co*, 62  
L J Q B 77, *South Stafford Shire v Ebbs Smith*, (1895) 2 Q B 674, per Lord  
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summons for direction *Arnott v Hayes* 36 Ch D 731, *Davies v White*, 53 L  
J Q B 275 The party whose account is sought to be inspected may oppose  
the application on any ground on which inspection of ordinary documents  
could be resisted *Yearly Practice*, (1921) 453 No evidence is absolutely  
necessary but the Judge must be satisfied that the entries in question are ad-  
missible in evidence in the action, and for this purpose evidence may be

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required *Arnott v Hayes*, 36 Ch D, 731, *Poull* 375. This section does not give any new power of discovery (*Arnott v Hayes* 36 Ch D 737 *R v Bono and Another*, 29 T L R 635), or alter the principles of law or the practice with regard to discovery (*Pollock v Earle*, 1895 1 Ch 4) or take away any previously existing ground of privilege (*South Staffordshire Tramways Co v Ebbs Smith* (1895) 2 Q B 669 C A, *Parnell v Wood*, (1892) P 139). An order under this section should be made on sufficient ground only. *Perry v Phosphor Works Co*, (1894) 71 L T 1 854. Where a defendant applied for inspection to assist him to justify a libel imputing pecuniary embarrassment, inspection was refused. *Emmet v Star Newspaper Co* 62 L J Q B 77. Similarly in *Pollock v Earle* (1898) 1 Ch 1, the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, *e.g.* as to the bank balance of a company, in an action against one of its directors for inducing a purchase of its shares by alleged misrepresentation as to such balance. *Philp Et* 332. In the above case *Landley M R* said "The Court should take care that this section is not made a means of oppression. The order should only be made where the entries of which inspection is sought will be admissible in evidence at the trial. *Howard v Beall* 23 Q B D at p 2.

It seems that the Court has jurisdiction to order inspection of the accounts of third parties. *Howard v Beall* 23 Q B D 1. *South Staffordshire v Ebbs Smith* (1895) 2 Q B 669. *M Gorman v Kierans* 35 Ir L T R 84. *Iga Baul v Kashi Ram P L R* 1900 p 237. But this power should not be exercised ordinarily. *Pollock v Earle*, (1898) 1 Ch 1. But when order for inspecting the accounts of third parties is sought, a notice should be given to him. *South Staffordshire v Ebbs Smith* (1895) 2 Q B 669.

This section applies to all books kept by the bank, even when they are not in daily use and applies to the successors of the bank by whom the entries were made. *Asylum for Idiots v Handysides* (1906) 22 T L R 573. But it is doubtful whether the Loan Register in a Banker's Books come within the meaning of the Bankers Books Evidence Act. *Chandi Charan v Dostab* 31 C 284=8 C W N 125. The fact that the plaintiff has scheduled his pass book in his affidavit of documents does not necessarily deprive the defendant from getting an order to inspect the banker's book and in a fit case an order will be made. *Perry v Phosphor Co* (1894) 71 L T 854. *Early Practice* (1921) 459. The qualifications of the contractual duty of secrecy implied in the relation of banker and customer are: (a) Where disclosure is under compulsion by law (b) where there is a duty to the public to disclose, (c) where the interest of the bank required disclosure, and (d) where the disclosure is made by the express or implied consent of the customer. *Tournier v National Provincial Bank's* (1924) 1 K B 461=93 J 1 K B 449. Where a party desires an order under section 6 of the Bankers Books Evidence Act 1891, on his own behalf the Court ought to grant it *ex parte* but where he applies against the other party the Court ought not to make the order without notice to the other party. *Trueman v Lalhurchand*, 5 Bom L R 565.

7 (1) The costs of any application to the Court or a Judge, under or for the purposes of this Act, and the costs of anything done or under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself App

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs

## APPENDIX H

### THE INDIAN OATHS ACT

#### ACT X OF 1873

*Received the assent of the Governor General on the 8th April, 1873*

An Act to consolidate the law relating to Judicial oaths, and for other purposes

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations, It is hereby enacted as follows —

#### I PRELIMINARY

Short title                      1 This Act may be called "The Indian Oaths Act, 1873"

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States

Local extent

in alliance with Her Majesty,

[Commencement]—*Repealed by the Repealing Act, 1873 (XII of 1873)*

History "The employment of oaths" says Prof Wigmore "takes our history back to the origins of Germanic law and custom, where, as in all primitive civilizations, the appeal to the supernatural plays an important part in the administration of justice. But the use of oaths for witnesses appears as only a single and subordinate phase of the general resort to oaths. The early Germanic modes of trials consisted largely in a reference, in one form or another, to the *Judicium Dei*. By oaths formally taken one might even establish his claim or his plea beyond attack. It was not a matter of weighing the credibility of a sworn statement, the thought was rather that such an appeal could not be falsely made with impunity. To such an invocation a judicial and determinative effect was attributed by the religious notions of the time. The progress from this notions of the oath at large (which left its traces as late as the 1800's in some of the common modes of procedure) to the second stage of a test or security for credibility was slow and gradual. In the 1700's came the beginning of a third stage of development, in which legislature sanctioned what the community had

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required *Arnott v Hayes*, 36 Ch D, 731, *Pouell* 375. This section does not give any new power of discovery (*Arnott v Hayes* 36 Ch D 737 R v *Dono and Another*, 29 T L R 635) or alter the principles of law or the practice with regard to discovery of privilege (*South Staffordshire Tramways Co v Ebb Smith* (1895) 2 Q B 669 C A *Pennell v Wood*, (1892) P 139). An order under this existing ground of privilege should be made on sufficient ground only. *Perry v Phosphor Works Co*, (1894) 71 L T 874. Where a defendant applied for inspection to assist him to justify a libel imputing pecuniary embarrassment, inspection was refused (*Emmot v Stai Neu-yape Co* 62 L J Q B 77). Similarly in *Pollock v Earle*, (1898) 1 Ch 1, the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, *e.g.*, as to the purchase of a company, in an action against one of its directors for inducing him to buy shares in the above case *Landley M R* said "The Court should take care that this section is not made a means of oppression. The order should only be made where the entries of which inspection is sought will be admissible in evidence at the trial." *Howard v Beall*, 23 Q B D at p 2.

It seems that the Court has jurisdiction to order inspection of the accounts of third parties. *Howard v Beall* 23 Q B D 1, *South Staffordshire v Ebb Smith* (1895) 2 Q B 669. *Gorman v Kierans* 35 Ir L J R 84, *Lyra Baul v Asalu Ram P* L R 1900 p 237. But this power should not be exercised ordinarily. *Pollock v Earle*, (1898) 1 Ch 1. But when order for inspecting the accounts of third parties is sought, a notice should be given to him. *South Staffordshire v Ebb Smith* (1895) 2 Q B 669.

This section applies to all books kept by the bank even when they are not in daily use and applies to the successors of the bank by whom the entries were made. *Asylum for Idiots v Handpicks* (1906) 22 T L R 573. But it is doubtful whether the Loan Register in a Banker's Books come within the meaning of the Bankers' Books Evidence Act. *Chandi Charan v Baisab* 1 C 281 = b C W N 125. The fact that the plaintiff has scheduled his pass book in his affidavit of documents does not necessarily deprive the defendant from getting an order to inspect the banker's book and in a fit case an order will be made. *Perry v Phosphor Co* (1894) 71 L T 874. *Early Practice* (1921) 459. The qualifications of the contractual duty of secrecy implied in the relation of banker and customer are: (i) Where disclosure is under compulsion by law, (b) where there is a duty to the public to disclose, (c) where the interest of the bank required disclosure and (d) where the disclosure is made by the express or implied consent of the customer. *Tournier v National Provincial Bank's* (1924) 1 K B 461 = 93 L J K B 449. Where a party desires an order under section 6 of the Bankers' Books Evidence Act 1891 on his own behalf the Court ought to grant it *ex parte* but where he applies against the other party the Court ought not to make the order without notice to the other party. *Tremblay v Lalumière* 5 Bom L R 865.

7 (1) The costs of any application to the Court or Judge, under or for the purposes of this Act, and the costs of anything done or under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank, if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

Magistrate has right to administer oath to a witness *Emperon v Lal*  
 12 Cr L J 577=12 Ind Cas 841=4 Bur L T 130 By s 4 of the  
 Oaths Act 1873, all persons having by law authority to receive evidence  
 1 to administer oaths and affirmations in discharge of the duties,  
 of the powers imposed or conferred on them by law *King*  
*v Palani*, 2 L B R 272 A Sub magistrate acting under ch XIV  
 of Procedure Code is a Court acting in the discharge of a duty  
 on him by law and is therefore authorized to administer oath under  
*Telon v Emperon*, 29 M 89=3 Cr L J 370 Witnesses exa  
 a Commissioner appointed under Act XXXVII of 1850 to hold  
 into the behaviour of a certain Judicial officer, are bound to state  
 1 render themselves liable to be punished under s 193 I P C  
 falsely *Gobind Ram v Empress*, 18 P R 1898 The proce  
 arbitrator is not governed by the Oaths Act *Bhaqirath v Ram*  
 223=A W N 1982, 34 A Magistrate is not competent to  
 in the course of a non judicial inquiry *Allahcarayo v Crown*,  
 S=35 Ind Cas 672

### SECTION 5. BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

5 Oaths or affirmations shall be made  
 by— by the following persons —

witnesses, that is to say, all persons who may law-  
 fully be examined, or give, or be required  
 to give, evidence by or before any Court  
 acting by law or consent of parties authority to  
 receive evidence,

(b) interpreters of questions put to,  
 and evidence given by, witnesses,

(c) jurors

who are so sworn shall render it lawful to ad-  
 - proceeding, an oath or affirmation to  
 necessary to administer to the official inter-  
 , after he has entered on the execution of  
 duty, an oath or affirmation that he will  
 discharge those duties

"An oath is a religious sanction that mankind have  
 agreed that when the witness is of a religion it  
 is of all religion is the belief of a God' *Per Lee*  
 , 1 Atk. 455 In the same case *Wills L C J*  
 in a God, and that He will regard and punish us  
 for failing to qualify a man to take an oath *Hadwick*  
 for failing to an oath is an appeal to the Supreme  
 power of truth and the avenger of falsehood. In  
*Martin B* said "The doctrine laid down (in  
 essence of an oath was an appeal to the  
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 present relates to present life or to future exist-  
*McLaughlin*, L R 14 Q B D 697, *Brett M R*  
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 man for perjury it is enough' In *Shaw v. Moore*, 1 Jones



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come fully to believe namely that the material requirement of an oath marked injustice, and that theological belief should not obstruct the admission of competent witnesses. In this view the tendency has been either to make the application of the oath optional with the witness, or to abandon its essential feature by rendering theological belief unnecessary." *Ilignore* § 1815

**Theory of oath** The theory of the oath, in modern common law, may be termed a subjective one, in contrast to the earlier one, which may be termed objective. The oath is not summoning of Divine vengeance upon false swearing whereby when the spectators see the witness standing unharmed they know that the Divine Judgment has pronounced him to be a truth teller. But it is a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to pervert the truth as he saw it. *Ilignore* § 1816

**Applicability** The provisions of the Indian Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. Statement on special oath is evidence but if what is deposed to is not admissible in evidence under the Evidence Act, the fact of a special oath will not make it admissible. *Shel h Jamu v Muhammad*, 90 Ind Cas 378=A I R 1926 Nag 194

2 [Repeal of Enactments] *Repealed by Act XII of 1873*

3 Nothing herein contained applies to proceedings before Courts Martial or to oaths, affirmations or declarations prescribed "by or under any Instructions under the Royal Sign Manual of His Majesty or" by any law which, under the provisions of the India Councils Act, 1861, the Governor General in Council has no power to repeal

## II AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

4 The following Courts and persons are authorized to administer, by themselves, or by an officer empowered by them, in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law —

- (a) all Courts and persons having by law or consent of parties authority to receive evidence,
- (b) the commanding officer of any military station occupied by troops in the service of Her Majesty

Provided

- (1) that the oath or affirmation be administered within the limits of the station, and
- (2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India

**Scope** A Magistrate holding an enquiry as to the fitness of a surety has power to record evidence on oath in the exercise of the power and duty conferred upon him. *Emperor v Ghulam*, 26 A 371=A W N 1901 52 There is no provision of law which requires a Court examining a witness to record the fact that an oath was administered. *Syed Ahmad v King Emperor*, 11 A I R 933=35 A 575 Under the rules framed under the Steam Vessels

\* Inserted by s 2 of Act VI of 1919

Act, a Magistrate has right to administer oath to a witness. *Emperor v Lal Meah*, 12 Cr L J 577=12 Ind Cas 841=1 Bur L J 130 By s 1 of the Indian Oaths Act 1873 all persons having by law authority to receive evidence are authorised to administer oaths and affirmations in discharge of the duties, or in exercise of the power imposed or conferred on them by law. *King Emperor v Palani* 2 I B R 272 A Sub magistrate acting under ch XIV of the Criminal Procedure Code is a Court acting in the discharge of a duty imposed on him by law and is therefore authorized to administer oath under this section. *Teron v Emperor*, 29 M 89=3 Cr I J 370 Witnesses examined before a Commissioner appointed under Act XXXVII of 1850 to hold an enquiry into the behaviour of a certain Judicial officer, are bound to state the truth and render themselves liable to be punished under s 193 I P C if they testify falsely. *Gobind Ram v Empress*, 18 P R 1898 Cr The procedure of the arbitrator is not governed by the Oaths Act. *Bhaqirath v Ram Ghulam*, 4 A 283=1 W N 1882, 34 A Magistrate is not competent to administer oath in the course of a non judicial inquiry. *Illaharaya v Crown*, 17 Cr L J 368=35 Ind Cas 672

### III PERSON BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by— 5 Oaths or affirmations shall be made by the following persons —

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence,

(b) interpreters of questions put to, and evidence given by, witnesses,

(c) jurors

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties

Nature of the Belief "An oath is a religious sanction that mankind have universally established. I agree that when the witness is of a religion it is sufficient for the foundation of all religion is the belief of a God' *Per Lee L C J in Omchand v Barker*, 1 Atk. 455 In the same case *Wills L C J* said "Nothing but the belief in a God, and that He will regard and punish us according to our deserts is necessary to qualify a man to take an oath" *Hadurch L C* added "All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood. In *Müller v Salomons*, 7 Exch 535 *Martin B* said "The doctrine laid down (in *Omchand v Barker*) was that the essence of an oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood. It is immaterial whether the punishment relates to present life or to future existence. In *Attorney General v Bradlaugh*, L R 14 Q. B D 697, *Brett M R* said "There is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong that is enough" In *Shaw v, Moore* 4 Jones

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Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties

**Nature of the Belief** "An oath is a religious sanction that mankind have universally established. I agree that when the witness is of a religion it is sufficient for the foundation of all religion is the belief of a God." *Per Lee L C J* in *Omichand v Barker*, 1 Atk 455 In the same case *Wills L C J* said "Nothing but the belief in a God, and that He will regard and punish us according to our deserts is necessary to qualify a man to take an oath." *Hadwici L C* added "All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood. In *Muller v Salomons*, 7 Exch 535 *Martin B* said "The doctrine laid down (in *Omichand v Barker*) was that the essence of an oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood." It is immaterial whether the punishment relates to present life or to future existence. In *Attorney General v Bradlaugh*, L R 14 Q B D 697, *Brett M R* said "There is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong that is enough." In *Shaw v, Moore*, 4 Jones

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**P. H. L. 26, Pearson J said** 'There is no ground for making a distinction between the fear of punishment by the Supreme Being in this world and the fear of punishment in the world to come. Both are founded upon the sense of religion. The efficacy of the fear of the punishment in either case depends upon the degree of belief as to the certainty of that punishment so that there can be upon reason no ground for making a distinction. The rule of law which requires a religious sanction is satisfied in either case.' *Wignore § 1817* The purpose of the Oath is not to call the attention of God to the witness but the attention of the witness to God. All that is necessary to an oath is an appeal to the Supreme Being as thinking him the rewarder of truth and the avenger of falsehood. *Indar v Jog Mohan, 1924 Oudh 442*

**Persons subjected to the oath** This section lays down that oaths or affirmations shall be made by the three following classes of persons namely (1) witnesses (2) interpreters, and (3) jurors. So oath or affirmation is requisite in all testimonial statements made in Court. An interpreter is a kind of witness and must be sworn. *Wignore § 1824, R v Douglas, 13 Q B D 42 59, 61 72* A juror should also be sworn. *Queen v Ramsdoddy 20 W R Cl 19*

**Accused person** 'Originally an accused person was allowed to produce no witnesses, later he might produce them but they testified without oath and finally they were allowed to be sworn.' *Wignore § 1824* This section as well as section 342 (4) of the Cr Pro Code lays down that no oath shall be administered to the accused. The provision in sub section (4) that no oath can be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section. It has no reference to any other act of the accused, and therefore the accused can make an affidavit on oath in support of an application for transfer of the case under section 526. *Ghulam v Emperor 3 Lah 46=23 Cr L J 399* see also *Reg v Hammantha 1B 610 Emperor 3 E, 45 C 720 Q L v Dalgua 10 Emperor 22 C W N 740 Alshay v K E, 20 Cr L J 342* *B 190 Alladad v King Emperor, 9 P R 1906 Q L v Banu v Emperor 33 C 1353, Emperor v Durant 23 B 213 Joseph v Emperor, 3 Bur L J 265, K L v O E v Tribuni, 20 A 426 Emperor v Gorind, 18 Bom L R Annya 3 Bom L R 437 The term 'accused' means a person under trial *Hinanda v Emperor 2 C L J 149*, see also *Emperor v Gorind, 18 Bom L R 266 Krishna Doyal v Corporation of Calcutta 31 C W N 506=28 Cr L J 407* A magistrate has no power to administer an oath or affirmation to a person whose statements he records under s 164 Cr Pro Code. *Lalu v Empress 2 P R 1893 Or* see also 10 C P L R Cr 16*

**Scope of the section** The direction in s 164 Cr Pro Code, that the statement shall be recorded in one of the manners prescribed for recording evidence is merely a direction as to procedure. The statement itself is one which the law permits to be made before the Court by a witness and is therefore evidence within the definition of s 3 of the Evidence Act. The person making it is a witness within s 5 of the Oaths Act. *Queen Empress v Alagu 16 M 421=1 Weir 175* Although a Magistrate might examine a person for the sake of obtaining information upon which a case might be stated against some person not before the Court he cannot examine him on oath as such person is not a witness. *Hari Charan v Queen Empress 27 C 455=4 C W N 249* Whether a child understands the nature of oath or not, he should when examined as a witness be examined on oath or affirmation. *Queen Empress v Sheoratan S C Oudh 242, Empress v Saubha 11 C P L R 16 Cr* Having regard to the language of the Oaths Act, neither a Judge nor a Magistrate has any option when once he has elected to take the statements of a person as evidence but to administer either an oath or an affirmation to such a person as the case may be. *Queen Empress v Lal Sahai 11 A 183=1 W N 1839 65 Queen Empress v Maru 10A 297* But in *Golca Chema v Emperor 15 Cr L J 161=22 Ind Cas 737*, it has been held that although section 5 of the Oaths Act is imperative still section 13 of the Act governs the cases of this sort. The effect of the omission to administer an oath to the interpreter under section 7 (b) of the Oaths Act is to render it necessary for the prosecution to

prove that the interpretation was made accurately *Rahhal v King Emperor*, App 9 C L J 690=13 C W N 942

An enquiry on an application under s 100 Cr Pro Code, 1898 to issue a search warrant is judicial inquiry and proceedings preliminary to the issue of search warrant under s 100 are judicial proceedings. In the course of such judicial proceedings, the Magistrate would be empowered to examine persons on oath and such persons would be bound to take oath under s 5 of the Oaths Act and under s 14 of that Act would be bound to state the truth *Abdul Aziz v Crown* 34 P R 1916 Cr =17 Cr L J 491=36 Ind Cas 171

## 6 Where the witness, interpreter or juror is a Hindu or Muhammadan,

Affirmation by Native or by person objecting to oaths or has objection to making an oath, he shall, instead of making an oath, make an affirmation

In every other case, the witness, interpreter, or juror shall make an oath

Hindu and Mahomedan law on the subject. If we turn to India even prior to the introduction of English rule, we find that the Laws of Menu had their oath too, and in point of form, that prescribed by Menu is not very different from the English one. — The imprecatory part too of the oath of Menu if not framed exactly in conformity with the varying Code of the religious belief of the swearer was nevertheless in a form adopted to the peculiarities of the influences by which each individual might be presumed to be most affected. 'Let the Judge curse Priest to swear by his veracity, a Soldier by his horse or elephant and his weapons, a Merchant by his line, grain, and gold a Mechanic or servile man imprecating on his own head if he speak falsely all possible crimes. The meaning is he shall adjure a Brahmin by saying, if you speak falsely your truth will be destroyed a Cashetie by saying your horse or elephant and weapon become useless, a Vaisya 'your cattle seeds and gold will be unproductive. A Sudra he shall adjure by saying, 'if you speak falsely all sins will be on your head' (*Macnaghten's Hindu Law* Vol I 248). A course of imprecation though, by the way which seems to address itself rather to the punishment of a pre-ent life than a future one. This however appears not to have been the only cause of swearing. According to *Mr Beaufort*, the form of swearing by the water of the Ganges, and by copper and *toolsy* is virtually sanctioned by many *shastras*, but other prescribed forms are of equal validity, and all oaths made by laying the hand on any symbol or image of the Deity have the same obligation. The old Mahomedan Law indeed as administered in India did not require the oath to give validity to the evidence, even in judicial cases, but it contained no prohibition against it." *Goodere El* pp 76 77. The Hindus and Mahomedans were allowed to give their evidence on solemn affirmation by Act V of 1840. Witnesses who are Hindus or Mahomedans, are exempt from taking oath. *Bhai Khan v Emperor*, 20 P R 1902 Cr =47 P L R 1902. The offence of giving false evidence may be committed, although the person giving evidence has been neither sworn nor affirmed. *Gobind v Q F*, 19 C 355

## IV FORM OF OATHS AND AFFIRMATIONS

### 7 All oaths and affirmations made under section 3

Forms of oaths and affirmations shall be administered according to such forms as the High Court may from time to time prescribe

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation—Repeated by the Lower Burma Courts  
Act (VI of 1900) s 48 Schedule II

The form of oath varies in countries according to different laws and constitutions but the substance is the same in all. It would be absurd for him (i.e. Omichund who was a Hindu) to swear according to the Christian oath which he does not believe, and therefore, out of necessity, he must be allowed to swear according to his own notion of the oath. It is laid down by all L C said "The next thing is the form of the oath. It has been the writers that the outward act is not essential to the oath. It is the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking." So where there was no prescribed form of oath, Lord Mansfield said "But as the purpose of it (oath) is to bind his conscience every man of every religion should be bound by that form which he himself thinks will bind his own conscience most." *Atcheson v. Sabrine* 2 Stra 1101, *R v Morgan* 1 Leach Cr L 4th Ed 54, *Mildrons case* 1 Leach Cr L 4th Ed 412, *Walker's case* 1 Leach Cr L 498, *McC v Reid*, Peak N, Pls 23, *R v Fitchman*, C & M, 24, *Edwards v. Rouse* Ry & Moo 77. The usual form of oath in criminal cases at common law was as follows: "The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand, and that done, to say to him 'The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth the whole truth, and nothing but the truth' The usual form of words in civil cases differed slightly 'The evidence that you shall give to the Court and Jury, touching the matters in question shall be the truth the whole truth, and nothing but the truth. So help you God!'" *Wigmore* § 1818.

The form of the administration of the oath is immaterial, provided that it involves in the mind of the witness the bringing to bear of this apprehension of punishment and cannot mislead what words or ceremonies are used in imposing the oath provided he recognises them as binding by his belief. *Indar Prasad v. Lala Jagmohan*, 11 O L J 485=84 Ind Cas 314.

Capacity to take oath—Children. It was formerly thought that for children there was an age below which the incapacity to take the oath was beyond doubt and was to be regarded as always wanting. This notion was probably due to the unwarranted transfer into the law of Evidence of some principles of substantive law, by which certain ages specially seven years were thought to mark the beginnings of capacity for various purposes. *Young v. Slaughterford* 11 Mod Pl Cr 1 302, 634 *Bulle*. *Vide* Co Litt 6 b 2476, *Hale* 228 *R v Traitors*, 1 Stra 700. But this view was finally repudiated in *R v Brastie*, East Pleas of the Crown 1 443. After much deliberation, where the Court said "An infant though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath. For there is no precise or fixed rule as to the time with which infants are excluded from giving evidence but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood which cannot be collected from their answers to questions propounded to them by the Court but if they are found incompetent to take an oath their testimony cannot be received." See also *R v Perkins* 2 Moo Cr C 139, *Braddon's Trial*, 9 How St Tr 1127. *N 147=41 C 400*. *Fatu v. Emperor*, 6 Pat L J 147=61 Ind Cas 703. *Evidence of child witnesses can be admitted without oath or affirmation.* *In re Chinavendakadu* 33 M 530. *Hussain v. Emperor* 76 Ind Cas 1037. *Hari Ramji v. Emperor* 20 Bom L R 365=45 Ind Cas 497. In the case of a child witness the Judge is bound first to ascertain by questioning the child whether it is by tender years prevented from understanding the questions put or from giving rational answers to those questions. Then if the Judge intend to take the statements of the child as evidence, he should proceed to administer

the affirmation, but if he deliberately refrains from so doing, on the ground that the child cannot understand the nature of a solemn affirmation under section 13 of the Oaths Act, the deposition of the child will be admissible *Fuqeroi v Kusha*, 5 Bom L R 551

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8 If any party to, or witness in, any judicial proceeding Power of Court to ing offers to give evidence on oath or tender certain Oaths solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him

Scope of the section The term "party" to any judicial proceedings in this section does not include the complainant in a criminal proceeding nor he accused Sections 8 11 of the Oaths Act do not apply to criminal proceedings *Queen Empress v Muzaji* 13 B 389, *Imperator v Haji Ali* 5 S L R 129=13 Ind Cas 215=13 Cr L J 23, 1 Weir 822, *Emperor v Chuman*, 22 Bom L R 893=58 Ind Cas 147 Under the provisions of this Act, an oath proposed in a form which could affect a third party can not under any circumstances be lawfully administered *Ram Naram v Babu Singh*, 18 A 46 *Nabi Baksh v Ram Jaiyaya* 66 P R 1910=7 Ind Cas 479=114 P L R 1910 *Fulsi Ram v Dayaram*, 88 Ind Cas 448=23 A L J 513 Where the lower appellate Court, at the instance of the defendant, called upon the plaintiff to swear on the *Koran*, that the defendant's case was false, which the plaintiff refused to do held that the lower appellate Court was justified in raising a presumption from the plaintiff's refusal that his case was false, the Court having power to act as it did under the provisions of Act X of 1873 *Issu Meah v Kalaram*, 2 C L R 476, *Ulagappa v Peria*, 15 Ind Cas 195 But where defendant also refuses no presumption arises *Sukdeo v Ganesh*, 10 Ind Cas 472=7 N L R 50

Where in a suit, the parties put in a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the parties thereto subsequently, asked them to withdraw from the reference on the ground of collusion of that person with the other party and no collusion was proved Held, he could not be allowed to do so *Chiddu v Kuar Sen* 3 A L J 651=29 A 49

An agreement to a case decided on the evidence of a third person given on oath, is in the nature of a reference to arbitration under the Civil Procedure Code and would be valid and binding on the parties to a suit if all of them join in it The provisions of ss 8 12 of the Oaths Act have no application to such a case *Lal hraj Singh v Dullma*, 4 A 302

Neither an invocation nor an oath or affirmation in the technical sense of the words is in any way an essential part of the special oath or solemn affirmation provided for in section 8 of the Indian Oaths Act of 1873 The special oath or solemn affirmation referred to in section 8 of the Act is something quite distinct from the ordinary oaths and affirmations referred to in section 5 The latter are to be in such form as the High Court prescribes, the first from its very nature, is independent of such administrative direction and must be in the form held binding by persons of the race to which the deponent belongs The special "oath or solemn affirmation", when permitted, is a complete substitute for the ordinary oath or affirmation and need not be supplemented by it or any part of it The words "oath" and "affirmation" used in respect of the special procedure provided for in section 8 are merely descriptive of the nature and suggestive of the consequences of the ritual—linking it up with ordinary oaths and affirmations—but are in no way connected with what its form should be *Indar Prasad v Jogmohan Das*, 31 C W N 1053=54 I A 301=2 Luck 316=46 C L J 13=39 M L T 618=53 N L J 1 (P C)=54 I A 301



## HIL INDIAN EVIDENCE ACT

The offer of the guardian of a minor defendant on behalf of the minor to make by the deposition to be given by a plaintiff on a special oath stands on a very different ground from an agreement or compromise contemplated by C.P. Code Order 32 r 7 and in such a case the minor is bound by the consent of his guardian although given without the leave of the Court provided there is no fraud or gross negligence on the part of the guardian *Muhammad v Behary Lal*, A I R 1930 Cal 163

9 If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness or cause him to be asked, whether or not he will make the oath or affirmation, Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question

Scope Under ss 8 and 9 of the Act it is not necessary that the form of oath should be specified before it can be held binding on the parties agreeing to be bound by it. It is sufficient if the oath is common among and held binding by the class to which the parties belong. *Islam Ali v Hanuman* 29 P R 1887. If in the course of a suit the plaintiff offers to bind himself by the oath of a witness and the witness, after consenting to the offer, refused afterwards to take oath the Court cannot decree the suit in the plaintiff's favour even though the defendant had agreed to it in case the witness refused to take the oath. *Bawa Suchal v Rana*, 31 P R 1888. A local commissioner appointed under the circumstances referred to in ss 8 and 9 of the Oaths Act is not authorised to take evidence the term does not include persons authorised to take evidence, such as a commissioner. *Puran Chand v Chabar*, 89 P R 1909 = 3 Ind Crs 621 = 143 P W R 1909. Pleader has no power to bind himself that can make an offer contemplated under this section. If however a party specially authorises his pleader, or an agent to make an offer to be bound by a particular oath he might be estopped from retracting the step he had taken if his offer were acted on. *Sadasu v Maruti*, 14 B 435. A offer taken in a particular form stands on a very different ground from an agreement or compromise contemplated by s 462, C.P. Code, 1892. In spite of the absence of the Court's sanction to the agreement under s 462, the minor defendant is barred by the consent of his guardian, if there is no fraud or negligence on the part of the latter. *Shoo Narain v Sult Lal* 27 C 229 = 1 C W N 327. *Chengal Reddi v Venkata*, 12 M 483. Where a plaintiff refuses to take an oath by which the defendant offered to be bound as provided by this section the refusal is a piece of conduct which the Court is entitled to consider along with other evidence. *Salhdeo v Ganesh* 7 N L R 50.

A person, who under s 9 of the Oaths Act, agrees to be bound by an oath cannot retract. The agreement to be bound by an oath is in effect, an agreement to treat the evidence given under the oath as the evidence in the case and to dispense with other evidence. If the party who has agreed to be bound, prevents the oath being taken the other party is entitled to a decree at any rate where it is the plaintiff who agrees to be bound and the result of

his refusal to allow the oath to be taken in the form agreed upon is that there is no evidence in support of his case *Umriyamma v Mutiah*, 17 M L J 99, see also *Aima Begum v Muhammad Balsh*, 63 P R 1881, *Thoyi Inmal v Subbaraya*, 22 M 234

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Where the defendant takes oath proposed by the plaintiff, the oath is conclusive *Chhedi Lal v Jauala Prasad*, 6 A L J 244=31 A 315=2 Ind Cas 201. The mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit. If the party to be bound by the oath adheres, after the oath is taken, to the mode of disposal mentioned in the agreement, then it is an adjustment, and a judgment by consent may be recorded, for the consent then would be unqualified. If the matter stated in the agreement is sufficient as the ground of a decision a judgment may be passed, for then it would be conclusive evidence under the Oaths Act *Tasudera v Warana* 2 M 356. A duly authorized agent holding a special power of attorney from a party to a suit enabling him to conduct it in a manner he may deem fit can make an offer under s 9 of the Oaths Act, to be bound by the oath of the other party and to have the case decided in accordance therewith *Wasu Aman v Farva Bibi*, 14 A L J 38=38 A 131=32 Ind Cas 348.

Where the agreement proves abortive, a suit can be decided on evidence taken *Seshagiri v Sanjay Sethi*, 4 L W 258=1917 M W N 104=36 Ind Cas 1001. Where an offer is made by plaintiff to be bound by oath the Court has full discretion to call upon the defendant to accept or refuse the offer and subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result *Khanay Din v M Nw* 65 Ind Cas 700. Section 9 is by no means mandatory and it seems that under certain special circumstances the Court may have discretion to refuse to refer the matter to the referee *Manta Bibi v Khuda Balsh*, 1923 A 65, but see *Mithu Lal v Sripal* 45 A 724=21 A L J 637=1 L R 4 A 596=74 Ind Cas 918, *Ram Bhay v Dhuni Chand* 92 Ind Cas 813=A I R 1926 Lah 240.

Ordinarily a party cannot resile from his offer, but he can do so with the permission of the Court *Ram Bhay v Dhuni*, 92 Ind Cas 813, *Narayan v Srikantha*, 4 Mys L J 217, *Salil v Wali*, 49 A 388=25 A L J 297=A I R 1927 All 590.

Where in certain divorce proceedings among Mahomedans the plender for the wife applied that both parties should be put on special oath and the Court granted the application directing the parties to take the Oath in the form prescribed for 'Lann' under Mahomedan Law but there was nothing to show that the other party agreed to abide by such oath. Held that such oath could not be conclusive because of section 11 of the Oaths Act *Khatiya Bibi v Umar Sahib*, 52 B 295=110 Ind Cas 131=30 Bom L R 447=A I R 1928 B 285.

The word "party" in this section includes a duly authorised representative such as a plender and that he can make the offer contemplated by the section *Amu v Uhammal*, 5 O W N 10.

A party cannot add new condition to his original offer and the other party can take the oath in accordance with the original offer *Kinhi v Kunmath* 1928 M W N 183=A I R 1928 Mad 488=109 Ind Cas 758.

# 10 If such party or witness agrees to make such oath

Administration of oaths. If a party or witness agrees to make such oath of affirmation, the Court may proceed to administer it or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn on or affirmed and return it to the Court.

Scope. Under section 10 of the Oaths Act the agreement to take an oath must specify the form of oath and the place where the oath has to be adminis-

## THE INDIAN EVIDENCE ACT

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tered An agreement by one party in general terms to take oath in any form or in any place that his adversary may like does not satisfy the requirements of section 10 *Mangt v Paramayya*, 9 Ind Cas 260=21 M L J 618 The procedure prescribed in the Act must be strictly followed, and it is only when an agreement is arrived at that the Court is empowered by s 10 of the Act, to administer the oath proposed The necessary procedure preliminary to the agreement must be adopted *Krishna Rao v Srinivasa Rao*, 7 M I T 286=9 Ind Cas 604 Under this section, the Court if it does not administer the oath itself must issue a Commission to some person to administer the authorise him to take the evidence of the person to be sworn and return it to the Court *Madhgov v Gopal* 7 C P I R 123 see also *Dar Bur v Dar Meah*, 17 Ind Cas 930=6 L B R 60

11 The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated

**Evidence conclusive as against person offering to be bound** The decision of an issue arrived at, under the provisions of the Act is not an adjudication operating as an estoppel in any future proceedings *Keshava v Rudiam* 5 M 209 This section does not apply to the evidence of a defendant who has been examined under the usual form of oath, and not under any oath or form of affirmation under s 8 *Ram Jotadar v Ram Kishen*, 22 W R 337, see also *Kashwan v Dhulu* A W N 1885 188 Under section 11 it is 'the evidence so given which shall be against the person who offered to be bound by the oath be conclusive proof of the matter stated' *Madhgov v Gopal Bhaskar* 7 C P L R 122 *Sutan v Devi* 45 P R 1898, *Hamid v Nagui* 84 Ind Cas 729 *Ghamathul v Suddayya* 90 Ind Cas 577 (2)=49 M L J 379 A statement by a witness that a party is in possession in point of law admissible evidence of the fact that such party was in possession under section 11 of the Oaths Act it is conclusive proof of the matters stated The expression 'conclusive proof' in s 11 is to be understood in the sense in which it is defined by s 4 of the Indian Evidence Act, 1872 *Filhu v Ramji* 8 Bom L R 19=1 M L T 63

The parties to a suit agreed to be bound by the deposition of a referee in the manner contemplated by ss 10 and 11 of the Oaths Act, and a decree was passed in favour of one of the parties on the strength of that deposition The referee died afterwards and it was found on appeal that the said deposition did not fully cover the questions in issue between the parties Held that the case was therefore to be remanded to the lower Court for disposal according to the usual procedure *Mahabir Prasad v Dat Misi*, 13 A 386=A W N 1891, 143 There is nothing in the Indian Oaths Act construing a Court to pass a decision in favour of a particular party If a party to a suit says that he would be bound by the oath of a particular person under the provisions of section 11 of the Act it means no more than this that *pro tanto* he will be bound that is to say in so far as the matter of that evidence is concerned and that evidence will be conclusive as to its truth and the truth of such evidence will be conclusive against him throughout the whole of the litigation But it does not in any way, compel the Court trying the case to accept that evidence as conclusive *Muhammad Zahur v Cheda Lal*, 14 A 141=A W N 1892, 3 An attorney empowered generally to conduct a case and specifically to compromise it or refer it to arbitration on behalf of his client may bind him by offering the opposite party to take oath and the suit to be decided accordingly *Anga Bishen v Malina* 143 P L R 1903=8 P R 1903 see also *Ghanib v Arim* 72 P R 1874

Under this section the oath is not conclusive to the suit but is so only to the facts deposed to in the oath *Jattaluma v Bala Sheka* 3 M L T 163, *ul Hussein v Badruddin* 1 Bom L R 531 A defendant to a civil suit agreed to be bound by whatever statement might be made by the plaintiff upon oath as prescribed by law The plaintiff accordingly was examined on oath administered in the usual manner Held

that, though the statement then made by the plaintiff might not be binding under the special provisions of section 11 of the Oaths Act 1873, nevertheless the defendant must be held bound by his agreement to rest the decision of the case upon the plaintiff's statement on oath *Muhammad v Muhammad*, A W N 1893, 200

The oath taken in one proceeding under the provisions of sections 9 11 of the Act is not binding in any subsequent proceeding *Badiuddin v Ar-a muddin*, 33 C 386=10 C W N 501

Where an appellate Court confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact, the decree of the Court is none the less a final adjudication *Ahmed v Mordin*, 24 M 441

Where the plaintiff originally agreed to be bound by the oath of the defendant, if taken in a particular form and subsequently varied the agreement by attaching further conditions as to the way in which the oath should be made opportunity must be given to the defendant to take the oath in the manner originally agreed upon between the parties. If the defendant does so the evidence so given will be conclusive evidence of the facts to which it relates. If the defendant refuses to do so, the Court must proceed to dispose of the case on the merits *Thallu v Kuppunda*, 12 M L R 613

An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties though the subject matter of the suit is different. *Sanyal v Arlu Suaro*, 13 M L R 261=21 M L J 321=36 M 287=18 Ind Cas 835

An oath is under s 11 of the Oaths Act conclusive only as against the person who offered to be bound by it and not so as against one who never joined in the challenge and such persons have the ordinary right of appeal against the decree *Falaud v Iateh Din*, 83 P R 1918=50 P W R 1918=45 Ind Cas 230

Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on the oath to show that time was not the essence of the contract *Athermant ulah v Chandioth*, 10 L W N 140=52 Ind Cas 619

When the plaintiff takes oath as desired by the defendant, the Court is bound to decide in favour of plaintiff *Janna v Nanda*, 118 P R 1919=57 P L R 1919=49 Ind Cas 1005

Where an offer is made by the guardian of the minor defendant to the plaintiff as regards the truth of a certain fact, the minor defendant is bound by the statement of the plaintiff made under specified oath *Parbhoo v Jamil* 19 A L J 911

Where the complainant offers to be bound by the statement made by the accused if he made the statement after walking several steps towards the Ganges and the accused made the statement under these conditions the statement being made on oath was conclusive proof of the facts set forth in it *Dulsulh v Raja Rama*, L R 5 A 147

This section does not provide that the evidence given on oath shall be conclusive proof of the matter stated, but it provides that as against the person who offers to be bound by the special oath, it would be conclusive proof of the matter stated. Section 11 of the Oaths Act does not prevent the Court from attempting to establish that a particular statement made by the appellant on oath was false in fact and false to his knowledge. In other words it is open to the Court to establish that by making that statement the appellant gave false evidence within the meaning of s 193 I P Code *Ramdas Bishnu Das Ime*, 26 Bom L R 713=82 Ind Cas 359=25 Cr L J 1287

There is nothing in the Oaths Act which says that the reference to the referee comes to an end as soon as the referee has once been examined. The referee can be re-examined if all the points which would be necessary to be established are not put to him. *Radha Krishen v Kaslu Nath*, 48 A 276=A L J R 1926 All 266=24 A L J 241

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For the application of section 11 of the Oaths Act it is necessary that the statement given by a referee should amount to "evidence" of the fact in controversy between the parties. *Batu Ram v Hudeba*, 103 Ind Cas 718 = A I R 1927 All 676

When a party to a suit undertakes to abide by the oath taken by a particular person and the person merely takes the oath, he cannot afterwards say that he will not abide by the oath. *Chett Ram v Bhup Singh*, 98 Ind Cas 861 = A I R 1927 F 49

Where a party agrees that he would be bound by the oath of a witness, though the other parties do not agree to be so bound, he will be bound and the case must be tried only as against the others. *Ram Ratan v Ramall* 27 A L J 1097 = 118 Ind Cas 189 = A I R 1929 A 779

12 If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

**Scope of the section** Under section 12 of the Act, it is only when a party refuses to make the oath proposed that the Court is bound to record that he was asked if he would make it and that he refused to do so. *Madhogar v Gopal* 7 C P L R 122. This section directs the Court to record, as part of the proceedings, the nature of the oath proposed, the fact that the party was asked to make the oath and refused together with any reason assigned for the refusal. The section seems to contemplate that the Court shall give such weight as it may think fit, to the fact that a party has offered to make an oath and has afterwards refused to make it whilst it negates the view that the refusal to make the oath is, in itself, a ground for dismissing the suit or giving the plaintiff a decree as the case may be. *Mayan v Pathu Kuli* 17 M L J 545 = 31 M 1 per *Chitt C J*. It may be doubted whether this section was intended to apply to a case, in which the parties have arrived at an agreement that one of them shall take an oath. *Ibid*, per *Haller J*. By an agreement between the parties to a suit the plaintiff agreed that he should take an oath, and that on his failure to do so the suit should be dismissed. Held on the failure of the plaintiff to take the proposed oath that the agreement could not be recorded as an adjustment of the suit and the suit should be proceeded with. *Mayan v Pathu Kuli*, 17 M L J 545 = 31 M L T 98 = 31 M 1.

Where the plaintiff offered to be bound by any statement recorded by the defendant as to his indebtedness in the plaintiff's book, the failure on the part of the plaintiff to produce the account book is equivalent to failure to take an oath, or refusal to be bound by an oath. *Amruchand v Gobind Sahai* 5 P R 1003 = 37 P L R 1903.

A Court is not entitled to presume because a party refuses to take a special oath that his case is false. In the absence of anything on the record to show the reasons for the refusal, no inference can be drawn. *Amantulla v Chhattoo*, 93 Ind Cas 830 = A I R 1926 Cal 817.

Where the plaintiff after agreeing to abide by the oath of a third person subsequently declined to abide by it, the Court has no power to dismiss the plaintiff's suit on account of the plaintiff not having taken the oath but must either proceed to administer the oath and decide the case in accordance therewith or accept the plaintiff's refusal to abide by the oath drawing such inference from the refusal as is permissible and then proceed with the trial of the case in accordance with law. *Babu Ram v Nathu Ram*, 99 Ind Cas 288 = A I R 1927 Lah 78.

## V MISCELLANEOUS

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- 13 No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission substitution or irregularity took place or shall affect the obligation of a witness to state the truth

Proceeding and evidence not invalidated by omission of oath or irregularity

Scope The evidence of a boy aged 10 to whom no oath or affirmation was advisedly administered was held admissible *Budha v Empress*, 31 P R 1889 Cr The omission in the above section includes any omission and is not limited to accidental or negligent omission *Empress v Sanbhajirao* 11 C P L R Cr 16, *Queen Empress v Unaperumal* 16 M 105 per Parker J, *Golla Chinnu v Emperor*, 15 Cr L J 161=22 Ind Crs 737, *Queen v Sheo Bhogla* 23 W R Cr 12, *Emperor v Kasha*, 5 Bom L R 551, *Queen Empress v Shiva*, 16 B 359, *Queen v Ananta* 22 W R Cr 1, *Q v Perumal*, 1 Weir 827 (F N) *Queen v Ituraja* 22 W R Cr 14 *Bulchand v Faral Nath*, 18 C W N 1323, *Nagar v Emperor* 18 C W N 147=41 C 406 *Dham v Emperor*, 13 A L J 1072, *Emperor v Hari* 20 Bom L R 365 *Emperor v Sashi*, 24 C W N 767, *Fatu v Emperor*, 6 Pat L J 147, *Hussain v Emperor*, 1923 Lah 332, but see *Queen Empress v Unaperumal*, 16 M 105 per Collins C J, *Queen v Masu*, 10 A 207=A W N 1888 86 *Pan Nyun v King Emperor*, 2 L B R 322, *Daya v King* 9 Bur L 1 133=36 Ind Crs 468 If the jury in a Sessions trial are not sworn, the omission is one which could be covered by this section *Queen v Ramsdoy*, 26 W R Cr 19 This section has no application to the evidence of a witness taken on commission in a foreign territory *Kadambine v Kumudine*, 30 C 934=7 C W N 806 This section applies to deposition taken by Registrar of the Presidency Court of Small Causes at Calcutta *Bulchand v Faral Nath* 18 C W N 132.

Asking whether a person would take oath and not recording the fact and not actually offering the oath are irregularities vitiating the trial *Afso Khan v Shahu* 1922 Cal 148

- 14 Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject

Persons giving evidence bound to state the truth

Scope Section 132 of the Evidence Act read with s 14 of the Oaths Act, compels a witness to answer criminating questions and he is protected by the proviso to s 132 from a criminal prosecution for any offence for which he criminate himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer *Queen Empress v Ganu Singh* 12 B 410

- Amendment of Penal Code ss 178 and 181 15 The Indian Penal Code, sections 178 and 181 shall be construed as if, after the word "oath" the words "or affirmation" were inserted

- 16 Subject to the provisions of sections 3 and 5, no person appointed to any office shall, before entering on execution of the duties of his office, be required to take any oath, or to make or subscribe any affirmation or declaration whatever

Official oaths imposed

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Lithuania

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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